# THE CONSTITUTIONALITY OF STATUTORY LIMITATION TO THE RIGHT OF ACCESS TO INFORMATION HELD BY THE STATE IN SOUTH AFRICA

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## 1 INTRODUCTION

The importance of the right to gain access to government-held information cannot be overemphasised. The rationale often enumerated for granting access to such information includes ensuring transparency and accountability of public officials, encouraging public participation in policies and decisions taken by government, combating corruption in public institutions and for purposes of realising other rights to which people are entitled.[1] Realisation of the right in South Africa is imperative, especially given the recent past of oppression and tyranny, and the role that government secrecy played in this regard.[2] For this reason, the right of access to state-held information is firmly entrenched in the Constitution of the Republic of South Africa, 1996 (the Constitution), illustrating the state's commitment to transparency and accountability.[3] Furthermore, the Promotion of Access to Information Act[4] is a statute passed specifically for the purpose of granting access to information to the general public. Certain areas of public administration, however, require confidentiality in order to effectively dispose of their functions. Security institutions, particularly, require secrecy of intelligence-related information so as to ensure the safety and well-being of the Republic and those living within its borders.[5] One of the ways in which government aims to secure confidentiality within these institutions is by passing legislation criminalising the unauthorised disclosure of certain information and imposing penalties in cases of any

[1]Currie & Klaaren *The Promotion of Access to Information Act Commentary* (2002) 16; Klaaren "A Right to a Cellphone? The Rightness of Access to Information" in Calland & Tilley (eds) *The Right to Know, The Right to Live* (2002) 18 19-20; Johannessen, Klaaren & White "A Motivation for Legislation on Access to Information" 1995 *SALJ* 45 45-49.

[2]Klaaren & Penfold "Access to Information" in Woolman, Bishop & Brickhill (eds) *Constitutional Law of South* Africa 2 ed 2011 RS 3 62-3.

[3]Section 32.

[4]Act 2 of 2000.

[5]Gilder "Submission to the Parliamentary ad hoc Committee on the Protection of Information Bill www.pmg.org.za/files/docs/080729barry**gilder**.doc (accessed 07-10-2011).

contravention. Unfortunately, these statutes often contain provisions that confer public officials with wide discretionary powers in classifying information and determining which information should be exempted from public scrutiny.[6] In this way, evidence of corruption and maladministration within public bodies may be legitimately excluded from public awareness. Research illustrates that there are some common methods employed by drafters of legislation when restricting the right to have access to information, allowing public officials the opportunity to withhold certain information which would otherwise fall within public knowledge. This paper identifies the various methods used in this regard and analyses the extent to which these devices might unconstitutionally infringe upon the right of access to information.

## 2 PROTECTION OF INFORMATION BEFORE 1994

The protection of information pre-1994 in South Africa will not be discussed in any detail in this paper. Suffice to say that laws restricting access to information became progressively more pronounced, both in number and in severity as the government tried to enforce its apartheid policy. Before 1994, it was often said that "one hundred laws" inhibited freedom of information.[7] This was largely due to the security legislation which effectively restricted access to state-held information and punished unauthorised disclosure of information. One of the reasons advanced for these measures was that government, in order to sustain the policy of apartheid, had to suppress awareness of the nature and scale of repression required for these purposes. During the Conference for a Democratic South Africa (CODESA) deliberations, prior to South Africa's first democratic elections in 1994, the South African government was said to have destroyed vast amounts of official records.[8] This was presumably done to obliterate compromising information which revealed gross human rights violations during the apartheid era.[9] Although the Archives Act[10] contained provisions for the destruction of certain documents, mass destruction of records occurred outside the ambit of this Act, as was

[6]Klaaren "National Information Insecurity? Constitutional Issues regarding the Protection and Disclosure of Information by Public Officials" 2002 *SALJ* 721 729-731.

[7] Merrett *A culture of Censorship: Secrecy and Intellectual Repression in South Africa* (1994) 209; Merrett "A Tale of Two Paradoxes: Media Censorship in South Africa Pre-liberation and Post-apartheid" 2001 *Critical Arts* 50 50.

[8]Harris 2000 *Transformation* 29.

[9]Harris 2000 *Transformation* 29; Klaaren "The Right of Access to Information at Age Ten" in Rembe (ed) *Reflections of Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 167.

[10]Act 6 of 1962.

subsequently revealed through an investigation undertaken by the Truth and Reconciliation Commission (TRC).[11]

The South African Parliament itself has noted that the secretive and unresponsive culture in public and private bodies of the past frequently resulted in abuses of public power and violations of human rights.[12]

## 3 THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION

The right of access to information was carried over from the Interim Constitution and extended in the Constitution, in section 32, as follows:[13]

Section 32:

"(1) [e]veryone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."[14]

### 3 1 Vertical and Horizontal Application

Whereas the Interim Constitution provided only a qualified right to information held by the State, the equivalent right in the Constitution eliminated this qualifying proviso. It removed the burden on the applicant to prove that the information was required to exercise or protect another right, as was a requirement in terms of section 23 of the Interim Constitution. As a result, it was hoped that section 32(1) would be a powerful tool to implement accountability and transparency in public institutions.[15] Furthermore, section 32 of the Constitution may be applied horizontally, allowing an individual to gain access to information held by private bodies where such information is required by an individual to exercise or protect his or her rights.

[11]Harris 2000 *Transformation* 35.
[12]See the Preamble to PAIA.
[13]Section 23 of the Interim Constitution entrenched the right to have access to government-held information. This right was also originally linked to its own constitutional principle, which ensured that it would find a place in the final Constitution: Constitutional Principle IX; See schedule 6 of the interim Constitution.
[14]Section 32.
[15]Roberts *Die Reg op Toegang tot Inligting in Publieke Administrasie* (LLD-thesis, Unisa, 2005) 87.

Section 32 imposes a greater burden on the state with respect to access to information than it does towards private bodies. Section 239 of the Constitution defines an organ of state as not only the different departments of the state in the national, provincial or municipal spheres of government, but also those functionaries or institutions that exercise public power or perform public functions in terms of the Constitution itself or any Act of Parliament. A private body that performs a public function or exercises a public power will be an organ of state in terms of the Constitution, and the unqualified right of access to information, as guaranteed in section 32(1)(a), applies.

Even though the qualification in respect of government-held information was removed, this did not automatically entitle persons to gain any and all information sought. The right to gain access to information must be weighed up against the rights of the rest of the community.[16] For example, where disclosure of certain information will infringe an individual's right to privacy, such information may be legitimately withheld from the requester.[17] The right of access to information may also be limited in terms of the section 36 limitations clause. In terms of section 36, the rights in the Bill of Rights may only be limited in terms of law of general application and such limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". In order to determine if a limitation meets this requirement, all relevant factors must be considered, for instance "the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve such purpose".[18]

### 3 2 Legislation giving effect to section 32 and section 32's role post-PAIA

Section 32(2) of the final Constitution mandated the legislature, within three years, to enact legislation giving effect to this right; this was done in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) [put number in the footnote]. With respect to the role of section 32 after the enactment of such enabling legislation, there has been some disparity amongst academic writers as to the effect of the term "give effect to". Many believed that once the envisaged legislation has been enacted, such legislation would be the sole means of enforcing one's right of access to information, effectively causing a "permanent constitutional

[16] Roberts *Die Reg op Toegang tot Inligting* 88.
[17] Devenish *A Commentary on the South African Bill of Rights* (1999) 450.
[18] Section 36 of the Constitution.

