**Report on Jan. 19 Meeting of the South African Parliament Committee Working on the Protection of Information Bill**

**By Sithembile Mbete**

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Today’s committee meeting was very poorly attended with only four MPs in attendance. Two were from the ANC (Nkosinathi Fihla and a new member), one was David Maynier from DA and the other Steven Swartz from ACDP. Today’s discussion was meant to be on Working Document 1 (I’ve attached both working documents to this email) presented by the State Law Advisor (SLA) yesterday. However the MPs decided that they would prefer to have the presentation on Working Document 2 before commencing their discussion.

Working Document 2 provides for classification of information to be dealt with solely by the POIB and access to be dealt with according to PAIA. Its language has thus been revised in order to bring it in line with PAIA. The major changes are as follows:

-          Clause 1: the definitions for information officer, relevant authority and requester have been included to make the Bill consistent with PAIA. So in Working Document 2 all references to “head of an organ of state” have been replaced with “information officer”. “Relevant authority” and “requester” are defined according to section 1 of PAIA.

-          Clause 18, 20, 21, 22: “Information officer” is substituted for “head of organ of state”

-          Chapter 7: is completely redrafted to provide for access requests solely through PAIA

Following the SLA’s presentation Burgess asked for clarification on whether the “information officer” in PAIA holds the same position as envisaged by “head of an organ of state” in the Bill because in his mind both of these labels referred to the Director-General or chief accounting officer of a government department. The SLA said he had not checked whether this would be this case. Maynier said he agreed with Burgess that it would be the case that the DG would be info officer and head of an organ of state according to both definitions. However the problem was it wasn’t clear who the info officer was in most departments where the powers of the information officer are often delegated. He thought the committee should head towards the proposal presented in Working Document 1 of having two systems for access to information (in the Bill and PAIA) in order to simplify matters. He said the committee had a tendency to “fetishise” PAIA even though it was not properly implemented in practise. Burgess said that the failings of PAIA were well-known and while they should be taken into account, they should not become the primary preoccupation of the committee.

Burgess then asked the SLA whether the terms “information officer” and the “classifying officer” in the Working documents referred to the same person. The SLA said both terms referred to the “head of an organ of state” so they would probably refer to the same person. Burgess questioned the desirability of giving the same person who classifies information the powers to review access requests for that same information. Under PAIA there are areas where the information officer can use her discretion to decide whether to grant an access request, so would an information officer have discretion over a document she had classified? If not then the POIB would interfere with the powers of information officers under PAIA. The important point Burgess didn’t articulate (deliberately I think) is that  having the classifying and reviewing officer as the same person, presents the risk that the information won’t be declassified because the officer will be reluctant to make available information they thought should be secret in the first place! Lluwellyn Landers of the ANC was quite insistent during deliberations last year that the classifying officer *should not* be the same person handling requests for access of information. He wasn’t in the meeting today but it will be interesting to see if he still holds the same position. Burgess asked the SLA to draft a legal opinion on this issue and present it to the committee tomorrow.

Another matter Burgess brought up was that of the public interest defence. He said he had done research on international best practice and discovered that there were many democracies which don’t provide it (he used the US and UK as examples). Swart pointed out to me after the meeting that Canada, whose legislation the Minister used as a model, does provide for a public interest defence. Burgess asked the SLA to provide an opinion on this issue as well. He seemed quite set against including a public interest defence but it is still up for discussion.

The SLA spoke about the recent Mail and Guardian victory in the Supreme Court of Appeal to access a confidential report on Zimbabwe’s 2002 elections. He urged the committee to take into account the judgment which said a culture of justification permeates PAIA and that the burden of proof in a request for access to information lies with the public body. This means that it is the burden of the state to provide justification for why information should be secret, not of the requester to explain why she should have access to it. This was an interesting contribution by the SLA as it seemed to be intended to remind the committee that the default position of the law is for secrecy to be the exception and not the norm. Burgess completely missed the point and used the judgment as proof that not all government officials are corrupt.

