



## The Judicial Role in Defining National Security and Access to Information in South Africa

Jonathan Klaaren

**To cite this article:** Jonathan Klaaren (2015) The Judicial Role in Defining National Security and Access to Information in South Africa, *Democracy and Security*, 11:3, 275-297, DOI: [10.1080/17419166.2015.1067613](https://doi.org/10.1080/17419166.2015.1067613)

**To link to this article:** <http://dx.doi.org/10.1080/17419166.2015.1067613>



Published online: 04 Sep 2015.



Submit your article to this journal [↗](#)



Article views: 15



View related articles [↗](#)



View Crossmark data [↗](#)

# The Judicial Role in Defining National Security and Access to Information in South Africa

Jonathan Klaaren

---

WiSER & Law, University of the Witwatersrand, South Africa

This article argues that judicial and other institutions concerned with legal interpretation are playing an increasing role in regulating and defining the concept of national security for South Africa, particularly in the realm of national security information. Part I surveys the post-apartheid evolution of accountability of South Africa's national security agencies with particular attention to the treatment of national security information. Starting from a low base, intelligence agencies in South Africa have become more accountable, in part through the greater degree of access to national security information. Part II portrays the placement of access to national security information within South Africa's legislative framework, taking into account the keys laws underpinning both secrecy and disclosure regulation. Here, with no definition of national security on the secrecy side, it is on the disclosure side of South Africa's legislative framework that the judiciary and other legal actors are crafting an operative definition of national security. Part III covers three recent developments, arguing that they demonstrate the increasingly important regulatory role played by the judiciary and other legal institutions. These include two key Constitutional Court decisions and an ongoing legislative reform effort.

**Keywords:** Access to Information, Judiciary, National Security, Regulation

Secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception.<sup>1</sup>

## INTRODUCTION

This article argues that judicial and other institutions concerned with legal interpretation are playing an increasing role in regulating and defining the concept of national security for South Africa, particularly in the realm of

---

Address correspondence to Jonathan Klaaren, WiSER & Law, University of the Witwatersrand, 6th Floor, Richard Ward Building, East Campus Braamfontein, 2050 Johannesburg, South Africa. E-mail: [jonathan.klaaren@wits.ac.za](mailto:jonathan.klaaren@wits.ac.za)

national security information. In substantiating this thesis, the article provides an account of the ways in which information relating to national security is regulated and may be accessed in contemporary South Africa. Part I surveys the post-apartheid evolution of accountability of South Africa's national security agencies with particular attention to the treatment of national security information. This part details the ongoing transformation of the security services sector, including its shifting constitutional regulation. Starting from a low base, intelligence agencies in South Africa have become more accountable, in part through the greater degree of access to national security information. Part II portrays the placement of access to national security information within South Africa's legislative framework, taking into account the key laws underpinning both secrecy and disclosure regulation. Here, the continuing conceptual entrenchment of the constitutional right to access to information is highlighted. With no definition of national security on the secrecy side, it is on the disclosure side of South Africa's legislative framework that the judiciary and other legal actors are crafting an operative definition of national security. The final section of the article, Part III, covers three recent developments, arguing that they demonstrate the increasingly important regulatory role played by the judiciary and other legal institutions. These include the key Constitutional Court decision in *Independent Newspapers*, the recently concluded lengthy litigation around accessing from the presidency a confidential report on the fairness of the 2002 elections in Zimbabwe, and the current controversy around the legislatively passed but not yet assented to or judicially vetted Protection of State Information bill.

## **PART I: THE ACCOUNTABILITY OF SOUTH AFRICA'S INTELLIGENCE AGENCIES—THE INFORMATION ANGLE**

This part surveys the post-apartheid evolution of accountability of South Africa's intelligence agencies, with particular attention to their treatment of national security information. This perspective demonstrates the prominent influence of the Constitution and its judicial and legal interpreters since the end of apartheid in this sector. A focus on administrative interpretation of the constitutional imperative of transparency and access to information also turns attention to the place of information disclosure within the sector accountability structures themselves.<sup>2</sup> Consideration of this dimension of security sector accountability and governance complements the picture of access to national security information as understood within the legislative framework of disclosure and secrecy regulation covered in the next section.

