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MEDIA CENSORSHIP

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The aim of these dialogues is to create a space for open and informed dialogue and debate around key local and global political, social and economic issues facing South Africa.

Human dignity, freedom of expression and the Protection of Information Bill

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Few people in South Africa will argue with the contention that– in the most exceptional circumstances – the state has a duty to keep secrets. The identity of intelligence agents, details of troop movements or the whereabouts of our submarines during a time of war (one never knows when we might be attacked by the Lesotho navy), and even the private deliberations of the cabinet may arguably be kept secret to protect "the life of the nation". In a democracy like ours it is therefore necessary – in very limited circumstances, to sanction state secrecy.

However, the South African Constitution unambiguously limits the situations in which the state should be allowed to keep secrets. This is because any form of secrecy infringes on the right to freedom of expression – including the right to the freedom of the press – as well as the right of access to any information held by the state. And as our Constitutional Court has emphasised, these rights lie at the very heart of our democracy. Secrecy – and the concomitant limits of freedom of expression and the media – therefore always pose a potential threat to the health of our democracy.

As the Constitutional Court stated in their judgment in the case of *S v Mamabolo:*

> "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm."

State secrecy is inherently anti-democratic as it potentially prevents citizens from obtaining information kept by the state. This information will often be needed to allow every individual to participate meaningfully in our democratic system and democratic dialogue or will assist a citizen to enforce his or her fundamental human rights. Knowledge is power: where the state abrogates for itself the right to

keep knowledge about its activities from citizens, it potentially robs citizens of the power to make informed decisions about important issues of the day. Decisions on who to vote for, whether to engage in political protests, whether to sign petitions or even, in extreme cases, whether to engage in civil disobedience are burning questions that can only be answered responsibly where citizens have access to sufficient and reliable information. In the absence of the free flow of information, democracy is hollowed out and becomes meaningless: citizens become mere passive recipients of state charity or, in extreme cases, become the passive victims of oppression.

Second, censorship and state secrecy infringes on the human dignity of every individual in South Africa. In order to live a meaningful life, a life in which an individual has the ability to decide for him or herself who they are or who they want to become, how they view the world around them, and how they want to live their lives according to the demands of an own moral code, the individual must enjoy the right to receive and impart the widest range of opinions and factual information. This point was tellingly underscored by the Constitutional Court in the case of *South African National Defence Union v Minister of Defence and Another* where it stated that the free flow of information is valuable for many reasons including

> "its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . . ."

The argument that secrecy and censorship will often be necessary to protect the human dignity of a small group of politicians and other public figures is therefore deeply problematic and fallacious as it prioritises the (subjective) human dignity of a few supposed servants of the people above the (constitutionally guaranteed and objective) human dignity of the 45 million South Africans who are not cabinet Ministers, do not drive around in R1 million cars, have never set foot in the Mount Nelson Hotel – except maybe to clean the toilets – and only see blue light brigades rushing past their homes while they prepare dinner for their families on open fires.

It is against this background that one should evaluate the provisions of the Protection of Information Bill and the rather eccentric, and un-lawyerly and vague, comments by the Chief State Law Advisor, Enver Daniels, who attempted to justify his opinion that the Protection of Information Bill was constitutionally valid.

From a constitutional perspective, the problems with the Bill go far beyond its individual clauses. In my opinion, a mere tinkering with particular clauses of the Bill will not render an otherwise unconstitutional Bill constitutionally valid. It will only make a fundamentally draconian and oppressive piece of legislation politically slightly more palatable without addressing the problems with the basic premise of the Bill. Section 17(1) of the Bill gives the game away as it states: "Secrecy exists to protect the national interest." This sentiment cannot be true in an open and democratic society based on human dignity, equality and freedom. Secrecy is often the enemy of the national interest – if we assume that it is in the national interest for every human being in a country to live in, and meaningfully to take part in, a thriving democracy and to live a life of dignity in which individual agency, freedom and striving for justice and equality is more important than the interests of the state as defined by politicians and state bureaucrats. Secrecy can only be said always to be in the national interest in a non-democratic or partially democratic state in which the human dignity of every individual is considered to be less important than the interests considered to be important by politicians and state bureaucrats.

