SUBMISSION TO
THE AD HOC COMMITTEE ON PROTECTION OF INFORMATION LEGISLATION
ON THE PROTECTION OF INFORMATION BILL [B 6-2010]
25 JUNE 2010

BY THE POLITICAL INFORMATION AND MONITORING SERVICE (PIMS)
OF THE INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA (IDASA)

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to the ad hoc Committee on Protection of Information Legislation

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1. Introduction

1.1 Idasa makes this submission on the Protection of Information Bill [B 6-2010] (hereinafter referred to as the Bill) to the Ad Hoc Committee in response to an invitation issued by Parliament on 7th May 2010.

1.2 Idasa is a non-profit public interest organisation committed to promoting sustainable democracy based on active citizenship, democratic institutions, and social justice. Idasa has been extensively involved in work aimed at strengthening key policies, legislation and practices relating to transparent, accountable and effective governance in South Africa, and elsewhere on the African continent. Idasa is grateful for the opportunity to comment on the proposed law.

1.3 Accordingly, this submission will focus on what we understand to be particularly important aspects of the Bill relating to public governance.

2. General Comments on the Bill

2.1 Idasa welcomes the new Bill. First, it repeals Act 84 of 1982 developed during the apartheid era, which appears to contain excessive secrecy provisions. Second, protecting state information from unlawful disclosure, destruction, alteration and loss serves an important purpose and thus-far, South Africa lacks a coherent regime to classify and declassify information appropriately and effectively.

2.2 In the process of constructing such a regime, Idasa recognizes that a degree of confidentiality and secrecy will be required in order to advance legitimate national security goals, and that certain information may be exempt from disclosure by the state, despite the broad constitutional right of access to information. While a bill of this nature is primarily concerned with preserving state information, and protecting such information from disclosure in the pursuit of broadly legitimate goals, at the same time it is crucial that the bill should promote governmental transparency and

accountability in *substantive* terms. As presently framed, it appears to give largely merely formal recognition to this ostensible objective.

2.3 In Idasa's view, the Bill potentially falls short of the constitutional standard for access to information contained in section 32 of the Constitution, 1996, and further elaborated in the Promotion of Access to Information Act, 2000, (PAIA) and related legislation, including the Protected Disclosures Act, 2000, (PDA). As we seek to show below, the broadness and vagueness of the Bill potentially interferes with the realisation, accessibility and enforceability of the right of access to information. This is so, notwithstanding the fact that Clause 6 – with the exception of sub-paragraph (j) – which provides for a national security override; Clause 17(1)(b)(i) to (v), sub-clauses (c), (d), (h), (i), (k), (l) and (m); as well as Clause 42 of the Bill serve to protect against improper classification of information by state officials (for example, for ulterior purposes).

2.4 Idasa submits that the Bill in question will need to contain clearer and fairer guidelines on the principles, processes, and standards used to classify and declassify information and to adjudicate related disputes. While any classification regime must surely allow for non-disclosure of state information in specified cases, the Bill, as it currently stands, permits the possibility of unjustifiable and excessive secrecy. According to Idasa, the bill must be careful to avoid making it more difficult for citizens seeking to obtain information from government departments and other organs. In short, an overarching fault of the bill is that it moves towards protecting information unduly, rather than granting access to it. In doing so, its effect is to undermine the primacy of the already-detailed provisions of PAIA regarding, for example, defence, security and international relations (s.41); national and public economic interests and financial welfare (s.42); and third party research information (s.43).

3. South Africa's Access to Information Framework: Approach

3.1 South Africa's access to information framework is well known but worth reproducing for the purposes of this submission. Section 32(1) (a) of the Constitution stipulates that "everyone has the right of access to any information held by the state". Section 36 'Limitation of rights' provides that this and other fundamental rights may be limited only by a law of general application and to the extent that it is reasonable and justifiable in a democratic society based on human dignity, freedom and equality, and taking into account a number of relevant factors. These factors include:

'(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means th achieve the purpose.'

3.2 In 2000, PAIA, and the 2002 amending Act, gave effect to a broad right to information with limited exceptions as required by section 32 read with section 36 of the Constitution (1996). Furthermore, PAIA enables access to information held by private parties where this is necessary for the exercise of rights.

