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Endangered species?

"Three may keep a secret if two of them are dead."

Benjamin Franklin (Poor Richard's Almanack 1735)

Throughout the apartheid era, South Africa's white minority government suppressed the right to a free press in order "to stifle the opposition to its policies of racial supremacy". Security related matters were cloaked in secrecy and press freedom was invariably limited through "either the censorship of stories or banning and confiscation of publications". The need for the free flow of information became crucial to those who sought to liberate the country from the clutches of the apartheid regime.

The Constitution, 1996 introduced the dawn of a new democratic era. Change was therefore inevitable, as the Constitutional Court so succinctly put in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another (2008 (5) SA 31 (CC), 155)*:

"An open and democratic society does not view its citizens as enemies. Nor does it see its basic security as being derived from the power of the state to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past."

Recently the Protection of State Information Bill [B6-2010] was passed by parliament. This aims to put certain state-held information beyond the public's reach. Since national security is of major concern for any democracy, some secrecy is welcome, if not essential. What is not welcome is the door it opens for corruption.

Press freedom

As a point of departure it is argued that only through a critical and vigilant, but also an independent media can a democracy thrive. The function of the press is, inter alia, to act as "watchdog" for the governed and to publish information that is in the public's interest. The court emphasised the importance of the press in *Government of the Republic of South Africa v Sunday Times Newspaper (1995 2 SA 221 (T) at para 27-28A)* holding that "the press is in the front line of the battle to maintain democracy".

Freedom of information

Freedom of information is premised on the notion that individuals are permitted to request access to state held information that has an impact on them. It is within this context that freedom of information is closely connected to the right to freedom of expression and, in particular, the right to freedom of the press. In an open, transparent and democratic society the government needs to be held accountable for their actions. If they refuse to disclose certain information or any information at all, the public's right to know is infringed upon. As the court held in *Brümmer v Minister for Social Development (2009 (6) SA 323 (CC), 62)*:

"Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information."

The 1996 Constitution required the enactment of legislation aimed at enabling the right of access to information as enshrined in section 32(2). It was therefore no surprise that the Cabinet passed the Promotion of Access to Information Act 2 of 2000 (PAIA). It is one of the most far-reaching pieces of legislation passed, as its purpose is "to give effect to the constitutional right of access to any information held by the State...".

It is beyond dispute that a certain amount of secrecy in government is essential. For this reason PAIA does not afford absolute rights. Rather they are qualified and the public is afforded the right of access to information held by the state "subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance", in terms of sections 9(a) and (b)(i). Section 41(1) expressly sets out the grounds for the refusal of the disclosure of information that could cause harm to the security or defence of the Republic:

However, a problem occurs when government officials refuse to disclose information conveying national security reasons when, in truth, said "national security reasons" are used to conceal mal- and inept administration. In light of this, the Supreme Court of Appeal held in *Minister for Provincial and Local Government for the Republic of South Africa v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland 2005 (2) SA 220 (SCA)* that "all exemption clauses in PAIA must be interpreted in light of the broader scope of the constitutional right".

Theophilopoulos, an associate professor lecturing constitutional law at Wits School of Law, states that in certain circumstances, public policy considerations require the disclosure of state information in the interest of the fair administration of justice. He argues that the conflict between the individual's (or public's) interest in access to, and disclosure of, information, and the state's interest in preserving the secrecy of information are two aspects of the same public policy considerations, which must be weighed against each other in order to achieve a proper balance. The reverse is also true: if it is decided that the interest, which is against disclosure, outweighs public interest, such information is not to be disclosed. Importantly, in *Van der Linde v Calitz (1967 (2) SA 239 (A))* the Appellate Division held that a court retains the residual power to

overturn a properly tendered state objection in respect of certain categories of state information, where it is satisfied that the objection is unjustified or cannot be sustained on reasonable grounds.

Secrecy Bill

Since its introduction, the Secrecy Bill has provoked incomparable contention and unease among South Africa's citizens. The media believes it is "a direct attack on the media". It is believed that its promulgation would suppress the media and some are of the opinion that it is contrary to the government's policy of openness and transparency. Brink in "A long way from Mandela's kitchen" *New York Times* (11 September 2010) thoroughly conveys the outrage of the media towards the Secrecy Bill:

"South Africa faces its starkest challenge yet in the form of two pieces of anti-press legislation that would make even the most authoritarian government proud. One, cynically named the *Protection of Information Bill*, would give the government excessively broad powers to classify information in the 'national interest'; the other, which would create a media appeals tribunal to regulate the printed and electronic press, is written in language chillingly reminiscent of that used by the apartheid regime to defend censorship in the 70s."

Scope of the Secrecy Bill

One of the repercussions of the Secrecy Bill is that, once information is classified as "sensitive", "secret" or even "top secret", its accessibility to the public and the disclosure thereof is limited. It is also of general concern that some of the definitions contained in the Secrecy Bill are too vague to be sufficiently clear and accessible.

A further matter of concern is that the Secrecy Bill enables a rather large number of organs of state to classify information (see sections 3 and 12). The fact that many different parties are empowered to classify information creates the ideal opportunity to conceal fraudulent activities. In *Minister of Health v Treatment Action Campaign (2002 (5) SA 721 (CC))* the court was granted an opportunity to consider the manner in which government policy is *supposed* (own emphasis) to be implemented by organs of state. The court held, *inter alia*, that as a result of the new constitutional order, state power is under scrutiny to ensure that constitutional obligations are met. It is therefore suggested that classification should only be confined to state security parties to mitigate the possibility of the concealment of fraudulent activities.

Provisions of the Secrecy Bill, such as sections 1 and 9, describe the nature of the classified information. This includes "any" files, books and/or any individual information and documents that can automatically be classified. It is too broad a definition as it creates the likelihood that information that bears no threat for national security can be classified.

Even though the Secrecy Bill aims "to provide for a system of classification, reclassification and declassification of state information", it also aims to "promote the free flow of information within an open and democratic society without compromising the national security of the Republic". It

wants "to put the protection of state information within a transparent and sustainable legislative framework" as provided for in section 32(2) of the Constitution.

Limiting press freedom and access to information: Masetlha considered

In *Independent Newspapers (Freedom of Expression Institute as Amicus Curiae) v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa (2008 (5) SA 31 (CC))*, the Constitutional Court was granted a unique opportunity to rule on the competing requirements of access to information and the need for secrecy in national security. In the minority judgement, Sachs J considered the interaction between section 32 which provides that everyone has the right of access to any information held by the state and the necessity for secrecy in security agencies. The court held that a mere classification of a document within a court record as "confidential" or "secret" or even "top secret" under the operative intelligence legislation or the mere *ipse dixit* of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction whether the public should be granted or denied access.

Yacoob J argues that "it is difficult to justify a regime in which a court can limit rights more easily than legislature can" (at par 83). He went further stating that, where competing rights should be balanced against each other, the proper test would be one based on the section 36 limitation (at par 85), supplemented by considerations of reasonableness and justifiability.

To prevent a return to the oppression and inequalities of the past, government must ensure the bona fide enactment and protection of the right to a free press and access to information. As van Heerden A so accurately says in *The constitutionality of statutory limitation to the right of access to information held by the state in South Africa* 2014 SJ 44, "While corruption thrives in secrecy. . . access to information is the most effective weapon to ensure a truly open and accountable public administration".

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