Accountability for intelligence agencies both in South Africa and in Africa generally has started from a historically low base. This is, of course, nearly axiomatic in the case of apartheid South Africa. Secrecy was a "hallmark of

the apartheid regime.”<sup>3</sup> As Sandy Africa has argued and documented, secrecy played an enabling role in the elaboration, proliferation, and implementation of apartheid.<sup>4</sup> Indeed, the Truth and Reconciliation Commission’s final report noted a large number of apartheid laws with secrecy clauses. These included the Official Secrets Act, the Protection of Information Act, the Statistics Act, the Nuclear Energy Act, the Petroleum Products Act, the Criminal Procedure Act, the Disclosure of Foreign Funding Act, the Inquests Act, and the Internal Security Act.<sup>5</sup>

The level of accountability for intelligence agencies in Africa across the board has also been low. Writing on intelligence and accountability in Africa generally, Lauren Hutton notes that

[t]he justifiable need for secrecy has . . . in many African states become a blanket of secrecy—the norm rather than the exception—providing cover for ethically questionable operations, corruption, abuses of power, inadequacy and inefficiency. A system of accountability needs to be created that . . . can on the one hand respect the justifiable use of secrecy, but can [on the other hand] also ensure that intelligence agencies are serve the broader justice and security needs of the people.”<sup>6</sup>

Hutton explains this, noting that “the politicised role of intelligence in Africa has its roots in the historical evolution of intelligence arrangements.”<sup>7</sup> Noting that constraints on the classification of information can serve as a mechanism of accountability, Hutton nonetheless discerned a recent trend whereby “the practice of accountability and oversight of the intelligence sector has gained significant currency in the past decade.”<sup>8</sup>

Starting from this low domestic and continental base, the more recent story—at least in South Africa—has been one of increasing attention to the necessity for accountability. Some scholarly work has begun to explore the constitutional, legal, and bureaucratic dynamics that underpin the South African trend toward greater accountability for intelligence services. Laurie Nathan roots this in the enactment of the Constitution and writes that “the security chapter [of the Constitution] asserts the principle of civil supremacy, declaring that national security is subject to the authority of Parliament and the executive and that multi-party parliamentary committees must have oversight of all the security services” as well as the constitutional entrenchment of non-partisanship in relation to the intelligence services.<sup>9</sup> Writing on the cusp of the transition, Africa and Siyabulela Mlombile heralded the minefield that awaited the attempted transformation of intelligence in the direction of democratic governance and concluded that “the nature of intelligence is such that the balance between secrecy and democracy will always be a fine one to strike.”<sup>10</sup>

What is striking is how the Constitution has been positioned at the center of this transformation of the intelligence services in South Africa. For instance, in Nathan’s view, “[t]he South African constitution lies at the heart of

a relatively successful process of intelligence transformation [even though] its relevance for the intelligence community is complex and contested.”<sup>11</sup> Nathan notes that the emphasis of the Constitutional chapter on the security services (including the intelligence services) “is on the rule of law: national security must be pursued in compliance with the law, including international law; members of the security services may not obey a manifestly illegal order; and the security services must act, and must teach and require their members to act, in accordance with the Constitution and the law.”<sup>12</sup> Nathan also notes the practical provisions of the Constitution to the effect that “[n]ational legislation must regulate the objects, powers and functions of the intelligence services. It must provide for the co-ordination of the services and for civilian monitoring of their activities by an inspector appointed by the President with the approval of at least two-thirds of the legislature.”<sup>13</sup>

Nathan’s view is particularly informed by his membership on the 2008 Ministerial Review Commission on Intelligence. Itself an exercise in accountability, the Ministerial Review Commission’s report has to be the best current description and assessment of the state of the accountability of the national security agencies.<sup>14</sup> Though neither Africa, Mlombile, nor Nathan are trained lawyers, they all use the South African Constitution as the touchstone for their analysis, in addition to noting its significant yet neglected impact in the field of intelligence and accountability.<sup>15</sup>