Burgess then expressed his dissatisfaction with the definition of information peddler contained in Working Document 1. He said it did not cover what he expected it to cover. For a term so frequently used in the intelligence community, he felt there must be an effort made to understand it and thus properly legislate for it. He referred to the report of the Joint Standing Committee on Intelligence on the “Browse Mole Report” which explained the dangers information peddlers pose for the Republic. He encouraged all members of the ad hoc committee to read it in order to familiarise themselves with the phenomenon (I’ve attached the Joint standing committee report but have yet to read it myself). Based on the findings of this report, he was of the opinion that the definition provided in Working Document 1 should be adjusted.  According to him the report describes information peddlers as a network of people who originate from the pre-1994/Apartheid era who were previously involved in sanctions-busting and have relationships with foreign governments (e.g. US, UK and Germany). They apparently manipulate “true facts”, turn them into lies then sell them to foreign governments. Their reasons for doing this are for financial gain and to be awarded security contracts. He then spoke about the recent news reports of a man who was caught trying to sell information from Denel to a foreign government. He argued that this was proof that there was a great deal of sensitive information/government secrets which needed to be protected from this kind of infiltration. In his view the POIB was attempting to show the displeasure of the government at these kinds of offences.

Burgess’s rant about information peddlers makes it clear that the ANC’s obsession with information peddling is tied closely to its internal dramas and the abuse of the intelligence services. It is unlikely that they will back down from its inclusion in the Bill. It is concerning that Burgess used the Denel example because he doesn’t seem to realise that the committee agreed that commercial information should be excluded from the Bill. In my understanding that means Denel’s trade secrets would not be covered by the revised Bill. Is my interpretation correct? The SLA has been asked to present a revised definition of information peddling taking into account the Joint Standing Committee report. Maynier suggested that the Minister of State Security or someone from his department come back to the committee to give the presentation on information peddling that he gave earlier last year. Maynier argued that because the committee had so many new members, it would be useful to update them on this issue. Burgess did not say whether he would comply with this request.

Maynier also asked that a schedule be drawn up showing exactly which institutions the POIB would apply to according to the current definitions. Burgess said this was unnecessary as the Bill clearly gives powers to any organ of state and it is easy to discern what counts as an organ of state. Besides, just because all organs of state were empowered to classify by the law it didn’t mean they would all use that power. Maynier provided three reasons for the importance of having a clear schedule of affected institutions:

1. There is a democratic concern if institutions like the public protector or joint standing committee on intelligence would be able to classify information
2. There is an administrative concern if every state institution/public entity has to set up structures for the classification of info
3. There are financial concerns because classification/management of info is expensive. There would also be consequences if this Bill was applicable to provinces (i.e. unfunded mandates)

Burgess said he would leave it to the SLA to decide whether he wanted to draw up such a schedule. He was dismissive of the effort to determine which institutions were implicated in the application of the Bill and described the task of drawing up a schedule as “tedious”. With regards the issue of cost, he said that the M.I.S.S guidelines expected departments to budget for the protection and storing of sensitive information already. Therefore there shouldn’t be much extra cost to departments from the POIB. All organs of state “should’ve been budgeting for this for years”. However departments hadn’t been budgeting accordingly and had been lackadaisical in their approach to protecting sensitive/classified information.  According to him the Bill was just trying to formalise and “get right” what MISS couldn’t. He described the Bill as the “turbo version of MISS.”

The meeting was then adjourned. The committee will meet tomorrow at 9.30am in room V454 in the Old Assembly building. The SLA will make a presentation on the opinions he was asked to present. The meeting will be brief because many members of the committee must attend committee chair induction training tomorrow. The DA is expected to make a presentation on Friday.

Today really felt like it was two steps forward, six steps back. Even the little victories we’ve won seem very fragile because things keep being brought back in through the back door. I think the campaign needs to revisit its 7 demands and study the two working documents closely to determine exactly where there are issues outstanding and potential threats of regression. It may also be worthwhile for us to draw up our own schedule to determine how widely applicable this Bill will be and see whether this presents new angles from which to do battle.

Regards,

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