lock-out".[19] Drastic though the statement seems, this view is not without its merits. Klaaren and Currie agree that section 32 will still play a role in interpreting provisions in the envisaged legislation and to challenge the constitutionality of Acts of Parliament, but direct application of the constitutional right in section 32 is otherwise very limited.[20] In *Institute for Democracy in South Africa v African National Congress (IDASA v ANC),*[21] the court held that section 32 cannot be relied on independently to serve as a cause of action; except where the constitutionality of an Act of Parliament is being challenged.[22] The court drew on the judgement in *Naptosa v Minister of Education, Western Cape*[23] in concluding that, should such a direct application be permissible, it would lead to the development of '"two parallel systems", which would be "singularly inappropriate"'.[24]

The court's view in this regard is also in line with our common law principle of avoidance, which dictates that legislative and common law remedies should be exhausted first before one may apply the constitutional right directly.[25] It is also in line with the principle that provisions of greater specificity be relied on before resorting to ones of a more general nature[26] and the fact that deference should be paid by our courts to the constitutional mandate placed on the legislature to develop legislation giving effect to the constitutional right.[27]

## 4 PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)

### 4 1 Purpose of the PAIA

Both the Preamble and section 9 of the PAIA lay down the purpose of the Act, and the two provisions overlap to some extent.[28] Generally, the Act aims to enable an individual to gain access to information so as to facilitate the protection and exercise of his or her rights and to promote the ideal of transparency and accountability in public and private bodies.[29] The Act intends to do this by establishing procedures or mechanisms which would enable an

[19]Klaaren "Constitutional Authority to enforce the Rights of Administrative Justice and Access to Information" 1997 *SAJHR* 549 555.
[20] Direct application may be permissible where the envisaged legislation does not apply to a specific situation, possibly due to exemptions enumerated in the Act itself. See Klaaren & Penfold "Access to Information" in *Constitutional Law of SA* 62-4.
[21]2005 5 SA 39 (C).
[22]*IDASA v ANC* 50A-B.
[23]2001 (2) SA 112 (C).
[24]*IDASA v ANC* 50G.
[25]Currie &Klaaren *Commentary* 26.
[26]*Ferreira v Levin NO* 1996 1 SA 984 (CC).
[27]Currie & Klaaren *Commentary* 26.
[28]Currie & Klaaren *Commentary* 13-15.
[29]See section 9 and the preamble of the Act.

individual to gain access to such information as "swiftly, inexpensively and effortlessly as reasonably possible".[30] This is in line with Klaaren's explanation of the right of access to information. He submits that the right of access to information should be viewed as the right to have the mechanisms in place in order to allow one to gain access to the information he or she requires.[31] He uses the internet as an example: The right of access to information would not necessarily afford one with the mass of information available on the world-wide web, but it would rather guarantee suitable public access to the internet.[32] Taken in this context, freedom of information legislation should be regarded as a mechanism one may use in order to gain access to information, thereby enforcing the constitutional right of access to information.[33] South Africa's Promotion of Access to Information Act 2 of 2000 (PAIA) does exactly this by detailing the procedure to be followed by persons requesting information.[34] Information from public institutions, as well as private individuals may be gained through the provisions of PAIA. However, flowing from the terms of the constitutional provision, a requester must be able to motivate why the information is required from a private individual.[35]

### 4 2 Limitation of the right of access to information in terms of the PAIA

The PAIA has been criticised as being both "over-restrictive" and "under-inclusive".[36] The Act is over-restrictive in the sense that, where the Constitution guarantees the right to access "any *information* held by the state" (emphasis added),[37] PAIA waters it down to include only "a *record* held by a public body"[38] (emphasis added).[39] The Act is also over-restrictive with respect to the comprehensive range of exclusions contained in chapter four.[40] Under-inclusiveness of the Act essentially refers to the fact that it does not contain the same unqualified right as provided for in the Constitution, since certain state bodies are exempted from the provisions of the Act.[41]

[30]Section 9(d).
[31]Klaaren "The Right to a Cellphone?" in *The Right to Know, The Right to Live* 20.
[32]*Ibid*.
[33]*Ibid*.
[34] For information held by a public body, the procedure in section 18 of the Act is to be followed.
[35] Section 50(1)(a) of the PAIA.
[36] Currie & Klaaren *Commentary* 27.
[37]Section 32.
[38]Section 3(a).
[39] Currie & Klaaren *Commentary* 28.
[40] *Ibid.*
[41] Currie & Klaaren *Commentary* 27.

An example of the consequence of PAIA's apparent "over-restrictiveness" and "under-inclusiveness" can be found in a 27 September 2012 decision of the Constitutional Court in *PFE International Inc (BVI) and v Industrial Development Corporation of South Africa.*[42] In this matter the Constitutional Court held that PAIA was not applicable to gaining access to information (in a civil case) held by the Industrial Development Corporation (IDC). Upon a refusal by the IDC to hand certain documents over to them, the applicants launched an application in the High Court for an order directing the IDC to provide the documents. The applicants claimed that they were entitled to those documents in terms of the PAIA. The IDC opposed the claim on the basis that the request for information was governed by the Uniform Rules of Court, as the applicants sought these documents for a civil trial where proceedings had already started. The IDC argued that PAIA did not apply in those circumstances. The High Court found in favour of the applicants and ordered the IDC to supply them with the requested documents in terms of PAIA. On appeal, the SCA overturned the High Court's judgment. The SCA held that PAIA did not apply to the matter because PAIA specifically excludes its application to court proceedings which have already commenced on the basis that access to that information is governed by the Uniform Rules of Court. In the Constitutional Court, the applicants contended that because a trial date had not been set at the time the request was made, the Rules did not apply to a request for documents and therefore PAIA was applicable. The Constitutional Court held that PAIA provides three conditions which must be met before a finding of its non-applicability can be made. The parties agreed that the first two conditions were met; the only issue for the Constitutional Court to determine was whether the Rules constituted "another law" as contemplated in PAIA. The Court considered the relevant Rule and held that on the wider meaning given to it, access to the documents sought by the applicants may be determined under the relevant Rule. The Constitutional Court thus found that PAIA was not applicable here and dismissed the appeal with costs.[43]

### 4 3 Restrictive scope of application and statutory exemptions

The term "record" is given a very wide definition in the Act, so as to include information in any form or medium, as long as it is recorded.[44] From its broad description, it is apparent that a "record" need not necessarily be a document, but would, for example, not include

[42] [2012] ZACC 21(as yet unreported).
[43] *Ibid.*
[44] Roling *Transparancy and Access to Information* (LLM-thesis, UCT, 2007) 13.

information in the form of oral decisions made at meetings or physical objects.[45] This may be seen as a limitation on the constitutional right which refers to "any information".[46] It is also not possible for a requester to gain access to information that has not been recorded, or to ask the official to create a record with certain information.[47] The problem in this regard is that a situation may arise where information may deliberately not be reduced to recorded form in order to keep such information out of public scrutiny.[48]

Chapter 4 of the PAIA contains certain grounds of refusal in relation to a request for information. These exemptions are necessary to protect sensitive information from disclosure and can be justified for a number of reasons, for instance to protect the privacy or safety of third parties and to ensure the confidentiality of information pertaining to national security and defence.[49] However, the Open Democracy Advice Centre (ODAC) has expressed the concern that there may be a trend developing to use the PAIA as a "shopping list for exemptions".[50]

The PAIA contains several exemptions to disclosure where secrecy is needed for some legitimate purpose. Section 41, for example, limits access to records containing information on "defence, security and international relations of [the] Republic". It cannot be disputed that some secrecy in government is of essential importance.[51] This is especially true when one considers the situation that could result if state adversaries had free access to sensitive records held by the military. However, Klaaren and Penfold have identified refusals under this provision as one of the instances most likely to be challenged on constitutional grounds.[52] According to them, it is all too easy for public officials to refuse a requester access to information, asserting that it is for reasons of national security, when, in fact, it is the interests of the government itself that are being protected.[53] Officials may, for example, be tempted to use this ground of refusal to conceal maladministration within the particular government