It is therefore difficult to single out specific clauses in the Bill for criticism. However, I will highlight a few of the most problematic clauses and point out why they may make the Bill unworkable and dangerous and, in some cases, unconstitutional and why arguments in support of the Bill are at best disingenuous and at worst dishonest.

First, it is argued that the Bill will protect the public as it requires that all "valuable information" held by the state must be identified and protected from destruction. This, so the argument goes, will prevent state officials from destroying important state information, information that ordinary citizens might need to access to advance their own well being. But the Bill defines the "valuable information" that need to be protected from destruction extremely narrowly. Only information

required by the state itself for its own benefit or information that must not be destroyed because its destruction would deny individuals services or benefits they are entitled to, are protected from destruction. This means that information needed by individuals to exercise their fundamental human rights or information required by individuals to become active citizens who are capable of exercising their democratic rights in an informed manner, are not protected from destruction. State documents relating to corruption, maladministration, unlawful activity by politicians or state officials will therefore often not be protected by the provisions of the Bill and may legally be destroyed. If this Bill is passed and if it is applied strictly (which might not be the case as the provisions seem rather unworkable and very expensive to implement), state officials will be entitled to embark on an orgy of destruction of state documents – long before they embark on an orgy of classification. These provisions of the Bill thus seem to be in conflict with the right of access to information as guaranteed in section 32 of the Constitution and have the potential completely to thwart the aims of the Promotion of Access to Information Act.

Second, where documents are not destroyed, the Bill allows any head of an organ of state to classify or reclassify information as "confidential", "secret" or "top secret". An organ of state includes any government department, parastatal or other institution created by an act of Parliament, including universities. The Minister of State Security or the President can allocate one organ of state to another for purposes of the Act, which means he or she can decree, for example, that Eskom now falls under the Presidency for purposes of the Act or that the Minister of Public enterprises now falls under the Minister of Justice. This would potentially allow the Presidency to decide, say, on which documents held by Eskom should be classified as secret. These provisions are open to abuse as the President or the Minister can decide who should be allowed to classify information. Although the Act contains provisions warning that classification should not be done for a nefarious purpose and should not be aimed at hiding incompetence or inefficiency in government, it is difficult to see how these softening provisions could be practically policed. If anyone challenges the classification of a document on the basis that the document was classified to hide corruption or inefficiency in government, the first question that will be asked of the challenger is whether he or

she knows about the document because he or she is in possession of a copy of that document. If that person knows about the document because he or she is in possession of the document, that person may be guilty of a criminal offence carrying a minimum sentence of between 3 and 15 years imprisonment. Unless a person is very sure of the fact that the document was wrongly classified, a person would therefore be foolhardy, to say the least, to challenge the classification of a document for fear of becoming Jackie Selebi's room mate. Worse, one might have to feign high blood pressure and might have to claim that one is eating copious amounts of Goji berries – like the poor, terminally ill, Schabir Shaik – merely to stay out of prison and to ensure at least some quality time on the golf course.

Third, it would almost be impossible to show that a document was wrongly classified as "confidential", "secret" and "top secret". Put differently, any head of an organ of state will have an extremely wide discretion to lawfully classify state documents. Unless state officials who classify documents have impeccable ethical standards, have no incentive to hide any corruption or maladministration, and take the greatest of care to apply the law holistically and with reference to those sections warning against needless classification of documents, vast amounts of state documents that could shine the light on the actions of the government and could keep individuals informed about important matters in our democracy, could be classified as secret. This is because the operational sections of the Bill – especially sections 11 and 12 – state that whenever it is in the national interest to do so, documents can be classified. The national interest is defined so broadly that almost any state document could conceivably be classified. The national interest includes "*but is not limited to*", inter alia, all matters relating to the advancement of the public good, and includes the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations. This means that any document, for example, that might suggest that the President or the Minister of Finance has been bribed by a crooked businessman or any document that implicates the Police Commissioner in murder or corruption could be lawfully classified on the basis that news of such wrongdoing would not advance the public good. Recall that then President Thabo Mbeki suspended Vusi Pikoli when he wanted to arrest Jackie Selebi and later claimed that this was necessary to protect South Africa from chaos and instability. Clearly evidence of the acts mentioned

above could damage the country's reputation and may scare off investors who may negatively affect economic growth. These provisions are truly Orwelian in scope and only the most honest, diligent and upright official will be able to resist the temptation of using it to classify information to protect themselves and their cronies. (President Mbeki would have been able to use it to classify information regarding the warrants for Jackei Selebi's arrest and the searching of his house, for example.)

