

# SECRECY IS A SLIPPERY AFFAIR

**A**ssume for a moment this scenario: the South African government thinks it is possible that the increasingly unstable state of Canada, where power has recently been usurped by a moustachioed gunslinger who was formally a naval petty officer, has deployed agents to discover some of South Africa's intimate mining secrets. South Africa deploys counter-intelligence officers to Canada, including an agent code-named RS352.

An employee of the Chamber of Mines of South Africa, sympathetic to the compelling aura of the new Canadian leader, gets wind of the deployment of Agent RS352, and provides documentary evidence of his existence to a South African journalist. Should the act of accepting that information alone constitute a criminal offence in South Africa?

How do you know if information is potentially threatening to an individual or South African security until you have seen it?

Change the scenario a bit. What if the Chamber of Mines official provided the information not out of sympathy for the revolutionary Canadian leader, but because RS352 was stupidly deployed with an inadequate cover and was arrested and is now languishing in Canadian jail, known to be one of the most horrible flea-pit prisons in the world.

Revealing the information would be embarrassing to the South African authorities, arguably deservedly. But it would also harm relations between the Revolutionary Government of Canada and South Africa. By making a public issue of it, the publication could force a diplomatic row that until then both sides were keen to keep under wraps.

With the best will in the world, defining secret information is a slippery affair. But it would be patently false to assume that genuinely secret information does not exist and therefore should not be protected. So much depends on how much public trust administrators and politicians can command in constructing rules to govern this information. Judging by the recent arguments about the Protection of Information Bill, the answer is "not much".

Contrary to public opinion, the bill

was originally designed to improve, not degrade, South Africa's official secrets legislation. Yet along the line, a whole combination of events caused the debate over the bill to become something of a *cause célèbre*, to the extent that this tricky debate turned into a media rumpus.

The first problem was that the legislation itself was conflated with a different debate about the establishment of media tribunal within the ANC about how to "strengthen" the current regime of self-regulation by the media.

The second problem was these two essentially separate issues coincided with dramatic international events including the Wikileaks saga, in which a whole raft of confidential cables written by US diplomats were leaked. To confuse the issue further, these leaked cables actually helped bring about democratic change in a whole range of North African states. But they also embarrassed some US government officials, and possibly also put some informants at personal risk.

Is it possible to unpick this whole catastrophe?

The starting point is to distinguish the argument over the media tribunal from the actual content of the Protection of Information Bill, formally the State Information Bill, which did not arise out of the Polokwane resolutions and makes no reference to a media tribunal.

The genesis of the State Information Bill predates the ANC's Polokwane conference, and, although it is hard to believe, it was originally intended to open up state information since the existing legislation actually dates back to apartheid days and is patently unconstitutional.

In a paper written for the Nelson Mandela foundation by Iain Currie and Jonathan Klaaren of Wits University, the duo write that the argument in favour of new legislation is unimpeachable.

"The reform of South Africa's antiquated and paranoid security law is a necessity," it says. It was always meant to be subservient to South Africa's existing constitutionally mandated freedom of information act, the Promotion of Access to Information Act (PAIA).

But somewhere along the line, the ambit of the bill was conceived in a way that took it way beyond "secret" information to include a kind of wholesale management of state information, including information in public sector corporations. The Act became not an official secrets legislation but addressed a wider ambit of the security of information generally.

After a furious debate in parliament and elsewhere, this position has now been reversed, and the information security aspects of the legislation have been removed, leaving official secrets legislation. What does it say?

The original bill had five categories of information: sensitive, commercial, confidential, secret and top secret. Only the last three now remain. Furthermore, the original description of "national interest" has been narrowed to "national security".

In classification levels, it says

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state information may be classified as "confidential" if the information is "sensitive information, the disclosure of which is likely or could reasonably be expected to cause demonstrable harm to the security or national security of the republic or could reasonably be expected to prejudice the republic in its international relations".

"Secret" information is classified as "sensitive information, the disclosure of which is likely or could reasonably be expected to cause serious demonstrable harm to the security of national interest of the republic". Or it "could reasonably be expected to jeopardise the international relations of the republic". Or it is likely to endanger the physical security of a person.

"Top Secret" information is that which is likely to cause "serious or irreparable harm to the national security", or "is likely... to cause other states to sever diplomatic relations" with the republic. Or, it may endanger the life of the individual concerned.

The minimum prison sentences for unlawful disclosure have been removed, and there is now provision for appeal to a retired judge rather than a serving cabinet minister. All good.

But the current working draft does not contain provision for a public-interest

defence, and this remains controversial. However, the Wits lawyers argue that because the bill is still subject to PAIA (the Protections of Access to Information Act), it could be argued that it effectively does include a kind of public-interest override contained in PAIA.

In other words, if a document is classified "secret", it still needs to be disclosed unless the mandatory or discretionary grounds for refusal applies to it. And even if one or other ground of refusal is applicable, it must still be disclosed if 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 the public interest in disclosure outweighs the reasons for non-disclosure.

A real public interest defence is something different however; it does not just allow circumscribed disclosure; it operates as a defence to the criminal penalties. That is quite a distinct concept, say the Wits researchers.

Former intelligence minister Ronnie Kasrils was, in fact, in favour of the inclusion, saying it was a "vital requirement" and if not included would "certainly generate the impression of a government and ruling party wishing to conceal its own misdemeanors by obstructing investigative journalism".

As it stands however, in the draft version it remains a criminal act to not only disclose but even to possess classified information.

The 2008 version of the bill had a different approach to criminalisation, by criminalising the harm caused rather than the mere possession of classified information. The Wits duo suggest this may be a good compromise; not quite a public-interest override, but an escape hatch allowing information to be assessed.

So, what about the examples cited at the start? In the first case, the act of passing on the information alone is a criminal offence, as is the act of receiving it. But if the suggestions for reworking the legislation are accepted, it would only be a criminal act if the information is published and some harm actually comes to Agent RS352.

In the second situation, it is still a bit up in the air. It seems most likely, the disclosure would be morally defensible yet attract criminal sanction. However, there is a chance that even in terms of the draft legislation the journalist would get off, because although it's a state secret, there may have been a substantial contravention of the law.

Clearly, more work needs to be done, and perhaps more campaigning too.