3.3 Notably, the South African Constitution and right to information framework (embodied in the aforementioned legislation) recognise that the free flow of information is intricately linked to core democratic requirements of openness, accountability, responsiveness, informed debate, accountability and ethical governance. International developments reflect that integral relationship, particularly the non-binding United Nation Declaration on Human Rights and Article 19 of the subsequent and binding International Covenant on Civil and Political Rights, 1966 (ICCPR).

4. Specific Objections against the Bill

Definitions

4.1 It is our impression that Clause 1(4) is aimed at combating information peddling, particularly when such information may be inaccurate or deliberately misleading. However, the effect of sub-paragraph (b)(ii) seems to be that a person is regarded as having knowledge if they have not actively verified its accuracy.

4.2 This strikes us as unreasonably onerous and, in some circumstances, a standard that is virtually impossible to meet. If, for example, information is passed on verbally and the initial information provider then becomes unavailable, the initial recipient (apparently the subject of the sub-clause) is placed in the invidious position of being compelled to verify that information even if they have no intention of acting on the information or even of passing it on, particularly if they have no means of verifying the accuracy of the information.

4.3 Given the potentially severe criminal sanction to which an innocent information- or 'knowledge-'holder can be exposed in terms of Clause 1(6), we recommend that sub-paragraph (b)(ii) is considerably revised to read 'the person has unreasonably failed to take readily available steps to obtain information to confirm the existence of the fact'.

General principles of State information

4.4 Clause 6(a) represents an unreasonably wide departure from standards contained in law, and includes a potentially unlimited category of 'justifiable public or private considerations'. We recommend that this clause be revised to read 'Unless restricted by law that clearly sets out reasonable and objectively justifiable public and private considerations…'.

4.5 Clause 6(j) constitutes an excessive and unbalanced national security override standard. As discussed in more detail below, we recommend that it be revised to afford a public interest override, or at least a stated equivalence between the public interest in openness and the reasonable requirements of the protection of clearly defined national security interests. Accordingly, we recommend that the sub-clause is revised to read: 'the national security of the Republic may not be compromised, subject to the standards and considerations contained in paragraphs (a) to (i) of Clause 6'.

Criteria used to determine information to be classified (and hence withheld from public)

4.6 Chapter 5 stipulates two categories of information which requires protection from disclosure – sensitive information and commercial information.

A: Sensitive Information

4.7 Clause 1 of the Bill states that "sensitive information" means "information that must be protected from disclosure in order to prevent the national interest from the Republic from being harmed". All such matters are subject to classification and exempt from disclosure to the public.

4.8 Clause 11(1), (2) and (3) provides an overall description, as well as a non-exhaustive list of matters falling within the "national interest". It includes "all matters relating to the advancement of the public good" (Cl. 11(1)(a)) and "all matters relating to the protection and preservation of all things owned or maintained for the public by the state" (Cl. 11(b)).

4.9 Clause 11(2) further provides that the national interest is "multi-faceted" and includes the "survival and security of the state and the people of South Africa" (Cl. 11(2)(a)), and the "pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations (Cl. 11(2)(b)).

4.10 Furthermore, according to Clause 11, additional matters falling within the national interest include, perhaps more understandably and acceptably in line with standard democratic expectations, include:- "— security from all forms of crime, protection against attacks or incursions on the Republic or acts of foreign interference, defence and security plans and operations; details of criminal investigations and police and law enforcement methods; significant political and economic relations with international organisations and foreign governments; economic, scientific or technological matters vital to the Republic's stability, security, integrity and development and all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion of Access to Information Act, whether in classified form or not" - (Cl. 11(3)(a) – (g)).

4.11 Clause 11(4) follows the abovementioned description and examples, providing that "the determination of the national interest must at all times be guided by the values referred to in section 1 of the Constitution." Section 1 of the Constitution is concerned, amongst other matters, with values of equality, openness, responsiveness and accountability.