The specific institutions set up by the Constitution include the Office of the Inspector General and Parliament’s Joint Standing Committee on Intelligence. The Constitution mandates establishment of a body to carry out civilian oversight of the intelligence services, providing for “civilian monitoring of the activities of [the intelligence] services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.”<sup>16</sup> The appointment of the Inspector General of Intelligence is done through the Intelligence Services Oversight Act.<sup>17</sup> The Office of the Inspector General has a certain degree of independence, with “line or functional accountability to parliament and an administrative accountability towards the Minister for Intelligence Services.”<sup>18</sup> While neither is not the front-runner, two of the eight shortlisted candidates for appointment as Inspector General in 2015 are employed within the Office—one as an oversight officer and one as a legal advisor.<sup>19</sup> In addition to the civilian oversight body, the Constitution requires legislation setting up a multiparty parliamentary committee for oversight of intelligence services as part of the security services of South Africa.<sup>20</sup>

These South African security sector scholars do not overstate the empirical hold that concepts of transparency have within the security sector. As Nathan puts it: “[A] major impediment to full compliance with the constitution is the extreme secrecy that surrounds the intelligence community,

stifling accountability, scrutiny and detection of unconstitutional behaviour.”<sup>21</sup> Indeed, particularly in this security sector, there was contestation and difficulty in determining the appropriate balance between secrecy and openness in order to effectively pursue security. Africa observes that “the intelligence services have become increasingly defensive and ambivalent about meaningful transparency. This alienation of the intelligence services is one of the most significant challenges facing the post-apartheid South African state.”<sup>22</sup> As we shall explore further below, this contestation within the sector has occasioned resort to the courts—the accepted institution in a constitutional democracy for settling disputes.

One specific terrain of this contestation is over understandings of secrecy and disclosure, both at the core of the function of the intelligence services (as discussed below) and at the level of the workings of the accountability structures. In the operations of the sector accountability agencies, this contestation often takes the form of information politics. The intelligence services are required by statute to report significant intelligence failures to the Inspector General.<sup>23</sup> This is not always forthcoming. Further, according to a senior executive in the Office of the Inspector General, it is more a matter of negotiation than of right for that office to receive access to the information it requires. “Although denial of access to information during an investigation by the office of the Inspector General is a punishable offence, securing the cooperation of the [intelligence] services requires a finer approach than recourse to the courts.”<sup>24</sup>

## **PART II: NATIONAL SECURITY AND INFORMATION: SECRECY IN AN OPEN DEMOCRACY**

One might think that that the place of national security in South Africa’s legal system would be determined in terms of secrecy legislation. South Africa’s currently operative secrecy legislation is the apartheid-era Protection of Information Act, 1982. However, the document at the center of South Africa’s secrecy regime is not a piece of legislation—it is a Cabinet policy: the Minimum Information Security Standards (MISS). The MISS has provided administrative interpretation of access to national security information in South Africa since 1998. This policy has been approved by the Cabinet and enjoys legitimacy within the security sector, although it does not enjoy the status of law. The MISS provides policy guidelines for a number of matters, including information security across the spectrum of government departments, vetting (providing individuals with security clearances), the classification and declassification of information, and physical security.

The MISS was a stopgap transitional measure and was never intended to provide permanent national security information policy. Indeed, its power is limited by the unconstitutionality of its formal empowering legislation, the

1982 Protection of Information Act.<sup>25</sup> The government has admitted the unconstitutionality of the 1982 Act in the process of developing legislation to replace it, the Protection of State Information Bill (discussed below). Perhaps even more significant, the MISS itself has no substantive definition of national security.<sup>26</sup> It merely sets out the processes, penalties, and procedures of classification of information.

This hole at the center of South Africa's secrecy regime has an intriguing consequence. With no valid or substantive definition of national security on the secrecy side of the legislative framework, the path lies open for the conceptual definition of national security to be developed on the disclosure side.