[45]Roberts *Die Reg op Toegang tot Inligting* 105-106.
[46]Currie & Klaaren *Commentary* 27.
[47]Beukes "Access to Information: The Bedrock of Just Administrative Action" 2003 *SAPL* 17 29.
[48]Roberts *Die Reg op Toegang tot Inligting* 237.
[49] See chapter 4 of the Act.
[50] Makhalemele "Summary of Case Law in terms of the Promotion of Access to Information Act – The South African Experience" http://www.africafoicentre.org/index.php?option=com_docman&task=cat_view&gid=307&limit=5&limitstart=0&order=name&dir=DESC&Itemid=419 (accessed 26-09-2011).
[51]Mathews "The Darker Reaches of Government" (1978) 31; De Jager "South African Policy on the Disclosure of Defence Information" 1998 *S.A Archives Journal* 69 69.
[52]Klaaren & Penfold "Access to Information" in *Constitutional Law of SA* 62-18.
[53]*Ibid*.

body, particularly since, under the same provision, the very existence of such information need not even be confirmed.[54]

This exemption was also the subject of the first case to have been decided by our courts under the PAIA, namely *Fakie NO v CCII Systems (Pty),*[55] a case concerning the controversial arms deal purchases made by the government.[56] After allegations of corruption were raised, the Auditor-General conducted an investigation into the arms deal and submitted a report to Parliament.[57] CCII, an unsuccessful bidder, made an application in terms of the PAIA to procure documents obtained during this investigation, which the Auditor General refused to provide, claiming that it related to security matters and was therefore protected under section 41 of the PAIA.[58] The court accepted that some confidentiality was necessary in the interests of security, but ordered the respondent to itemise those documents that would not be supplied, with detailed reasons as to why each of these documents needed to remain secret.[59] This judgement has been praised as being a triumph for access to information.[60] Moreover, in terms of the Supreme Court of Appeal decision in *Minister for Provincial and Local Government for the Republic of South Africa v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland*,[61] all exemption clauses in the PAIA must be interpreted in light of the broader scope of the constitutional right,[62] suggesting that a restrictive interpretation of the exemptions must be taken so as to uphold the wide ambit of the right embodied in section 32 of the Constitution.

Another example may be found in section 37(1)(a). This section contains a mandatory refusal of access to information where said information is subject to an agreement imposing a duty of confidence owed to a third party, such as a confidentiality clause in a tender document.

[54]Section 41(4)(a); Klaaren & Penfold "Access to Information" in *Constitutional Law of SA* 62-22; Roberts *Die Reg op Toegang tot Inligting* 237.
[55]2003 (2) SA 325 (T).
[56]Currie & Klaaren "An update on Access to Information in South Africa" 2003 *Freedom of Information Review* 72 75.
[57]*Ibid.*
[58] Makhalemele "Summary of Case Law in terms of the Promotion of Access to Information Act – The South African Experience" http://www.africafoicentre.org/index.php?option=com_docman&task=cat_view&gid=307&limit=5&limitstart=0&order=name&dir=DESC&Itemid=419 (accessed 26-09-2011).
[59] This is known as the Vaughn index and is used widely in freedom of information cases in foreign jurisdictions. In this regard, see *Vaughn v Rosen* 484 F2d 820 (DC Circuit Court. 1973).
[60]Currie & Klaaren 2003 *Freedom of Information Review* 75.
[61]2005 2 SA 110 (SCA).
[62]*Minister for Provincial and Local Government for the Republic of South Africa v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland* 116 A-D.

However, the SCA found in *Transnet v SA Metal Machinery Co (PTY) Ltd*[63] that the protection offered to a successful bidder in terms of this section does not apply after the tender has been awarded.[64] The State's constitutional obligation of transparency and accountability allows interested parties to access the pricing schedules of the successful bidder once the tender process has been completed.

It must be borne in mind that the exclusions mentioned above are all (barring one) subject to section 46, which contains a public interest override.[65] In terms of this section, disclosure of a record which would otherwise have been refused will be justified if the information it contains relates to "a substantial contravention of, or failure to comply with, the law" or "an imminent and serious public safety or environmental risk".[66] The emphatically restrictive language used in this section could potentially result in the underutilisation of the public interest override, as explained by the court in *Centre for Social Accountability v Secretary of Parliament*,[67] a case concerning alleged abuse of travel-voucher benefits by members of Parliament. Fortunately, in terms of section 81, the normal rules of civil procedure with respect to burden of proof applies to court proceedings brought under the PAIA, and the courts will not utilise a stricter standard of proof than the balance of probabilities standard.

The public interest override may additionally be applied to further the general objectives of the Act in promoting accountability and openness in government, not only those aspects which are specifically recognised in the relevant section.[68] This was also the view taken by the Eastern Cape High Court in *Avusa Publishing EC (Pty) Ltd v M Qoboshiyane*.[69] This case concerned a report compiled after allegations of maladministration within the Nelson Mandela Bay Municipality were raised.[70] Even though the court agreed that the report in question fell within the ambit of the exemption in section 44, it held that, given the considerable time that has lapsed since the compilation of the report, it would clearly be in the interests of the public for the information contained therein not to be withheld any longer.[71]

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[63] 2006 6 SA 285 (SCA).
[64] *Transnet v SA Metal Machinery Co (Pty) Ltd* para 55.
[65] Section 35, which deals with refusal of certain documents by the South African Revenue Service, is not made subject to the public interests override in section 46.
[66] Section 46(a).
[67] 2011 5 SA 279 (ECG).
[68] Currie & Klaaren *Commentary* 109.
[69] *Avusa Publishing EC (Pty) Ltd v M Qoboshiyane& others* ECP 2011-10-20 Case no 829/2011.
[70] *Avusa Publishing EC (Pty) Ltd v M Qoboshiyane& others* para 2-3.
[71] *Avusa Publishing EC (Pty) Ltd v M Qoboshiyane& others* para 47.

Certain state bodies are exempted from the provisions of the Act. Section 12(a) exempts records of Cabinet and its committees from the ambit of the Act. Since it is not one of the grounds of refusal listed in Chapter four, the public interest override does not apply to this particular category of records. Given the wide definition of the term "record", most information held by Cabinet will be exempted from disclosure.[72] This blanket exclusion of cabinet records presents a stark contradiction when one considers that the stated purpose of the Act is to promote openness and accountability in government. The same argument may be raised with respect to the exclusion of records of members of Parliament in section 12(c).[73]

### 4 4 Poor Implementation

The implementation of the PAIA has not been without difficulties. Requests for information made in terms of the PAIA often stumble against undue delay and unreasonable cost barriers.[74] The PAIA Civil Society Network (PAIA CSN) conducted research into the problems associated with the implementation of the PAIA and offer several reasons for the thwarting of requests made in terms of the Act.[75] The historical context of secrecy in government departments and the socio-economic handicap which a great portion of South Africans inherited from this era resulted in the majority of the populace lacking both adequate knowledge of PAIA as well as the appropriate skill to make use of its provisions.[76] Another reason is that access to information is dependent on proper records management by those in possession of the information – a responsibility undertaken poorly by a number of public and private bodies in South Africa.[77] The lack of proper training of information officials also contributes to the poor implementation of the Act.[78]

In *Garden Cities Inc v City of Cape Town and Another*,[79] Yekiso J referred to the constitutional mandate placed upon organs of state to put measures in place through which the public may gain access to information, and in so doing facilitate service delivery.[80]

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[72]Currie & Klaaren *Commentary* 55.
[73]Klaaren & Penfold "Access to Information" in *Constitutional Law of SA* 62-11.
[74]Roling *Transparancy and Access to Information* (LLM-thesis, UCT, 2007) 13.
[75]PAIA CSN "PAIA Civil Society Network Report: 2009" http://www.saha.org.za/projects/national_paia_civil_society_network.htm (accessed 23-09-2011).
[76]*Ibid.*
[77]*Ibid.*
[78]Roberts *Die Reg op Toegang tot Inligting* 223.
[79]2009 (6) SA 33 (WCC).
[80]*Garden Cities Inc v City of Cape Town and Another* para 41H.