4.12 Idasa highlights the fact that the Bill will give every organ of state (or its delegated authority) the power to classify information - approximately 140 bodies ranging from the Minister of State Security to municipal managers. Given this very wide range of potentially differing and, hence, complex and, for a citizen legitimately requesting access to information, extremely confusing proliferation of interpretations, it is vital that the Bill be specific with regard to the system and details of classification. Principle 1.1 of the 'Johannesburg Principles'[1] requires that restrictions are prescribed by law. This sensitive and complex issue should certainly not be determined by regulation or, worse, by a multiplicity of internal policies. Principle 1.1 provides further that any restrictions are accessible, clear and narrowly drawn. In this regard, Idasa submits that Clause 11(1)–(3) adopts an excessively wide description of the "national interest", which could justify classification and non-disclosure in a manner at odds with the values contained in Section 1– and referred to in Clause 11 (4) of the Bill.

4.13 That Clause 11 is over-broad and could lead to over-classification and unjustified non-disclosure can be demonstrated, for example, by the fact that any information held by the state claimed to be related to the advancement of the "public good" – potentially, anything related to the provision of any public services - becomes the subject of classification, as does information about any matter relating to the "protection and preservation of all things owned or maintained for the public by the State" – potentially, even an office building maintenance or cleaning contract, if it may include details of aspects of the internal configuration of the premises. Similarly, details of criminal investigations – such as progress reports ordinarily given to complainants – could become the subject of classification by a bureaucrat. Procedures to surmount such classifications place an extremely onerous burden on both the media and a requester.

4.14 Idasa cautions against the inherent dangers of adopting such an excessively wide and far-reaching definition of the "national interest of the Republic". In practical terms, it could well encourage government departments to keep information away from the public in circumstances that are unjustified under the terms of the Constitution and PAIA and, even, the ostensible objectives of parts of the Bill.

4.15 Clause 11 also allows a high degree of subjectivity on the decision-maker. For users of the Bill to comply with the Constitution in the course of making determinations about

[1] *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, Centre for Applied Legal Studies, University of the Witwatersrand, 1 October 1995. The Principles, drawn up by a gathering of global experts convened by CALS, codified international law and international best practice. See *The Johannesburg Principles: Overview and Implementation*, Toby Mendel, Article 19, 7 February 2003, hereafter 'Mendel'.

information management and classification, it is imperative that the Bill provides a clear, narrow definition of the "national interest". Over-broad definitions and the construction of values (through legislative provisions) that elevate secrecy at the expense of fundamental characteristics of democracy are harmful to the constitutional values and long-term interests of the country. While the judiciary can be (and has been) called upon to determine the nature and scope of the "national interest" in a given case, this places an unnecessary burden on this branch of the state, as well as on ordinary citizens who will be obliged to expend considerable personal resources to claw back democratic space already demarcated in the Constitution and PAIA. See Clauses 23, 24 and 25, which also allow lengthy periods of time before an administrative decision is taken to reclassify and release information. It is, therefore, imperative that the legislature itself should tighten up this definition.

Approach to the "National Interest" in the Bill

4.16 In practical terms, the relevant question is:- On what grounds should the Bill enable organs of state to refuse to disclose information? A thorough analysis needs to be undertaken as to how best to capture and frame the "national interest" in relation to the objective of classifying state information.

4.17 Across the world, and even within a given society, it is unlikely that there will be agreement as to what constitutes the "national interest". It is a concept that depends *inter alia* on history and on context, and is generally sensitive to social changes.

4.18 When determining what matters may be kept secret by the government because of the "national interest", it is instructive to explore the kind of society envisaged by the Constitution. Section 1, which identifies the founding values, clearly commits South Africa to a "multiparty system of democratic government, to ensure accountability, responsiveness and openness". The founding values also place great emphasis on the country's goal to achieve equality and to advance human rights and freedoms. Rights to equality, freedom of expression, political rights, access to information, human dignity, freedom and security of the person are critical democratic rights safeguarded by our Constitution.

4.19 Importantly, Section 195 of the Constitution contains the basic values and principles governing public administration. These principles apply to "administration in every sphere, every organ of state, and public enterprise". Section 195 (1) instructs the public service to "be governed by the democratic values enshrined in the Constitution", including an accountable and responsive public administration, in which the public is encouraged to participate in policy-making (S.195(1) (e) and (f)). Critically, section 195 (g) states that "transparency must be fostered by providing the public with timely, accessible and accurate information".

