



NELSON MANDELA
FOUNDATION

Living the Legacy

15 August 2011

The Chairperson
Ad Hoc Portfolio Committee on Protection of Information Bill
Parliament

Dear Chair

SUBMISSION ON PROTECTION OF INFORMATION BILL

Background

On 10 August 2011, at the request of the Committee, I made a verbal presentation on the archival and automatic declassification dimensions of the Bill (Working Document 12) on behalf of the Nelson Mandela Foundation. In particular, I focused on the definition of "archive" and sections 3(2)(d), 20, 26 and 29. This followed two previous written and verbal presentations to the Committee by the Nelson Mandela Foundation, both of which paid attention to these dimensions. After the 10 August presentation I was asked to make written recommendations for the Committee to consider.

Assessment

The provisions for archives and automatic declassification in the 2008 version of the Bill (B28-2009) were progressive, took account of the legacy of oppressive use of information classification by the apartheid state, and covered effectively the records of state structures which stay outside of archival custody beyond a period of twenty years. Subsequent revisions to the Bill have emasculated these provisions and diluted their strong progressive motivation. The revisions seem to have been guided by a fear of the consequences of a mass declassification of older (apartheid-era) records, and in particular seem to have assumed that

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declassification necessarily results in declassified records being placed in the public domain. This is not so. The Promotion of Access to Information Act (PAIA) provides robust protection from public access to a range of records categories, irrespective of their age or of whether they are classified or not. Mass declassification would merely facilitate application of PAIA in archival domains and simplify determinations of public access. And in any case, the Bill in its current form provides for extended (beyond the period of 20 years) classification in defined circumstances.

Recommendation

We therefore recommend that the archival and automatic declassification dimensions of the 2008 version of the Bill be reinstated, with the exceptions noted below. The sections of the 2008 Bill in question here are: the definition of "archive", and sections 3(2)(e), 25-28, 33, 36 and 56(2).

Exceptions:

- Section 3(2)(e). This power of exemption now properly belongs to the Classification Review Panel contemplated in the Working Document 12 version of the Bill.
- Section 36 (National Declassification Database). We would argue that this requirement is: intrinsically onerous; beyond the capacity of the National Archives; and unnecessary given the records description requirements provided for in archival legislation (national and provincial), in PAIA (records manuals and voluntary disclosure listings), and elsewhere in the Bill (especially reports to and by the envisaged Classification Review Panel).
- Section 56(2). This repeal is regarded as unnecessary. PAIA trumps all other legislation in relation to public access, and this is explicitly acknowledged in the relevant section of the Defence Act.

Thank you for your consideration.

Yours sincerely

Verne Harris
Head: Memory Programme