The legislative centerpiece of South Africa's access to information regime is the Promotion of Access to Information Act (PAIA).<sup>27</sup> PAIA was enacted in fulfillment of a constitutional command to Parliament to pass legislation giving effect to the constitutional right to access to information. That right is contained in the Constitution's section 32 and provides:

1. Everyone has the right of access to—
  - a. Any information held by the state; and
  - b. Any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.<sup>28</sup>

PAIA is divided into seven main parts, providing procedures for access to records of public and private bodies, for submitting appeals against decisions, and for making an application to court. There has been a recent significant amendment to PAIA with the passage of South African data protection legislation. Both the PAIA and the new data protection law—the Protection of Personal Information Act (POPI)—will be enforced by a new Information Regulator, a statutory body that will take over and add to many of the functions currently performed by the SAHRC.<sup>29</sup>

### **PAIA Provisions on National Security**

The substantive provisions of the PAIA most specific to national security are in section 41.<sup>30</sup> This section essentially provides the information officer with discretion to refuse a record, if its disclosure could reasonably be expected to cause prejudice to:

- i. The defence of the Republic;
- ii. The security of the Republic; or

- iii. Subject to subsection (3), the international relations of the Republic, or reveal information supplied in confidence in terms of international agreements (as specified further in section 41(1) (b)).

Section 41(1) provides a list of the specific kinds of information that are contemplated by the exemption ground contained in 41(1). This list of examples thus provides an outline as to what PAIA considers national security to entail. In that sense, the definition of national security is fairly comprehensively circumscribed through detailed examples given internally within the section, even though subsection (2) states that such examples should not necessarily limit the “generality of that subsection.”<sup>31</sup> Looking to these particularizations, PAIA envisages that the types of information that may constitute records that could fall under the exemption of section 41(1) will include information

- a. relating to military tactics, strategy, exercises or operations undertaken in preparation for *hostilities* or in connection with detection or curtailment of subversive or hostile activities;
- b. relating to quantity, characteristics, capabilities, vulnerabilities or deployment of weapons or equipment used to detect, prevent, suppress, or curtail subversive or hostilities—or anything being designed, considered or developed for such use;
- c. relating to characteristics, vulnerabilities, and deployment etc. of any military force or unit or person responsible for detection, prevention, suppression or curtailment of subversive or hostile activities;
- d. held for the purpose of intelligence relating to defense; the detection, prevention, suppression or curtailment of subversive or hostile activities; or of another state or international organization used by the Republic in the process of deliberation;
- e. on methods or equipment used for intelligence as referred to in (d);
- f. on the identity of a confidential or intelligence source;
- g. on the positions adopted or to be adopted by the Republic (or another international organization) for the purpose of international negotiations; and
- h. that constitutes diplomatic correspondence.

This definition takes as its reference point a military or armed conflict capability as central to the concept of national security. In this sense, the PAIA definition of national security is narrower than the wide “national security as national interest” view of national security that is often promoted in security sector reform, particularly from the viewpoint of developing countries.<sup>32</sup>



Indeed, the statutory PAIA definition is arguably narrower than the governing principles of national security contained within the Constitution.<sup>33</sup>

For an even more circumscribed view of national security within the military or armed conflict frame, one may look at the first draft of the *Draft Model Law for AU Member States*, which was commissioned by the African Commission on Human and Peoples' Rights and available in 2011. That text, while adopting a similar method for specifying national security and defense of the state, states in section 41(2) that the term "security or defense of the State" means:

- a. military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities;
- b. intelligence relating to—
- c. the defence of the State;
- d. the detection, prevention, suppression, or curtailment of subversive or hostile activities;
  - i. methods of, and scientific or technical equipment for, collecting, assessing, or handling information referred to in paragraph (b);
  - ii. the identity of a confidential source and any other source of information referred to in paragraph (b); or
  - iii. the quantity, characteristics, capabilities, vulnerabilities, or deployment of anything being designed, developed, produced or considered for use as weapons or such other equipment, excluding nuclear weapons.<sup>34</sup>

The South African definition is narrow than that of the African model law in form as well as content. While the South African specifications relate to "information including," the *Model Law* in its first draft as well as in its approved final version (in section 30) goes further in legal form to say that this is what national security "means."<sup>35</sup> Though this variation in claimed legal authority may not have a practical effect, it does demonstrate an intention to limit the idea of what national security is. Further, the *Model Law* differs significantly from the parallel provision in PAIA: it lacks the equivalent of PAIA section 41(d)(iii), 41(c) and changes the equivalent provision to PAIA section 41(b) so that the exemption in the African law will not extend to nuclear weapons. Though, at first glance, it appears as if PAIA sections 41(g) and (h) have also been omitted, this must be read alongside the fact that it considers international relations under a separate section.<sup>36</sup> The splitting of the two concerns also demonstrates the South African desire to tailor and make explicit the understanding of national security as much as possible. Indeed, all these variations demonstrate a desire on the part of the drafters of the African Model Law to be more circumscribed about the definition of national security than were the drafters of the PAIA.