4.20 In light of the above, Idasa suggests that the framework established by government which would allow the state to keep information out of public reach must properly account for the above-mentioned set of rights, values and commitments.

4.21 One aspect that is commonly seen to be part and parcel of the "national interest" relates to "national security". The Constitution, in section 198, sets forth the principles that govern the national security of the Republic. Accordingly, "national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life". Section.198 further states that "The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation." Section 198, however, makes it clear that "national security must be pursued in compliance with the law, including international law" and is "subject to the authority of Parliament and the national executive".

4.22 The judiciary in various pronouncements has provided an interpretation of what constitutes the "national interest" in the context of specific cases brought before it.[2]

4.23 Legislation such as PAIA also demonstrates the type of information that the state may validly refuse to disclose in relation to, *inter alia*, legitimate national and public concerns. PAIA already contains a comprehensive listing of grounds for refusal of information on the part of the state. Section 41(1), entitled "Defence, security and international relations of Republic", states that certain information which may cause prejudice to the defence, security or international relations of the republic, then this required information may be refused. In terms of section 41(3), however, if a record is older than 20 years, then there are no grounds on which the record can be refused.

4.24 Another instance where information can be refused, in terms of PAIA, is if it was "…supplied in confidence by or on behalf of another state or an international organisation; supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution." (Section 41(1)(b) of PAIA)

4.25 Section 42 of PAIA deals with the refusal of access to information in cases where the economic interest and financial welfare of the Republic could be materially jeopardised. Records include certain policies affecting the currency and its value. Furthermore information may be withheld if it will lead to harm being caused to the commercial or financial interest of the state or public body. Section 42(5) of PAIA, however, contains

[2] See *inter alia* Mendel

exceptions to the effect that information may not be withheld if it is already public knowledge, or if written consent has been given to disclose the information, or if disclosure would reveal a serious public safety or environmental risk.

4.26 Section 43 of PAIA protects information regarding research by a third party or a public body. Disclosure may be refused if such records will lead to a third party, a person carrying out research or the subject matter of the research being "seriously" disadvantaged.

4.27 The "Johannesburg Principles" also deal with the relationship between "national security" and freedom of expression and information – setting a high standard for the latter. Accordingly, governments are obliged to allow access to information regarding the operation of government where this is in the public interest. In terms of Principle 4, information may be withheld from the public only if there are "legitimate" reasons for doing so. Such restrictions should be narrow and be well defined by specific laws. Principle 4 also cautions against a refusal of disclosure unless there is a threat of "substantial" harm to that aim, and provides also that the harm to that aim of protecting national security interest must be greater than the public interest in disclosing the information.

4.28 Idasa submits that Clause 11 should be brought in line with the Constitution, the founding values of South Africa, the relevant provisions of PAIA, as well as the above-mentioned Johannesburg Principles.

B: Commercial Information

4.29 Clause 12 of the Bill allows the state to classify commercial information and to refuse disclosure if it may prejudice the "commercial, business, financial or industrial interest of the organ of state, organization or individual concerned". (Clause 12(1)(a)). Commercial information also becomes the subject matter from possible non-disclosure if it "could endanger the national interest of the Republic" (Clause 12(1)(b)).

4.30 Idasa submits that this provision is excessively wide, particularly in regard to the proposed inclusion of "business" and "industrial" -related information, and as section 36 of PAIA already gives sufficient protection to private entities, clearly stipulating the circumstances under which information of private entities can be withheld from the public. For example, Clause 12 may well affect the ability to gather information about state tender and procurement processes, including irregular tender processes. This would have a detrimental effect on the ability to, for example, combat corruption or inefficient tendering in South Africa, and would not be in the service of a legitimate public goal.

Public interest and national security

4.31 When making decision regarding classification in terms of Clause 11, the Bill includes a number of important principles and directions (ie guidelines).

