



LETSEMA CENTRE FOR DEVELOPMENT AND DEMOCRACY

NGO-Reg. No. 2009/018888/08

Submission on Protection to Information Bill 2010, 24 June 2010

1. Letsema Centre is an independent non profit community-based organisation implementing different research, training, and development initiatives in collaboration with local and international civil society organisations. The vision of Letsema Centre is to empower people, organisations and communities towards sustainable development and livelihoods.
2. Letsema Centre work through local and international partnerships. Amongst our current projects, programmes, and campaigns, Letsema Centre implement grassroots information-based capacity building focusing on development communication and takes keen interest in assessing the impact of public information on local development and democracy in general.
3. It is a proven fact that the concept of community journalism has for some time now preoccupied the centre stage of new developmental innovations since the age of information. Letsema Centre have taken the challenge of actively becoming part of ensuring that packaging, accessing, disseminating, and using public or private information must be properly regulated within acceptable human rights norms and must equally contribute towards creating truly democratic and developmental societies.
4. The primary basis for this submission is obviously the dire need to transform the old legislation pertaining to protecting information (depending on the kind of information). The secondary basis is the increasing need to guarantee the protection of citizens by nation-states and/or governments around the world against misuse of public or private information to achieve evil ends.
5. Logic would follow that any nation-state and/or government must be fully empowered to absolutely discharge duties related to protecting itself and thereby its subjects without infringing on the fundamental rights of people. On the same breath, citizens must be fully empowered to challenge their nation-state and/or government where abuse of information is factually in question. Letsema Centre interacted with likeminded community organisations towards developing this submission. It is equally critical that this submission be viewed as part of the progressive efforts towards ensuring that the final legislation on protecting information guarantees the balancing act on conflicting public or private versus state or national interests as may relate to access versus protection or otherwise.
6. Letsema Centre interacted with likeminded community organisations towards developing this submission. It is equally critical that this submission be viewed as part of the progressive efforts towards ensuring that the final legislation on protecting information guarantees the balancing act on conflicting public or private versus state or national interests as may relate to access versus protection or otherwise.
7. It is Letsema Centre's view that, in its current form and content, the Bill on »Protection of Information« would strengthen the rest of existing legislation directly or indirectly dealing or impacting on information specifically, and on the tasks of creating stable democracies generally. South Africa cannot afford to be the weakest link in the fight against worldwide criminal activities based on misuse or abuse of information.
8. There clearly exists gaps in the manner existing laws regarding information versus rights are interpreted, applied and enforced in our country. For instance, there have been repeated incidents linked to serious information leaks on cases or matters before courts of law, journalists or commercial media always abusing »the anonymous sources or privilege«, etc, more often posing national policy or security threats.

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9. The majority of legitimate nation-states and/or governments worldwide still find it extremely difficult to deal successfully against some of the most evil acts ever carried by human beings or organised syndicates such as treason, terrorism, espionage, information peddling, murder, etc, thereby posing serious threats not only to human life and security, but to ongoing worldwide processes of democratisation, stability, and peace.
10. Arguably, these and other kinds of evil activities are carried out successfully or often thrive where there are inadequate mechanisms on the part of the nation-states and/or governments to effectively exert sovereignty, or as it is with many countries, where governments are left naked or vulnerable to evil by not enacting or enforcing measures that seeks to regulate information.
11. The Constitution of the Republic of South Africa (RSA Constitution, Act 108 of 1996) substantially guarantees the fundamental rights of and obligations on all people including expectations or duties on the state and/or government. It must be stated categorically that the RSA Constitution is the supreme law, and in the case of this submission, there are specific constitutional provisions including but not limited to especially those focusing on peace and security, for instance, as provided for by section 41(1)(b) which obligate the state or government to »secure the well being of the people of the Republic«.
12. This submission overly contends that information is at the centre of societal and human security inasmuch as it is at the centre of development and democracy (as it is always generally said that »information is power«).
13. It is our considered conviction that any legitimate (or democratic nation-state and/or elected government) is bestowed with the natural, legal and moral duty to protect what it considers sensitive information negatively or positively affecting its subjects, the people.
14. There could be therefore varying degrees of accessing and/or protecting information by different nation-states and democratising societies for different objectives. The undertaking should be the moral duty by any nation-state to protect its subjects, its citizens, by amongst others, placing emphasis on protecting information related to public or private decisions potentially impacting on the rights of people, the public.
15. With the constant evolution of new ways characterising the super high way around communication, information and technologies and what has been termed convergence journalism and the ever increasing popularity of its tools including very lately, Twitters, Face book, etc. Nation-states and governments are under severe public pressures to device acceptable ways of enforcing rights and obligations related to privacy, sensitivity, and/or confidentiality.
16. In modernising societies where commercial media has increasingly become a feared anti-democratic and capitalistic force, existing not to serve neither genuine public interests nor imperative national interests, but largely concerned with maximising profits at the expense of fundamental rights of people, everybody need a legitimate nation-state and government to protect them, and this arguably must start by protecting information about people or about policy that empowers people, and in most cases or as it should be, such information is in possession of state or government.
17. Without state or government protection, the interests of the majority of vulnerable people become largely undermined by the selfish powerful few, as media proves. The key question to be asked is whether the »Protection of Information Bill« is in any way impacting negatively in ensuring that people have the necessary information, knowledge, etc, and empowered to engage openly with their nation-state and government for effective self-governance?
18. Letsema Centre believes that, if successfully passed, the »Protection of Information Bill« will ultimately be of more benefit towards regulating and balancing the challenge of excessive, abusive, and destructive access to sensitive state or private information within the fundamental principles relating to the right to privacy.