As can be seen, PAIA does not wish to exclude information relating to the military or security of the Republic generally from protection under a definition of national security. Still, PAIA exempts from disclosure on content grounds the specific, not the general. There is no further definition of national security or national interest within the definitions section. However, subversive or hostile activities (one of the main measures within section 41 for determining national security issues) are defined, in section 1, as

- a. Aggression against the Republic;
- b. Sabotage or terrorism aimed at the Republic or a strategic asset of the Republic, whether inside or outside the Republic;
- c. An activity aimed at changing the constitutional order of the Republic by the use of force or violence; or
- d. A foreign or hostile intelligence operation.

Although this definition of subversive or hostile activities does provide increased constraint on the discretion of those implementing PAIA, it should be noted that one indicator of subversive or hostile activities, the term “aggression,” is itself ambiguous. The African Draft Model Law on Access to Information replaces the reference to aggression with “an attack against the state by a foreign element.” Furthermore, the Model Law definition drops the reference to an “activity aimed at changing the constitutional order” of the state. Again, both variations are indicative of a more tightly drawn definition of national security in the African Model Law than in the PAIA.

Finally, it is important to note that, like a number of other PAIA exemptions, section 41(1) is a *discretionary* exemption ground. PAIA is simply nonapplicable to certain types of records, as seen in sections 7 (records in litigation matters) and 12 (cabinet records). With respect to national security records, Parliament chose not a blanket instance of nonapplication but rather an exemption that is (a) discretionary and (b) subject to the public interest override in section 46. The information officer may thus choose to disclose national security information if that is desired. A further standard provided within section 41 itself is that the discretion can be enacted only when the disclosure *could reasonably be expected to prejudice* the interests contained within section 41. Thus, information cannot be refused for disclosure on the grounds that information simply relates to such interests, or that it might prejudice such interests. A higher threshold is required.

### PAIA Cases on National Security

The national security sections of the PAIA have figured in two reported South African cases. Not surprisingly, these judgments relating to section 41 have not dealt directly with the “meaning” of national security but instead

have dealt with the kinds of justification needed to use the national security ground of exemption.

In *CC (II) Systems Proprietary Ltd. v. Fakie (NO) and Others*, a private company was attempting to get access to information relating to an Auditor-General review of the Strategic Defence Package as there had been claims of corruption in the tender process.<sup>37</sup> The information was refused on various grounds, including the ground that the information related to defense and security of the Republic and could thus be refused under section 41(a). The judgment dealt with the level of justification needed to utilize the exemption section and stated that information officers could not hide behind generalities when refusing information.<sup>38</sup> The Auditor-General was ordered to disclose some of the records.<sup>39</sup> The court held that when using PAIA section 41:

it is for the respondents to identify the record which is to be protected and to state concisely why it maintains that access to it can be withheld.<sup>40</sup>

The second judicial matter is the long-running litigation of *The President of RSA v. M & G Media*, which has been heard at the court of first instance twice, the Supreme Court of Appeal once, and the Constitutional Court twice. This matter is discussed in full below in Part III; only a thumbnail sketch will be given here. In this case, records were initially refused on a variety of grounds, which included section 41(1)(b)(i). This subsection relates to information supplied in confidence by other states. The court required full and proper reasons for refusal under section 41 on a theory that a culture of justification existed in post-apartheid South Africa.<sup>41</sup> The High Court went on to note that in considering using a section such as section 41, it will seldom be the case the information officer will be in possession of the direct knowledge necessary to aver such grounds; thus affidavits will be necessary to justify the refusal.<sup>42</sup> For this court, specificity and full justification in such affidavits was required, especially when considering the power of information officer to sever particular offending aspects of a record.<sup>43</sup>