4.32 Under "general principles of State information" (Clause 6), the following principles are included – Clause 6 (g) which states that "some confidentiality and secrecy is vital to save lives, to enhance and to protect the freedom and security of persons, to bring criminals to justice, to protect the national security and to engage in effective government and diplomacy". Clause 6 lists a laudable set of principles supportive of the fundamental democratic utility of openness. However, sub-clause (j) then proceeds to subject all listed principles (for example, accessibility, transparency and openness, accountability and even the promotion of safety and security) subject to the principle that the "national security of the Republic may not be compromised" – signaling a broad and blunt override.

4.33 Under 'Directions for Classification' Clause 17(1)(b), the bill provides the following welcome guidance - "classification of information may not under any circumstances be used to –(i) conceal an unlawful act or omission, incompetence, inefficiency, or administrative error; (ii) restrict access to information in order to limit scrutiny and thereby avoid criticism; (iii) prevent embarrassment to a person, organization and thereby avoid criticism; (iv) unlawfully restrain or lessen competition; and (v) prevent, delay or obstruct the release of information that does not require protection under the act." These provisions appear to endorse Principle 2 of the Johannesburg Principles. Clause 17(c) also states that "the classification of information in an exceptional measure…, and 17(d) that information is classified when there is (i) a clear, justifiable and legitimate need to do so; and (ii) a demonstrable need to protect the information in the national interests".

4.34 Clause 17(1)(i), moreover provides that classification decisions "should be assessed and weighed against the benefits of secrecy, taking into account the following factors (i) the vulnerability of the information; (ii) the threat of damage from its disclosure, (iii) the risk of loss of information, (iv) the value of information to adversaries, (v) the cost of protecting the information and (vi) the public benefit to be derived from the release of information".

4.35 However, all of these welcome limitations and precautionary principles are preceded by the blunt and unmotivated assertion that 'Secrecy exists to protect the national interest'. The overall effect is, once again, to render vulnerable a wide range of openness principles to broad and undefined security and national interest considerations.

The Bill does not allow for Disclosure in the "Public Interest"

4.36 Idasa submits that a "public interest defense" (based on a public interest override) should be included in the Bill so that the "public interest", as defined by the Bill, may nonetheless trump any restriction or decision not to disclose. We submit that this would be in line with the primary information-related legislation, PAIA.

4.37 Idasa wishes to emphasise and endorse the significance of the inclusion of such provision in a previous version of the Bill. When questioned about the reason for omitting the "public interest defence" clause in the current version, the Department's representative, at a parliamentary briefing in May 2010, stated that "defence of public interest" is already found in the common law and could be raised in court regardless of whether it appeared in the bill or not. The Department further argued that cases involving information would require at least three judicial officers to preside over such hearings, constituting an additional safeguard.

4.38 While Idasa notes that Clause 17 of the Bill, headed "Directions for classification", suggests that a head of an organ of state, when making classification decisions, should take into account "the public benefit to be derived from the release of information", (Cl. 17(1)(i)(vi)), one of 6 factors to be taken into account in terms of the clause, but does not constitute a "public interest defence".

4.39 Idasa submits that the bill should explicitly incorporate a "public interest defence". This is because the legislation itself should introduce and clarify the circumstances under which a public interest defence applies, having due regard to the objectives of the bill and requirements of open, transparent, effective, efficient and accountable government. The inclusion of a "public interest defence" in the legislation would also clearly afford a statutory status to the defence equivalent to the legal status of national security considerations, thereby giving clearer guidance to heads of organs of state when making important decisions regarding the fundamental right of access to information.

4.40 In a similar fashion, PAIA makes provision for the mandatory disclosure of information in the public interest. Section 46 of PAIA provides that information which could otherwise not be disclosed on a listed ground in the Act, must nevertheless be disclosed if (1) disclosure would reveal evidence of a substantial contravention of, or failure to comply with the law, or an imminent and serious public safety or environmental risk; and (2) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question (that is, contained in one of the grounds upon which a refusal can be based).

4.41 This, we respectfully submit, represents a more appropriate balance between these two sets of interests. In that regard, Clause 1(3) of the Bill is of concern to the extent that it requires that any conflict between the Bill and any other information, for

example PAIA and the PDA, to be resolved in favour of an interpretation that endorses the provisions of the Bill. This clearly contradicts the provisions of Section 5 of PAIA that the latter applies "to the exclusion of any provision of other legislation…that is materially inconsistent with an object, or a specific provision, of this Act."