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19. Naturally, the solution on managing or regulating access to versus protection of information could be found through education and/or media, but the nature of our educational systems and corruptible media makes it difficult to entrust with this kind of mammoth responsibility.
20. Both formal education and commercial media are so deeply flawed that they undermine the very dire need to entrench democratic morals and values. This worrisome charge against the education system and media outlets makes it difficult to guarantee the fundamental protection of rights of citizens, unless through enacting such a necessary legislative tool in the form of the »Protection of Information Act« to, inter alia, permit proper state regulation and management on information, and thereby guaranteeing security and stability.
21. The »Protection of Information Bill« must not be confused with typical wealthiest or high-level influential personalities or dubious companies or powerful ruling elites or organisations who always demand confidentiality or protection for their own sake, rather it must be understood that the Bill seeks to place much more necessary obligations on the legitimate nation-state or legitimate government to protect itself and thereby protecting its subjects by protecting sensitive information at its disposal or as it may deem classified.
22. Our interactions with community-based organisations as part of preparing this submission revealed many more lessons, including that grassroots communities are contending that it is correct to discuss that getting or accessing information could be hardest enough for the general public, but should not be the sole responsibility of the media to access state or government information, the state or government must be held accountable by all people to offer information to citizens at any stage or as it may be proactively necessary on the part of the state or government to do so.
23. Many hold a view that access itself requires control or management. Similarly that access to information must not be mistaken as open-ended, there must be regulations and limits within applicable laws, and many more people argued that where confidentiality is in the best public interest, it could equally be in the source's best interests.
24. The popular view throughout our interactive workshops has been that public information must serve as a liberating tool in advancing development and democracy in societies, and a caution that lest it could be used against the very people it must serve.
25. Sometimes the good intentions of classifying (selected) information as state information basically should mean that the state is acting in the best interests of the public. The public, the people, must in turn trust the state. Many scholars believe that it only when trust exists between the people and their government that we speak of true democracy. Trust is therefore at the heart of creating and sustaining democratic societies.
26. Lack of protection could lead to lack of trust, vulnerability, and instability in societies. In a nutshell, there is nothing anti-democracy and anti-human rights in properly regulating the access, flow or management of information in democratic societies as long as such serves to ensure sensitivity, confidentiality and respect for privacy as part of good governance practice.
27. Improper disclosures of state information must at all costs be regulated if not avoided. This would provide much-needed politico-legal balance in the interpretation and application of all rights related to access, usage, and/or dissemination of either state or personal information. The Bill would undoubtedly eliminate problems related to the usage of illegally obtained information including protecting innocent citizens whose personal information often get used by criminals, especially through information technologies.
28. The Bill on the »Protection of Information« as presented to an appreciative extent assist much greatly towards creating consistency in terms of constitutional frameworks governing the legal and moral principles related to client and attorney as also known similarly between patient and doctor. In recent times, we have seen this principle been abused by largely in media.