The rationales used by the South African courts for determining the narrow scope of national security found grounding in a normative framework more established than contemporary instruments such as the African model law and the Tshwane Principles—the Johannesburg Principles.<sup>44</sup> These principles acknowledge the existence of legitimate national security interests, yet highlight that it is the establishment of that legitimacy (rather than the interest itself) that ought to be advanced. As such, principle 2(a) of the Johannesburg Principles includes the requirement that a legitimate restriction can exist only where the genuine purpose and *demonstrable effect* is the protection of the national security interest.<sup>45</sup> Further, principle 2(b) stresses the level of justification required for legitimacy to be present.<sup>46</sup>

## The Concept of National Security within PAIA

Given that these sparse statutory definitions and small number of judicial decisions, what can one say about the meaning of national security within the PAIA? Most basically, it would seem that the PAIA frames rather than resolves the (perhaps inevitable) contest over the content of the concept of national security. This is a significant finding. A narrow definition of national security is based in PAIA section 41 as set out and reviewed above. In most jurisdictions, there is a tendency, at the very least within the institutions of the security sector, to make “national security” overly broad.<sup>47</sup> In order to elaborate a broader reading within the framework of PAIA, it would be necessary to move beyond the confines of section 41 and, for such a definition of the national security concept, include two other PAIA sections, section 40 (economic interests and financial welfare of Republic) and section 44 (operations of public bodies).<sup>48</sup> This multiple section reading could then move toward a broader understanding of “national interest” rather than national security. Such an expansion can lead to a heated political debate. This indeed occurred in South Africa regarding the Protection of State Information legislation (see further below).<sup>49</sup>

Even more expansively and controversially (as is the case in one reading of the new South African legislation), one might consider national security to relate to the full range of government activities (and thus, in effect, to all government information). On this last definition, there is one further aspect of the PAIA that comes into play, in terms of its application to Cabinet records. Under section 12, the Act is excluded from applying at all to the records of the Cabinet and its committees. As such, the only possibility for gaining access to such records properly interpreted would be to attempt to rely directly on section 32 of the Constitution.<sup>50</sup>

Of course, as noted above, the wording of section 41 clearly envisages a number of detailed exemptions to the access to military or government documents. Its internal structure thus pushes in the direction of particularity and specificity. Further, in the few judicial interpretations that do exist, courts clearly envisage a substantial level of justification for utilization of the exemption. The initial judicial route is thus to choose relatively stronger rather than weaker interpretations. This points toward, at the least, a judicial desire to narrowly circumscribe the idea of national security itself.

This judicial attitude ultimately may reduce to a concern for individual rights—a concern that the courts are appropriately bringing into their view of national security. As, for instance, Koetje has stated in the field of international relations:

National security is an interactive and integrative system consisting of the individual as the irreducible basic unit, who is connected both to the state and the international political system by way of civil society.<sup>51</sup>

Overall, PAIA and its judgments to date support a circumscribed military-capability notion of national security set within a culture of justification relating to the constitutional rights of the individuals within the population.

### PART III: THE ELABORATION OF NATIONAL SECURITY THROUGH LITIGATION

Three recent developments demonstrate the increasingly important regulatory role played by the judiciary and other legal institutions in the definition of national security. Two decided cases at the Constitutional Court level and one yet to be launched but certain to challenge at the same apex level demonstrate the increasingly legalized process within which the South African concept of national security is being elaborated.

#### The Independent Newspapers Litigation

The *Independent Newspapers* case demonstrated the potential for a court case on one matter—the fairness of the dismissal of a civil servant—to provide the platform for judicial interpretation of the concept of national security. The case followed from another Constitutional Court case—what the court termed “the underlying matter”—*Masetlha v. President of the Republic of South Africa & another*.<sup>52</sup> In the underlying matter, two applications by the dismissed head of the National Intelligence Agency (NIA), Mr. Masetlha, were heard and eventually dismissed by the High Court. This dismissal and its challenge in court were part of the high-wire politics of the time and constituted some of the skirmishing toward the eventual replacement of then-President Thabo Mbeki with current President Jacob Zuma. After the dismissal of his case in the lower court, Masetlha then appealed the High Court decision against him to the Constitutional Court. The facts crucial to the *Independent Newspapers v. Minister for Intelligence Services* matter followed. As the Court recounts:

In [his] application, Mr. Masetlha filed two sworn statements. The one he styled an “open court founding affidavit” and the other carried the heading “in camera founding affidavit.” In the in camera affidavit, Mr. Masetlha explained that he delivered two affidavits because “in this in camera affidavit there are many matters which I cannot disclose for fear [that] national security will be compromised.” The contents of the in camera affidavit differed markedly from that of the open court affidavit. The former described certain activities of the NIA and had attached several annexures some of which displayed on their face the state security classification “secret” or “confidential.”