4.42 This provision of the Bill contradicts also the spirit and aims of the PDA, which include the recognition in its Preamble that "criminal and other irregular conduct in organs of state…are detrimental to good, effective, accountable and transparent governance in organs of state…and can endanger the economic stability of the Republic and have the potential to cause social damage". To this end, the PDA seeks to "create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures". (Emphasis added)

4.43 It is submitted that the modalities for responsible disclosure set out in the PDA will be unjustifiably overwhelmed by the broad 'ouster' clauses in the Bill that constitute excessively broad and vague national security overrides.

4.44 We further submit that the "public interest defence" should apply to application of the sanctions regime. Thus, for example, if the exposure of information would be in the public interest, the Bill should exempt the relevant party from the range of criminal sanctions stipulated in the Bill.

No independent appeal system

4.45 The potential problems above are exacerbated by the fact that no independent internal or external (for example, an Information Commissioner) appeal system exists to determine the appropriateness of the information classification by a head of organ of state (or his or her delegated authority). In the event of a dispute, the Bill grants the Minister of State Security the power to decide.

4.46 As the Minister is an interested party, and also part of the executive branch of government, the Bill creates a situation where the executive is both decision-maker in the first instance, and then is also responsible for disposing of an appeal in respect of the very same matter. In this way, the Bill replicates the weaknesses in the effective implementation of PAIA and the PDA which require public-spirited individuals to expend considerable physical, psychological and financial capital in pursuing a request, or defending themselves from legal challenge, in a court system that currently operates in a manner not conducive to the weaker members of society.

4.47 However, matters of this nature have far-reaching consequences (namely, to withhold information from the public) and necessitate, we believe, the establishment of an

impartial body that would deal with disputes effectively and expeditiously. The question then is: Which body should have the power to decide appeals?

4.48 Idasa recommends the appointment of an independent information commissioner to administer all information-related legislation, including PAIA, PDA and this Bill. This Bill only adds to the weight of the many existing and long-standing factors and reasons necessitating the creation of such an independent entity.

4.49 In making the above submission, Idasa recognises that a dissatisfied party (typically an ordinary citizen) may refer a dispute (including the failure to disclose, or the decision not to declassify) to a court of law. While this affords affected parties an independent process, it is costly and time consuming, and typically excludes those with limited resources for litigation. Notwithstanding the existence of a court remedy, Idasa submits that the constitutional right of access to information should be supported by the existence of an independent appeal mechanism to determine such disputes in the first instance. Furthermore, the constitutional and legislative framework relating to information favours processes that promote the sharing of information with the public in appropriate circumstances, rather than the creation of obstacles to openness.

Effective Monitoring

4.50 Similarly, Idasa submits that the task of monitoring compliance with the provisions of the Act, including national protection information policies and programs, should be undertaken by a body other than the National Intelligence Agency (as set out in terms of Clause 30 of the Bill.) We submit that a state security agency located within the executive branch of government, should be subject to parliamentary oversight to ensure effective monitoring of important matters contained in the Bill.

Possession of Classified Records and Related Criminal Sanctions: The effect on Whistle-blowing and Reporting in the Public Interest

4.51 Clause 18 of the Bill instructs any person in possession of a classified record to report such possession and return such record to the SAPS of the NIA, if they know that such record has been communicated, delivered or made available unlawfully in a manner unauthorised by law.

4.52 Idasa recognises that Clause 18 may be intended to address the problem of information peddling. However, we are concerned that Clause 18 may have unintended and detrimental consequences. This is especially so when read in conjunction with Clause 39 of the Bill – which makes “any person who fails to comply with Clause 18 guilty of an offence and subject to a fine or imprisonment for a period

not less than three years but not exceeding five years or to both such fine and imprisonment…".