Unfortunately, many public bodies seem to hamper access to information, either due to the failure of internal systems or as a result of the incompetence of the information officers to whom a request has been made.[81]

### 4 5 Appeal and Review Procedures

Section 74 of the PAIA provides for internal appeal remedies where one's request for information has been denied by the official considering the request. Section 78, in turn, explains the procedure to be followed if an appeal under section 74 was unsuccessful. In such a case, the requester may, by way of an application, appeal to a court against the decision reached through the internal appeal, which application must be made within 30 days.[82] In *Brümmer v Minister of Social Development*[83] the Constitutional Court declared this 30-day limit as unconstitutional and "grossly inadequate" for allowing the normal applicant to file an application,[84] and held that the rights of access to information and to seek judicial redress are far more important than the financial and administrative burdens this strict time-period seeks to reduce.[85] Internal review mechanisms must, of course, still be utilised. For instance, in *Sumbana v Head, Department of Public Works, Limpopo Province*,[86] the court dismissed the application based on the fact that the applicants had not exhausted the internal appeal remedies before approaching the court for relief.[87]

Section 80 of the PAIA allows a court hearing an application for information, or an appeal against such an application, to access any information that was refused to a requester in terms of the Act. This allows the court to decide whether the refusal was justified, so as to determine whether the information in question should be disclosed. The Supreme Court of Appeal in *The President of the Republic of South Africa v M & G Media Limited*,[88] however, declined to make use of this provision, warning courts against becoming party to government secrecy, lest they lose the trust the public places in courts in ensuring openness and transparency. On appeal, however, the Constitutional Court found differently.[89] It stated that the very purpose of the provision is to "test the argument for non-disclosure by using the

[81] *Garden Cities Inc v City of Cape Town and Another* para 41I-J.
[82] Section 78(3)(c).
[83] 2009 (11) BCLR 1075 (CC).
[84] *Brümmer v Minister of Social Development & Others* 1098B; Sithole *Without Prejudice* (July 2009) 4.
[85] *Brümmer v Minister of Social Development & Others* para 70.
[86] 2009 3 SA 64 (V).
[87] *Sumbana v Head, Department of Public Works, Limpopo Province* para 72 (C).
[88] 2011 4 BCLR 363 (SCA).
[89] 2012 2 BCLR 181 (CC).

record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record", thereby facilitating access to information, rather than obstructing it.[90]

### 4 6 Distinction between Public and Private Bodies

Media groups and journalists have, thus far, not made extensive use of the provisions of the PAIA, largely due to the lengthy delays involved in a request for access to information.[91] Even those limited cases that have been brought before the courts have been severely criticised (by Combrink AJA) for the excessive amount of pre-trial litigation involved in cases where public bodies have shown complete "disregard for the aims of the Act and the absence of common sense and reasonableness".[92] Many of the cases reported were brought by political parties. Given the hybrid nature of political parties,[93] it is not surprising that much of the courts' deliberations have centred on the distinction between public and private bodies. In *Institute for Democracy in South Africa v African National Congress*,[94] the court had to decide whether a political party constituted a public body in terms of the Act. In answering this question, the court looked at the nature of the information sought by the applicants.[95] In this case it was clear that the information sought related to the activities of the political party in its capacity as private body, and the applicants were therefore required to motivate why such information was necessary for the protection of exercise of their rights.[96] This finding of the court has been severely criticised by Bosch.[97] Drawing from decisions made in terms of the right of just administrative actions, she argues that, although political parties are private bodies, they wield considerable public power and should therefore be subject to the stricter disclosure demands placed on public bodies.[98]

Other cases that have been brought before the courts have been more favourable to the notion of transparency. In *Mittalsteel SA Ltd v Hlatshwayo*,[99] the appellant was ordered to grant the respondent access to the requested documents, notwithstanding the fact that this company no

[90] *The President of the Republic of RSA v M&G* para 52.
[91] Klaaren "PAIA through the Courts: Case Law and Important Developments in PAIA Litigation" http://www.opendemocracy.org.za/wp-content/uploads/2010/10/PAIA-Through-the-Courts-Case-Law-and-Important-Developments-in-PAIA-Litigation-by-Jonathan-Klaaren1.pdf (accessed 04-02-2013).
[92] *Claase v The Information Officer of South African Airways* SCA 2006-11-20 Case no 39/2006 para 1.
[93] A hybrid entity is a body that has both public and private components.
[94] 2005 5 SA 39 (C).
[95] *IDASA v ANC* 53 E-F.
[96] *IDASA v ANC* 54 B.
[97] Bosch "*IDASA v ANC* – An Opportunity Lost for truly Promoting Access to Information" 2006 *SALJ* 615 – 625.
[98] Bosch 2003 *SALJ* 624.
[99] *Mittalsteel SA Ltd v Hlatshwayo* SCA 2006-05-2011 Case no 326/05.

longer fell within the definition of a public body. Since Mittalsteel was controlled by the state at the time the relevant records were produced, it was still made subject to the stricter disclosure demands placed on public bodies for purposes of granting access to said information.[100]

## 5 OTHER LEGISLATION RESTRICTING THE RIGHT OF ACCESS TO INFORMATION

A significant feature of the PAIA is that it does not repeal earlier secrecy laws restricting the right of access to information, but only overrides the earlier laws where there is an overlap.[101] Therefore, any information not formally requested through PAIA is still subject to those acts of parliament.[102] There are many statutes in force today that restrict the right of access to information, most of which are aimed at the safety and security of the state. The South African Police Services Act,[103] the Intelligence Services Act,[104] the Defence Act,[105] the Public Service Act[106] and the National Strategic Intelligence Act[107] all contain provisions restricting access to government-held information, to name but a few. While it cannot be disputed that some secrecy is needed for the military and other defence-related affairs of the state, these laws become unreasonable where they unjustifiably infringe on a person's constitutional rights. One Act in particular, the Protection of Information Act of 1982 (PIA), has been criticised for unconstitutionally restricting the right of access to information.

### 5 1 The Protection of Information Act (PIA)

PIA is the principal statute restricting access to information in South Africa today.[108] It was enacted at the height of apartheid, at a time when government was obsessive about secrecy and neglectful of basic human rights.[109] As is the case with many of the secrecy laws of this era, PIA imposes strict limitations on the accessibility of government-held information.[110]

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[100] *Mittalsteel SA Ltd v Hlatshwayo* para 28.
[101] Klaaren 2002 *SALJ* 722.
[102] Klaaren "Access to Information and National Security in South Africa" in *National Security and Open Government: Striking the Right Balance"* 189 194.
[103] Act 68 of 1995.
[104] Act 65 of 2002.
[105] Act 42 of 2002.
[106] Act 103 of 1994.
[107] Act 39 of 1994.
[108] Klaaren 2002 *SALJ* 722; Klaaren "Access to Information and National Security" in *National Security and Open Government"* 194; Hutton "Secrets, Spies and Security" 2009 *Monograph* 1 6.
[109] Moore "Critique of the Protection of Information Bill" 2009 *Monograph 77 77.*
[110] Klaaren 2002 *SALJ* 723.