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29. The Bill will strengthen the capacity of government to enforce the constitutional democracy and achieve development. Letsema Centre agrees with the proposed provisions, especially as they reflect core intents to balance access with protection. Our enduring democracy demands that we continue to review and strengthen policies and laws whenever necessary. The Bill therefore must be seen in the context of ongoing policy review process.
30. The state is a juristic person, and many more scholars have argued that in order for the state to serve its purpose, the privacy law must equally apply to the state as a juristic person to enable it (the state) to discharge its overall constitutional and moral obligations by safeguarding its people against any sort of prejudice arising from any such mala fides related to disinformation.
31. The principle in the South African law that: »all rights are limited« must guide the enactment of the protection of information bill, including ensuring that access is never abused but contextualised legally where there is a legitimate claim of access to information, and it would be correct to locate any such legitimate claim within the provisions of applicable laws on the promotion of access to information.
32. It must be acknowledged that the bill provides the necessary space to strengthen all other related laws governing information in South Africa. The bill does not make it impossible for anyone seeking disclosure to justify that it is indeed in the public interest or national interest as long as the meaning of this is not misused as it is often the case in the media.
33. It is a worldwide practice to regulate matters relating to what a nation-state and/or government may categorise as state information affecting people or national security or impacting on national policy, security, stability or peace. It has been proved through interactive learning workshops that evidence exists that more and more citizens and juristic persons are wary about availing their personal information for excessive usage by anyone without their consent.
34. It is therefore the duty of any state or government to protect such persons and their personal information against abuse or evil intents. Just like in the media, where the source is protected, those providing the state or government with their private or personal information, do so in confidence and such information must remain protected by the state or government.
35. The Bill seems broad enough to guard against prejudices arising from information as it relate to sensitive matters of safety and security of people, nation-state or government. It is increasingly worrisome that many more people obtain information illegally, and therefore worth arguing that any illegally obtained information must remain punishable by law, inasmuch as unanimous sources in the media seem to receive protection by law despite causing prejudices.
36. Letsema Centre believes that the policy or legislative need to protect information could pass the reasonable expectation test in terms of the RSA Constitution. It is a necessary review of previous laws related to protecting information and therefore the Bill must be welcomed as an important step towards strengthening democratic societies.
37. Our immediate task is to ensure that there are adequate monitoring and evaluation mechanisms to always seek improvements where necessary. Our young democracy is part of the advanced global community inasmuch as information is increasingly a central tool in advancing development and development. The Bill addresses some of the difficult challenges faced by both developing and developing nations regarding information management.
38. The challenge would often be how nation-states and/or governments apply these kinds of legislation on information in the manner that remain most beneficial not only to the protection but towards strengthening democratic societies. Protecting societies from real, perceived, or potential risks remains as paramount a task in any democracy and must therefore be properly regulated and enforced through democratic legislation.