4.53 In this regard, Idasa is concerned that classified information that comes into one's possession, the disclosure of which would be in the overwhelming interests of the public and country as a whole, could be entirely forbidden in all circumstances. Examples include if a classified document revealing major corruption came into the hands of a parliamentarian ordinarily covered by Parliamentary privilege, or a journalist or the Public Protector or the Auditor-General in terms of the PDA. Even in such circumstances, it is not clear that Clause 18 would allow, for example, a member of Parliament to retain possession of classified information pending otherwise lawful action, or a private individual to retain possession of such information even with the intention of acting on that information in conformity with their lawful obligations, such as disclosure to the Public Protector or the Auditor-General.

4.54 Idasa submits that such a provision could have an extremely negative impact on the oversight role of Parliament, and also impose undue constraints on investigative journalism, including the reporting of alleged criminal or irregular activity. While the Bill assumes, in Clause 18, that the relevant authorities will deal with the alleged irregular or unlawful activities contained in such information, it is unclear whether an individual would be able to act according to his or her otherwise lawful individual responsibilities as a loyal citizen.

4.55 For this reason, Idasa recommends that a clear "public interest override and defence" should be incorporated into the relevant clauses of the Bill.

Offence of improper classification with ulterior motive

4.56 Clause 42 provides that any person who knowingly classifies information for an ulterior purpose, for example, to conceal breaches of the law, promote unlawfulness or inefficiency, prevent embarrassment or give undue advantage, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

4.57 If it is accepted that the constitutional rights of access to information and to access to information about government conduct are at least of equivalent value and weight to the obligations associated with national security, it seems misplaced to make the deliberate concealment of information a relatively minor offence.

Parliamentary Oversight and Input on Regulations

4.58 Clause 7(1)(a) of the Bill grants significant powers to the Minister of Security to "prescribe broad categories and subcategories of information that may be classified, downgraded and declassified and protected against destruction, alteration and loss". Clause 8 provides further that organs of state must devise their own policies consistent with Clause 7. We have argued above that this introduces an unwarranted and unjustifiable degree of delegation with the result of increased opacity and complexity, whereas clarity and certainty should be recognised as primary aims and requirements of the Bill.

4.59 However, there is no provision for parliamentary involvement or oversight (or that of an independent body such as a new Information Commissioner) to provide input into the regulations. We recommend that, at least, the multiparty Joint Standing Committee on Intelligence should be afforded the authority to decide on the content of any regulations proposed by the Minister. Ideally, however, as argued elsewhere in this submission, the case in favour of the urgent establishment of an independent Information Commissioner is given additional weight by the need to achieve the delicate balance that must to be struck between the key constitutional interests and values at issue in this context.

4.60 Similarly, Clause 3(2) grants to the Minister the wide power, on the basis of undefined "good cause shown", to exempt an organ of state from the application of the duty to establish departmental standards and procedures in terms of the Bill. Sub-clause 3(3) further gives the Minister the power to impose various other exemptions and restrictions. As this clause potentially vests significant discretionary powers in the Minister, Idasa suggests that Parliament should be involved in the drafting and approval of such regulations, as an important accountability mechanism in respect of the powers of the executive branch of government in these sensitive matters.

4.61 Clause 7(3)(b) currently provides that the Minister has a discretion ("may") whether or not to take into account any comments received from interested persons before prescribing any categories of information in terms of information in regard to national standards and procedures. We respectfully submit that the provisions of section 33 'Just administrative action' read with section 195 'Basic values and principles governing public administration' of the Constitution, together with the provisions of the Promotion of Administrative Justice Act, 2000, require that the Minister has an obligation to take into account any such inputs.

5. <u>Conclusion</u>

5.1 The Bill should be careful to reflect and promote the essential elements of South Africa's democratic order, including transparency and accountability in the public sphere, by *inter*

alia remaining faithful to the constitutional framework for access to information, as well as to PAIA and the PDA. Furthermore, while the protection of state information is necessary in any democracy, it must be done in a manner markedly different to the previous apartheid-era legislation that is to be repealed by this Bill.

5.2 As discussed above, the broadness and vagueness of many aspects of the Bill, as well as the lack of an independent appeal mechanism and the absence of a public interest override, all suggest that information may be withheld on potentially very subjective and unconstitutional grounds. This would represent a dilution of a progressive, albeit imperfect, transparency framework that has sought to entrench the public's right to know about the governance of public affairs that directly affect the lives of people and important aspects of their personal wellbeing.