Section 4(1) of the Act prohibits disclosure of any information which the discloser knows or reasonably ought to know should remain secret for the "security or other interests of the Republic". No distinction is made between information relevant to the security of the Republic and information relating to other interests of the State, and any information may therefore fall within the ambit of the Act.[111] The Act furthermore prohibits the receipt or failure to take care of such information.[112] A contravention of section 4 is met with imprisonment or a fine or both.[113] The prejudicial effect of the broad terms contained in this section is further aggravated by the reverse onus contained in section 10.[114] Where it appears from the circumstances of the case or from the conduct of the accused that his or her intention was to prejudice the state, such intention may be presumed and the onus would rest on the accused to prove otherwise.[115]

Apart from the statutory provisions of the PIA, its manner of implementation may give further rise to criticism. The PIA is implemented through the Minimum Information Security Standards (MISS), a Cabinet-level policy document to be used as a set of minimum standards by all public institutions handling sensitive information in compiling their own procedures for the classification and declassification of information.[116] The MISS is widely acknowledged to be unconstitutional, given the fact that it implements information security in all public institutions handling sensitive information, and not only those establishments that are identified as security institutions in chapter eleven of the Constitution.[117] It also contains a very wide definition of "classified information" that bears no reference to national security, but instead commands the non-disclosure of "sensitive" information so as to include the whole public sector.[118]

A further complication with respect to the MISS is its enforceability. The MISS is a "national information security policy".[119] It is not an act of parliament, nor is it delegated legislation,

[111]Klaaren 2002 *SALJ* 723; Roberts *Die Reg op Toegang tot Inligting* 72-73.
[112]Section 4(1)(*dd*) and section 4(2).
[113]Section 4(1).
[114]Roberts *Die Reg op Toegang tot Inligting* 72.
[115]Section 10.
[116]Klaaren 2002 *SALJ* 724.
[117]Klaaren "Open Justice and Beyond: *Independent Newspapers v Minister for Intelligence Services: in re Maseltha*" 2008 *SALJ* 24 25.
[118]Klaaren 2002 *SALJ* 725.
[119]Klaaren 2002 *SALJ* 724.

and it is therefore not legally enforceable.[120] As a result, there is no consistency with respect to the classification of information, and information is sometimes over-classified or it is not classified at all.[121] There is also no procedure for the declassification of information, and a lack of appropriate checks and balances of the measures protecting information from disclosure.[122]

The unenforceability of the MISS also contributes to the potential unconstitutionality of PIA.[123] The Constitutional Court has made it clear that parliamentary guidelines must be available where wide discretionary powers conferred on public officials may infringe on any person's constitutional rights.[124] In the absence of such guidelines, the enabling legislation is more likely to be found unconstitutional and invalid.[125]

A benevolent interpretation of the MISS is, however, possible.[126] Considering references made to the (then) pending Open Democracy Bill[127] in the preface as well as chapter 1 of the MISS, it may be argued that the only information the MISS covers is that which is exempted from disclosure by the PAIA, and that in this way, the PAIA controls the MISS.[128] Unfortunately, this is not the interpretation that has been practised, and the MISS continues to run counter to the principles of openness and transparency – core principles which are guaranteed by various provisions of the Constitution and PAIA.[129]

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*,[130] the court was granted a unique opportunity to deliver a verdict on the competing requirements of access to information and the need for secrecy in national security. This case concerned an application made by a local newspaper for access to the official court record of the underlying

[120]Gilder "Submission to the Parliamentary ad hoc Committee on the Protection of Information Bill www.pmg.org.za/files/docs/080729barry**gilder**.doc (accessed 07-10-2011).
[121]*Ibid.*
[122]*Ibid.*
[123]Klaaren 2002 *SALJ* 729.
[124]*Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 941 A-D.
[125]Klaaren 2002 *SALJ* 729.
[126]Klaaren 2002 *SALJ* 726.
[127]Bill 67 of 1998.
[128]Klaaren 2002 *SALJ* 726.
[129]Klaaren "Access to Information and National Security" in *National Security and Open Government* 199.
[130] 2008 5 SA 31 (CC).

case, *Masetlha v President of the Republic of South Africa,*[131] portions of which included documents which had presumably been classified under the MISS.[132] In his minority judgement, Sachs J explained the interaction between the right of access to information and the need for secrecy in security institutions. The Constitution guarantees the right of individuals to gain access to state-held information.[133] The PAIA gives effect to this right and enumerates several legitimate grounds for non-disclosure, including information relevant to the safety and security of the nation.[134] This exemption does not, however, constitute a blanket ban on the disclosure of such information and security services are, therefore, not automatically entitled to secrecy.[135] The classification of documents as "confidential" or even "top secret" does not place these document out of the court's scrutiny.[136] Once placed before the court, said documents will be analysed in the context of surrounding circumstances to decide whether to uphold a government official's claim that such information should be protected from disclosure on grounds of national security.[137]

The majority judgement in the *Independent Newspaper* case has been criticised as "very disappointing" in that the learned judges "pay[s] far too much deference to the state's assertion of secrecy and confidentiality".[138] Klaaren, however, has viewed the judgment in a positive light and welcomed the judicial precedent set for open democracy, especially in light of the contentious Protection of Information Bill which, at the time, had just been introduced into Parliament.[139]

### 5 2 The National Key Points Act

Another apartheid-era law still on the statute books is the National Key Points Act.[140] This Act allows the Minister of Defence to declare any place or area to be a "national key point" if loss or damage to the said place or area could prejudice the Republic, or where it would be

[131]2008 1 SA 566 (CC).
[132]Klaaren 2008 *SALJ* 25.
[133]*Independent Newspapers (Freedom of Expression Institute as Amicus Curiae) v Minister for Intelligence Services: in re Maseltha v President of the Republic of South Africa* 86C-D.
[134]*Ibid.*
[135]*Independent Newspapers (Freedom of Expression Institute as Amicus Curiae) v Minister for Intelligence Services: in re Maseltha v President of the Republic of South Africa* 87B-C.
[136]*Independent Newspapers (Freedom of Expression Institute as Amicus Curiae) v Minister for Intelligence Services: in re Maseltha v President of the Republic of South Africa* 54H.
[137]*Independent Newspapers (Freedom of Expression Institute as Amicus Curiae) v Minister for Intelligence Services: in re Maseltha v President of the Republic of South Africa* 54I-J.
[138]Adv Wim Trengove SC as quoted in Klaaren 2008 *SALJ* 26.
[139]Klaaren 2008 *SALJ* 24.
[140]Act 102 of 1980.

necessary for the safety of the Republic to afford greater protection to it.[141] Once declared to be a national key point, security information about the area or place in question is effectively restricted from disclosure in terms of section 10 (2)(*c*). It is under this Act that the Minister of Public works claims to be unable to disclose information regarding the renovations at President Jacob Zuma's private homestead in Nklandla, reportedly amounting to the expenditure of almost R250 million at state expense.[142] A PAIA request for a list of all the areas currently defined as national key points has been thwarted by the head of the SAPS, claiming that the list itself must also remain secret.[143] This has led to calls for this Act to be amended so as to bring it in line with the constitutional values of transparency and openness.[144]

### 5 3 The Protection of Information Bill

The Protection of Information Bill was first tabled before Parliament in 2008.[145] It was subsequently withdrawn, reintroduced two years later and has since undergone numerous amendments.[146] The amendments were so severe that not even the original name survived and the Bill has most recently been referred to as the Protection of State Information Bill.[147] This Bill aims, amongst others, to provide principles for the proper protection and dissemination of information.[148] It further aims to provide principles and procedures for the classification and declassification of information as well as measures to oversee and monitor these functions.[149] The Bill also creates a statutory crime of espionage, a provision which was lacking in the PIA of 1982.[150]