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39. The protection of information bill provides for much needed space to restore the integrity of our democratic society by first restoring that of our democratic state and thereby equally restoring the dignity of all people. This fundamental mission could only be achieved by safeguarding information considered sensitive and guaranteeing that by doing so, this would serve public good.
40. More than fifteen years in defending and advancing popular democratisation and people-driven developmental governance, the time has come to clarify with degree of certainty or assurance, the symbiotic relationship between juridical-technicalities pertaining to the bill of rights and whether or not the state or government as a juristic person enjoys the same rights?
41. Pursuant with the myriad arguments contained in this submission, it also becomes important to start interrogating whether the time has come to distinguish information as it must be used to benefit development governance as opposed to information used to benefit commercial monopolies. Unfortunately there are few best lessons on this discussion around the world.
42. The application of the Bill of Rights in South Africa is also a new paradigm and many more advantaged persons and/or institutions including the commercial media are always finding it easier than your average citizen to abuse the very same laws that are meant to protect people or state or government. Laws must be enforced to protect people, not abuse them.
43. Empirical research has proved that not only our Constitutional framework in general, but it's Bill of Rights in particular, is rated amongst the best ever and arguably even amongst developed or established democracies. The challenge therefore is to continue enact laws that seek to strengthen this achievement.
44. There were interesting arguments during our grassroots interactions including that »if a patient lying in hospital feels that certain information or all about his/her ill health must not be disclosed, and if there are reasonable grounds that by protecting such information, the risks involved could be minimised, then such protection must be enforceable«. Could this argument perhaps take the discussions on the »Protection of Information Bill« to another level?
45. A catalogue of assortment of detailed fundamental rights as contained in the Bill of Rights in the RSA Constitution has been hailed as a seismic shift in the manner not only we all define the symbiotic relationship the nation-state relate to its nation-citizens, but how we all must seek mutual fairness in the manner we interpret, apply and embody constitutional democracy.
46. It is an open secret that our Bill of Rights as contained in the RSA Constitution is admired the world over. Letsema Centre is convinced that the Bill on the »Protection of Information« will go a long way in achieving the letter spirit of the Bill of Rights in particular and that of the RSA Constitution itself.
47. Perhaps we must all acknowledge that the complexities surrounding the interpretation and application of fundamental rights is an ongoing challenge and more often than not, it must be expected that the tension between access and protection, in terms of the extent access of information could be permissible and similarly the extent protection of information could be enforced, will always visit all democratising societies.
48. This remains therefore a worldwide challenge that nation-states and/or governments may not easily escape, but often have to confront head-on. Through managing information properly, including regulating and strengthening laws relating to identity books, private security and intelligence agencies, etc, the Bill elaborates important aspects around safeguarding the integrity and sovereignty of the nation-state, the government and its people, and must therefore be unconditionally supported.
49. For instance, there are many more cases of illegal immigrants wrongly in possession of documents of information and committing abhorrent crime in South Africa, and increasing cases of information peddling often confronted by government agencies, and the Bill effectively provides for measures to curb these kind of abnormalities. This Bill is another step going forward towards a safe, secure, and stable country.

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50. Letsema Centre wishes to reiterate that the promotion of human rights and constitutional democracy must inform the enactment of the proposed law on protecting information and trust that all possibilities will be explored to pass this Bill before parliament into enforceable law. South Africa remains the undisputed champion of protecting fundamental human rights of all people through legislating progressive public policies and regulations across all spheres of government.
51. Letsema Centre believes that Bill before Parliament assist this country to review and deal effectively with the legislative gap between the old 1982 Act on the Protection of Information. The proposed law would therefore go a long way in realigning constitutional mandates as they may relate not only to information but to the broader objectives of creating stable and growing constitutional democracies.
52. Before concluding, this submission must emphasise that the Bill must be as critically seeking to strengthen not only the Promotion of Access to Information Act of 2000 but most critically the RSA Constitution which imposes on the nation-state and/or government to protect its people by enacting policies and laws that are developed within acceptable democratic processes and therefore compliant with fundamental principles of democracy including accountability and transparency, etc.
53. This submission summarily and fundamentally seeks to argue that there is always, not only an inherent obligation on the part of the state to protect its people, but equally a legal or need (or otherwise) imperative to balance democratic excesses, in this case, with regard to creating an open or democratic society without trampling on the fundamental rights of people and developing legislation within constitutional and moral considerations or obligations bestowed on the nation-state and/or government.
54. The Bill progressively carries the necessary consistency in realising the objectives entailed in the RSA Constitution in relation to applicable information policies and laws. Letsema Centre fully support the Bill and would actively contribute beyond the next steps or formal processes towards ultimately enacting and enforcing the protection of information law in the best possible public interest based on the will of the people of South Africa, and as it may contribute towards global security, peace, and stability for all.
55. In conclusion, Letsema Centre wishes to thank parliamentary committee on the »Protection of Information Bill« for this rare opportunity to be the voice of the voiceless. The Bill represents decisive leap forward in transformative law. It is important for our enduring democratisation and development processes. Letsema Centre also wishes Parliament successes in its endeavour to become truly representative of different voices, especially those from grassroots communities. Thank you once again for the opportunity afforded.

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i This submission is a culmination of a series of three interactive workshops open to grassroots organisations including youth and women conducted around three townships (Mamelodi, Atteridgeville, and Garankuwa) in the City of Tshwane during May/June 2010 aimed at assessing the impact of public information on local development and local democracy by examining either enacted or proposed laws or policies on information. The submission is a result of collaborative efforts by three community-based organisations working on the subject of development communication. The arguments contained herein are not necessarily exclusive views of Letsema Centre.

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