In his legal opinion, the Chief State Law advisor assumes that our government is filled with such upright individuals. This assumption seems to be rather optimistic and naïve, if not delusional. In the document on "Leadership renewal, discipline and organizational culture" prepared for the ANC National General Council later this year the organisation admits that its members and leaders suffer from the "sins of incumbency", including patronage, bureaucratic indifference and arrogance of power. The document paints a bleak picture of ANC members in government having forsaken their revolutionary roots and having embraced a culture of corruption and dishonesty. But it would be some of these very members described in the ANC document who will be asked to apply an Act that will invite them to use absurdly broad definitions of "national interest" to classify state documents, either to protect themselves and their cronies or to protect the governing party from embarrassment and ridicule. It is not a question of whether the Act as currently written will be abused, but merely to what extent the necessary abuse of the provisions of the Bill will achieve the aim of covering up maladministration, wrongdoing and criminality.

Fourth, if one wants to appeal against a decision about the classification of any documents, then one would first have to appeal to the had of the organ of state who has classified the information and then ultimately one will have to appeal to the Minister dealing with State Security. There is therefore no independent mechanism to challenge the classification od documents. One can of course approach a court, but as we are being told quite frequently in relation to the Media Appeals Tribunal, approaching a court can be extremely costly and time consuming.

The argument is often heard that rights – even the right to freedom of speech and the media, the right to access information held by the state and the right to human dignity – are not absolute and that the Bill merely represents a legitimate limitation on these rights. At first blush, this argument seems plausible. Section 36 of our Bill of Rights states that rights may be limited if it is reasonable and justifiable to do so in an open and democratic society based on human dignity, equality and freedom. Unfortunately the Chief State Law advisor, in relying on this section to justify his certification of the Bill as constitutionally valid, fails to apply the Constitutional Court jurisprudence on the limitation clause to the Bill at hand. This failure is not surprising, because if he had applied the relevant jurisprudence he would not have been able to argue (without his nose growing ever longer – like a modern day Pinocchio's) that the Bill in its present form would pass constitutional muster. When determining whether the infringement of a right is justifiable in terms of section 36 one must balance two distinct interests against one another. On the one hand, one must look at the purpose of the Bill and ask how important this purpose is for the achievement of legitimate goals in an open and democratic society, and whether there is a sufficiently close relationship between the purpose of the Bill and the provisions of the Bill. On the other, one must look at the importance of the rights that are being infringed and the seriousness of the infringement and ask whether less restrictive means could have been used to achieve the same purpose. In this case the very purpose of the Bill is under suspicion because it broadly claims to be aimed at protecting the "national interest" (which includes the advancement of the "public good"). Even if it was legitimate purpose for a law to advance such a broad interest there is not a sufficiently close relationship (or for that matter any relationship at all) between the advancement of the national interest and the imposition of a system of classification of a wide variety of state documents. Even if there were such a link, the means used to achieve the purpose is far too invasive as it potentially allows for the classification of vast amounts of information required by ordinary citizens to exercise their rights, to participate meaningfully in our democracy and to live lives of dignity. The provisions of the Act are clearly overbroad. Given this, and given the facts that various provisions – including the draconian criminal penalties provided for the possession of classified documents – imposes severe limitations on our rights, no credible court would ever find that the limitations of our rights were justifiably limited in terms of the

limitations clause. If our Constitutional Court finds otherwise, it would lose almost all the credibility it currently has overnight. No credible lawyer has argued otherwise. In fact, I will put any credibility I might personally have on the line and give an absolute guarantee that the Chief State Law Advisor is catastrophically misguided and that the Constitutional Court will never agree that the Bill in its present format is constitutionally valid.

Why he has maintained otherwise and why some members of Parliament seem to have believed him, is beyond me.