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[141]Section 2(1) of the National Key Points Act.
[142]Mazibuko "DA to submit Proposed Amendments to National Key Point Act to Speaker Max Sisulu" http://www.da.org.za/newsroom.htm?action=view-news-item&id=11518 (accessed 20-12-2012).
[143]Bhardwaj, Mthembu & Hunter "State Wields Apartheid Big Stick" http://amabhungane.co.za/article/2012-11-22-state-wields-apartheid-big-stick (accessed 20-12-2012).
[144] *Ibid.*
[145]Currie & Klaaren "Evaluating the Information Bills" *http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (accessed 20-12-2012).*
[146]Peyper & Steenkamp "Skryf Wet op Inligting Drasties Oor" *Die Burger* (20-09-2011) 1.
[147]Benjamin "Group warns that New Version of Secrecy Bill makes Access to Information more Difficult" (28-10-2011) *Business Day* <http://www.businessday.co.za/Articles/Content.aspx?id=157267> (accessed 31-10-2011).
[148]Clause 2 (*c*) of the Protection of Information Bill.
[149]Clause 2 (*g*) of the Protection of Information Bill.
[150]Currie & Klaaren "Evaluating the Information Bills" *http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (accessed 20-12-2012).*

Since its introduction, this Bill has sparked unparalleled controversy and anxiety among the South African population.[151] Journalists, in particular, are severely opposed to the Bill, believing that it is a direct attack on the media and that publishing anything which is not pro-government will be met with harsh penalties.[152] It is believed that its promulgation will suppress the media and "mark the end of investigative journalism in South Africa".[153] Critics also argue that the Bill runs counter to government's open content policy by severely restricting access to government-held information.[154]

Klaaren and Currie submit that the fierce reaction by civil society is, at least to some extent, fuelled by confusion regarding the ruling African National Congress's proposal for establishing a Media Appeals Tribunal (MAT).[155] The MAT is intended to regulate the media so as to ensure a more accurate and accountable press.[156] The Protection of Information Bill was reintroduced into Parliament at approximately the same time as ANC Secretary-General Gwede Mantashe's indication that the MAT was under consideration, which caused many to believe that these two issues were conflated and posed a concerted attack on the media.[157]

Regardless of the confusion concerning the MAT, there are some aspects of the Bill which are troublesome and which require legal analysis. Due to the fact that the provisions of the Bill are, at the time of writing, still under consideration and being debated, no attempt shall be made to analyse any specific draft of the Bill. Instead, the major criticisms that have been raised against the Bill in general will be discussed.[158]

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[151] *Ibid.*
[152] Seokoma "Protection of Information Bill: SA Media under Attack" http://www.ngopulse.org/article/protection-information-bill-sa-media-under-attack (accessed 27-07-2011).
[153] *Ibid.*
[154] Vecchiatto "State Policy may make Officials Criminals" http://www.businesslive.co.za/incoming/2011/05/25/state-policy-may-make-officials-criminals (accessed 30-07-2011).
[155] Currie & Klaaren "Evaluating the Information Bills" http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (accessed 20-12-2012).
[156] *Ibid*.
[157] *Ibid*.
[158] There are several versions of the Bill available electronically. For the purposes of this article, reference will be made to the newest version available from the Parliamentary Monitoring Group website at http://www.pmg.org.za/report/20120911-committee-deliberations-proposed-amendments-protection-state-informat (accessed 19-12-2012).

### 5 4 Scope of Application

The Bill has been subjected to severe criticism regarding its broad scope, which seems to reach beyond security institutions so as to regulate all information generated by the state.[159] The reason advanced by Currie and Klaaren for the wide scope of the Bill can be found in the legislation it is intended to replace.[160] The PIA is drafted in such a way so as to include not only security-related information, but any information deemed to be valuable or sensitive, and to provide for the proper preservation and treatment of such information.[161] The Protection of Information Bill was initially designed to cover the same scope of information but, after considerable amendments were made, the later drafts of the Bill more closely resembled conventional security legislation.[162]

An earlier draft of the Bill was also criticised for conferring the power on any organ of state to classify documents.[163] A broad scope such as this would entitle not only entities handling real state secrets, but also, for instance, a provincial sporting board to classify records as secret and confidential, effectively restricting access to the information contained therein.[164] The situation is compounded by the fact that each of these institutions may use different interpretations of classification, making it extremely difficult for a requester to gain access to said records.[165] Clause 3 of the latest draft fortunately restricts application of the provisions dealing with classification, reclassification and declassification to cabinet, the security services and oversight bodies as referred to in the Constitution, unless the Minister of Defence makes said provisions applicable to other organs of state. While limiting the application of the Bill in this way is undeniably an improvement, any organ of state, with the exclusion of municipalities and municipal entities, will be entitled to apply to the Minister for authority to classify information.[166] Once the Minister is satisfied that good cause is shown he/she is

[159]Currie & Klaaren "Evaluating the Information Bills" *http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (accessed 20-12-2012).*
[160] *Ibid.*
[161]Brümmer "Breaking the Logjam?" http://mg.co.za/uploads/2011/06/28/110622-mgcij-assessmentbreaking-the-logjam.pdf (accessed 07-10-2011).
[162]Currie & Klaaren "Evaluating the Information Bills" http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (accessed 20-12-2012).
[163]Seedat "Submission to the Ad Hoc Committee on Protection of Information Legislation on the Protection of Information Bill [B 6-2010]" http://www.pmg.org.za/files/docs/100630idasa.pdf (accessed 07-10-2011).
[164]Brümmer "Breaking the Logjam?" http://mg.co.za/uploads/2011/06/28/110622-mgcij-assessmentbreaking-the-logjam.pdf (accessed 07-10-2011); Moore 2009 M*onograph* 78.
[165]Seedat "Submission to the Ad Hoc Committee on Protection of Information Legislation on the Protection of Information Bill [B 6-2010]" http://www.pmg.org.za/files/docs/100630idasa.pdf (accessed 07-10-2011).
[166]Clause 3 of the Protection of Information Bill.

entitled to grant such authority, once again allowing application to reach beyond security institutions.

Notwithstanding the amendments made to narrow the application of the Bill, some of the terms contained even in a later draft are wide enough so as to leave it open to abuse. For instance, the term "national interest", the basis on which information may be classified in terms of the earlier draft of the Bill, is a term that differs from one country to another, depending on the history and context of that nation.[167] According to Print Media South Africa, an overly broad definition such as this "betrays an obsession with secrecy that cannot be countenanced in a democracy",[168] and would lead to a greater commitment to non-disclosure and over-classification of information.[169] Potentially any information relating to the public service or anything owned or maintained by the state for the public could become classified and therefore not subject to disclosure.[170]

After objections against the vague concept of "national interests" were raised, government opted for this term to be replaced by "national security".[171] While "national security" was undoubtedly narrower in scope than "national interests", many were still concerned that, without a definitive and narrow definition of the term, it could be used to classify almost any information as confidential.[172] As a result, parliament conceded to calls for a statutory definition of "national interests" and the latest version of the bill includes a concise definition of the term.[173] For the sake of brevity, the definition will not be repeated here, suffice to note that the definition afforded in the Bill is still wider than the one in the PIA in force today.[174] Critics accordingly remain convinced that the definition is too open-ended, since the word

[167]Seedat "Submission to the Ad Hoc Committee on Protection of Information Legislation on the Protection of Information Bill [B 6-2010]" http://www.pmg.org.za/files/docs/100630idasa.pdf (accessed 07-10-2011).
[168]Milo, Ampofo-Anti & Wild "Submissions to the ad hoc Committee on the Protection of Information Bill B6-2010 in the National Assembly" http://printmedia.org.za/static/article_media/145_pmsa_submissions_on_protection_of_information_bill_b6_2010.pdf (accessed 07-10-2011).
[169]Moore 2009 *Monograph* 71.
[170]Seedat "Submission to the Ad Hoc Committee on Protection of Information Legislation on the Protection of Information Bill [B 6-2010]" http://www.pmg.org.za/files/docs/100630idasa.pdf (accessed 07-10-2011).
[171]Naidoo "Levels of Secrecy" http://www.fm.co.za/Article.aspx?id=145358 (accessed 07-10-2011).
[172]Brümmer "Breaking the Logjam?" http://mg.co.za/uploads/2011/06/28/110622-mgcij-assessmentbreaking-the-logjam.pdf (accessed 07-10-2011).
[173]Clause 1 contains all the definitions applicable to the Bill.
[174]News 24 "Info Bill Two Steps from Becoming Law" http://www.news24.com/SouthAfrica/Politics/Info-bill-two-steps-from-becoming-law-20121129 (accessed 12-02-2013).

"includes" makes it possible for public officials to add other acts which should not be included in the definition, vitiating the purpose of including a definition in the first place.[175]

### 5 5 Review Procedures

The greatest public concern with respect to the Bill is the fact that it grants very wide and sweeping powers to public officials which may be abused if proper checks and balances are not in place.[176] Civil society groups have called for an independent information tribunal or ombudsman to keep public authority conferred on officials in check and to provide for the review of decisions made by such public officials.[177] The original draft of the Bill included an Independent Information Protection Oversight Centre with authority to hear internal appeals and review, but this provision would have necessitated the creation of a separate administrative structure at state expense, and therefore did not find much favour amongst the legislature.[178]

The absence of an independent body charged with the oversight of decisions made by public officials and the inclusion of only internal appeal and review mechanisms ultimately has the consequence that the same persons who classify documents are the ones who will review that classification, an approach seemingly in violation of basic principles of administrative justice.[179] An aggrieved person would then have to approach a court for relief, should the (inadequate) internal mechanism not prove sufficient.[180] Using the ordinary courts to adjudicate on access to information disputes is also not suitable given the imbalance of power between the information requester and the person withholding such information.[181] Adding to this situation, the time and costs associated with our judicial procedure, as well as the fact that the existence of certain information need not even be confirmed or denied, results in the

[175]Duncan "Highway Africa written submissions on the Protection of State information Bill" http://www.ngopulse.org/press-release/highway-africa-written-submissions-protection-state-information-billhttps://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDsQFjAB&url=http%3A%2F%2Fwww.parliament.gov.za%2Fcontent%2F233%2520NCOP%2520Protection%2520of%2520State%2520Info%2520Bill%2520Feb%25202012.doc&ei=AUnTUN_gEqSV0QWeqoHQAQ&usg=AFQjCNEbR4s-D0aTvylF-2yhBnMNhANQYA&sig2=siZx-pOnRmaO_AITaA48cQ&bvm=bv.1355534169,d.d2k (accessed 18-12-2012).

[176]Moore 2009 *Monograph* 79.

[177]Currie & Klaaren "Evaluating the Information Bills" *http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf* (accessed 20-12-2012).

[178] *Ibid.*

[179]Moore "FXI Submission on Protection of Information Bill" http://fxi.org.za/index.php?option=com_content&view=article&id=100&Itemid=10 (accessed 07-10-2011).

[180]Kisoon "PAIA and Public Participation" 2009 *Monograph* 67 70.

[181]Kisoon 2009 *Monograph* 71.

possibility that such provisions will not survive constitutional muster.[182] Regardless of the detailed and comprehensive procedures in place for the classification and non-disclosure of information, without appropriate mechanisms for oversight, such procedures are meaningless and the legislation in question will remain open to abuse by public officials.[183]

After the public outcry and several submissions by opposition parties and civil society groups, parliament finally included an independent review mechanism in the Bill. Chapter 7 of the Bill now provides for the establishment of a Classification Review Panel which will oversee classifications.[184] This review panel is to be composed of 5 members nominated by the Joint Standing Committee on Intelligence and approved by Parliament.

### 5 6 The Public Interest Exemption

A public interest defence offers protection to journalists and whistle-blowers disclosing classified information, if it is to the benefit of the public that such information be revealed. The ruling party's unwavering insistence on excluding such a provision in the Bill was one of the main reasons for its recent temporary removal from parliamentary debate.[185] While the earlier draft of the Bill incorporated a "harm test", this provision was removed from the later draft.[186] This meant that the mere disclosure or possession of information was criminalised, regardless of the amount of harm inflicted on the Republic.[187] A formulation such as the one incorporated into an earlier draft of the Bill would implicitly provide a public interest defence, since the accused could argue that the benefit to the state outweighed the harm caused by his or her actions.[188]

However, this implied public interest defence clause was subsequently removed before being reintroduced into Parliament. The exclusion of a public interest exemption into legislation criminalising the disclosure of certain information may have the effect of severely restricting

[182]Moore "FXI Submission on Protection of Information Bill" http://fxi.org.za/index.php?option=com_content&view=article&id=100&Itemid=10 (accessed 07-10-2011).
[183]Moore 2009 *Monograph* 79.
[184]Clause 21 of the Bill.
[185]Peyper & Steenkamp "Skryf Wet op InligtingDrastiesOor" *Die Burger* (20-09-2011) 1.
[186]Currie & Klaaren "Evaluating the Information Bills" *http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf* (accessed 20-12-2012).
[187] *Ibid.*
[188]Brümmer "Breaking the Logjam?" http://mg.co.za/uploads/2011/06/28/110622-mgcij-assessmentbreaking-the-logjam.pdf (accessed 07-10-2011).

the media in the important role it plays in curbing abuses of power by public officials.[189] Recently, the ruling party included a public interest defence, although the defence offered by this provision does not provide complete protection to whistleblowers. Clause 43 now protects persons who unlawfully disclose or possess information which is protected under certain statutes or if it reveals criminal activity. Therefore, should a state official reveal information which does not necessarily reveal a criminal activity, he/she would be prosecuted regardless of the fact that it may have been in the public interest to disclose it.

Given the apparent unconstitutionality of the existing security legislation which aims to regulate the dissemination of information in South Africa, it can hardly be disputed that legislative developments to repeal these statutes are urgently required.[190] Unfortunately, as indicated in the discussion above, the Protection of Information Bill was drafted in a fashion which suggests a great danger to the right of access to information, and would, arguably, reinforce the presumption of secrecy already present in the affairs of public institutions.[191] Whilst it is true that the ruling party has gone to great lengths to ensure the constitutionality of the Bill, some provisions must still be amended so as to ensure an accurate balance between openness and secrecy in the public sector.

## 6 CONCLUSION

South Africa's Constitution, which has been globally recognised as one of the most progressive constitutions in the world, firmly entrenches a separate right of access to information.[192] Among the founding principles in the Constitution is the need for an accountable, responsive and open government, aims which can only be achieved by ensuring public accessibility to state-held information.[193] Section 32 guarantees individuals an unqualified right of access to information held by the state, eliminating the qualifying proviso of the equivalent right contained in the interim Constitution. As with all the rights in the Bill of Rights, section 32 may be limited in terms of a "law of general application" to the extent

[189]Moore "FXI Submission on Protection of Information Bill" http://fxi.org.za/index.php?option=com_content&view=article&id=100&Itemid=10 (accessed 07-10-2011).
[190]Moore 2009 *Monograph* 77.
[191]Moore 2009 *Monograph* 77-84.
[192]Section 32 of the Constitution of South Africa, 1996.
[193]O'Regan "Democracy and Access to Information in the South African Constitution: Some Reflections" in paper presented at conference on *The Constitutional Right of Access to Information* hosted by the KonradAdenaur Foundation and University of South Africa VerLoren van Themaat Centre for Public Law Studies at Pretoria, 04-09-2000 available at http://www.kas.de/wf/doc/kas_4936-1522-2-30.pdf?040625152235 (accessed 28-07-2011) 11 12.

that it is "reasonable and justifiable in an open and democratic society".[194] This section furthermore imposes an obligation on Parliament to enact legislation to ensure proper mechanisms through which this right may be enforced and to provide measures to alleviate the financial and administrative burdens which a request for information may impose on the state.[195]

The Promotion of Access to Information Act was the legislative response to the mandate imposed by section 32 of the Constitution. Part two of the Act provides procedures through which the public may gain access to state-held information so as to promote accountability and transparency in government bodies. Certain state bodies are, however, exempted and an array of limitations on the type of information which may be accessed are imposed. Section 12(a), for example, imposes a blanket provision on cabinet records – a stark contradiction when one considers that the aim of the Act is to ensure an open and transparent government.[196] Furthermore, the Act applies only to records, and any information not reduced to a recorded form will fall short of the Act for the purposes of requesting access to such information.[197]

Apart from the statutory limitations it contains, the Act has been criticised for its poor implementation. The lengthy and expensive procedure to be followed when requesting information as well as untrained and incompetent information officers and a largely unskilled populace all add to the reasons why the PAIA has, arguably, not been optimally used by the public to access state-held information.[198]

The safety and security of the Republic is a sensitive issue and requires special protection to keep information from falling into the hands of the country's adversaries. Information that is available to the public is, of course, also available to enemy states, and it follows that certain information must be exempted from disclosure, even to the South African population.[199] The PAIA contains an exemption in this regard,[200] and specific security legislation also prohibits

[194]Section 36 of the Constitution of South Africa, 1996.
[195]Section 32(2).
[196]The purposes of the Act is stated in its Preamble.
[197]Currie & Klaaren *Commentary* 27-28.
[198]SAHA "PAIA Civil Society Network Report: 2009" http://www.saha.org.za/projects/national_paia_civil_society_network.htm (accessed 23-09-2011).
[199]Gilder "Submission to the Parliamentary ad hoc Committee on the Protection of Information Bill www.pmg.org.za/files/docs/080729barry**gilder**.doc (accessed 07-10-2011).
[200]Section 41.

the disclosure of sensitive information. The Protection of Information Act, as implemented through the Minimum Information Security Standards, is the principal means through which government aims to regulate the flow of information between the state and its subjects.[201] This Act was promulgated during the apartheid era and confers wide discretionary powers on government officials in restricting access to information.[202]

An unfortunate consequence of many provisions in security legislation is the power it confers on public officials to conceal certain information. Even facts which are not sensitive in terms of security standards, information that should rightfully be in the public domain, are subject to discretionary powers conferred on public officials to refuse disclosure.[203] Carefully drafted, security legislation effectively allows government to legitimately obscure information from the public, often in an attempt to conceal corruption and abuses of public power.[204] This was done during apartheid and still remains a concern today, as is evidenced by the public uproar that resulted from the introduction of the Protection of Information Bill into Parliament.

One of the main concerns with statutes restricting access to information is the vague and overly-broad terms through which they may aim to classify information.[205] "[T]here is no more effective censor than an uncertain law", and incorporating vague and ambiguous terms into statutes may well permit officials to conceal information relating to maladministration within the public sector.[206] Where legislation confers discretion to a public official to classify information, thereby potentially precluding such information from disclosure, it must be precisely drafted so as not to leave the provision open to abuse.[207]

The phrase "in the public interest" is particularly favoured by drafters of legislation due to the protection afforded by its flexibility.[208] It is very difficult to prove what is and what is not in the public interest, which makes it a convenient and "impenetrable shield" to hide certain facts from public scrutiny.[209] For instance, information pertaining to government expenditure

[201]Klaaren 2002 *SALJ* 722; Klaaren "Access to Information and National Security" in *National Security and Open Government* 194.
[202]Klaaren 2002 *SALJ* 722.
[203]Roberts *Die Reg op Toegang tot Inligting* 60.
[204]Roberts *Die Reg op Toegang tot Inligting* 58.
[205]Moore 2009 *Monograph* 71.
[206]Mathews 1975 *THRHR* 359.
[207]Klaaren 2002 *SALJ* 729.
[208]Rycroft "In the Public Interest" 1989 *SALJ* 172 172.
[209]Rycroft 1989 *SALJ* 172.

may be kept confidential by deeming secrecy of such information to be "in the public interest". The aforementioned expenditure on the President's homestead in Nkandla may be a case in point. Terms such as "national interests" or "interests of the Republic" are similarly flexible and will allow government officials to hide maladministration in a veil of secrecy.[210]

Proper review procedures are exceedingly important, not only in security legislation, but in any statute imposing criminal liability. The doctrine of "*in propria causa nemo iudex"* means no person should judge his or her own decisions.[211] Without independent bodies for appeals and reviews, legislation undermines the rule of law principle and restricts openness in government institutions.[212] Courts and tribunals should, therefore, be freely accessible by the public whose rights may have been infringed by decisions taken by public officials, including a decision not to grant access to information.[213]

Legislation prohibiting the disclosure of information should furthermore have a public interest defence to protect whistle-blowers and persons who reveal misconduct and abuses of authority.[214] This is especially true where unauthorised disclosure is met with harsh penalties, as is the case in current and proposed security legislation in South Africa.[215] Where such protection is not afforded, employees and inferior public officials will be discouraged from revealing administrative irregularities conducted by their superiors.

The fierce public response that met the Protection of Information Bill is, in a number of respects, encouraging and was, in some ways, to be expected. Given South Africa's relatively recent past of human rights abuses under apartheid, and the role that government secrecy played in that regard, it is not at all surprising that South Africans guard their constitutional right of access to information with fervour and determination.

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[210]Moore 2009 *Monograph* 71.

[211]Law & Martin *Dictionary of Law* (2009) 366.

[212]Fazel "Who Shall Guard the Guards? Civilian Operation Oversight and the Inspector-General of Intelligence" 2009 *Monograph* 31 43; Kisoon 2009 *Monograph* 68 .

[213]Freely accessible also means affordable to the general population. An independent tribunal may be more cost-effective than a court, and may be equally effective.

[214]Moore "FXI Submission on Protection of Information Bill" http://fxi.org.za/index.php?option=com_content&view=article&id=100&Itemid=10 (accessed 07-10-2011).

[215]Under the Protection of Information Act, persons disclosing information in contravention of the Act may be imprisoned for up to ten years.

This contribution has shown that there are some common techniques used by legislators which leave statutes wide open to abuse and allow public institutions the opportunity to legitimately conceal fraudulent activities from the public eye. To prevent a return to the tyranny and oppression of the past, government must, in particular, ensure the proper application and safeguarding of the right of access to information. This includes not only devising an appropriate legislative framework, but also ensuring appropriate implementation and assessment of decisions made in terms of such legislation. Any legislation restricting the right of access to information must be narrowly formulated, so as not to confer wide discretionary powers on public officials without appropriate guidelines on how such power should be exercised. Furthermore, checks and balances must be in place to ensure that power is not exercised in an arbitrary fashion. While corruption thrives in secrecy,[216] access to information is the most effective weapon to ensure a truly open and accountable public administration.[217]

[216]Devenish *A Commentary* 439.
[217]Beukes 2003 *SAPL* 17.