In turn, the Minister [of Intelligence Services] delivered a single affidavit in the suspension application in answer to both the open court and in camera

affidavits of Masetlha. Although his answer was not in an in camera affidavit, in it he confirmed that “the nature of the subject matter in these proceedings does not permit full disclosure which if done would undermine national security beyond the relevance of these proceedings.” Even so, neither Masetlha nor the minister moved the High Court for an order restricting disclosure of any part of the record. Consequently, the High Court held its hearing in an open court and made no order proscribing public access to the record.

The application for leave to appeal was set down for hearing on May 10, 2007. Of its own motion and a few days before the hearing, this Court directed that the underlying record be removed from the Court website. The Registrar was directed not to make the hard copy of the record available to the public, pending further direction by this Court. This Court issued that direction because certain documents in the underlying record were marked “in camera” or “confidential” or “secret” and related to the activities of the NIA.<sup>53</sup>

A major newspaper following the news story of the Masetlha dismissal asked to see the record (including the documents marked “secret”) and was refused access. This newspaper then launched an application for such access, appearing at the Constitutional Court on the first day of the appeal of the *Masetlha* matter. The Court eventually granted access to some but not most of the documents to which the Minister for Intelligence Services retained his objections about being made public and made no order as to costs, noting “[e]ach party has gained substantial success to some degree.”<sup>54</sup>

In its decision, the Constitutional Court case clarified that South African courts would not lightly allow their jurisdiction to be ousted by claims of national security.<sup>55</sup> According to the Court:

A mere classification of a document within a court record as “confidential” or “secret” or even “top secret” under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.<sup>56</sup>

According to the Court, the harm sought to be prevented by national security can never be a speculative harm, reinforcing the need for a legitimate and justifiable use of the open justice principle.<sup>57</sup>

The test that emerges from *Independent Newspapers* comes from the judgment of Moseneke DCJ. Moseneke DCJ engaged in four steps in his analysis: (1) he examined the substantive content of the disputed material; (2) he characterized the information in the material as being either national security information or not; (3) he considered the de facto public nature of the information in the material; and (4) he considered redaction of the material.<sup>58</sup> In his analysis, conclusions on these four steps could differ on a fact by fact, case by case basis.

It is also worth noting the legal standard of limitation that the Constitutional Court used in this case. The standard was “in the interests of justice.”<sup>59</sup> As Moseneke DCJ put it:

[W]here a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public.<sup>60</sup>

It is significant that the Ministry for Intelligence Services’ participation in this case was not based on the unthinking reflexive stance of apartheid secrecy. Instead, the Ministry clearly applied its mind to the constitutional issues. The Ministry sought and received qualified legal advice on the question. For instance, the minister’s initial refusal of the request for the information from Independent Newspapers was reported to be because the minister preferred a court to decide the matter.<sup>61</sup> This constructive attitude by the intelligence ministry did not go unnoticed and unappreciated by the judges. The majority opinion noted “what is significant” is that the minister abandoned his earlier blanket claim.<sup>62</sup> Likewise, a later move to narrow down the minister’s objection to a mere several paragraphs was welcomed by both the majority and by one of the concurring judges, Sachs J.<sup>63</sup> Overall, one could say that the Ministry demonstrated the need for understanding, trust, and specificity in handling these claims of secrecy—factors not commonly encountered in the context of disputes between the media and intelligence services.<sup>64</sup>

### The Zimbabwean Elections Report Litigation

In a second separate matter litigated all the way to the Constitutional Court, another newspaper also instigated a judicial pronouncement on the concept of national security, this time in the context of PAIA. A South African newspaper, the *Mail & Guardian*, had been seeking access to a report drafted by two South African judges, known as the Khampepe-Moseneke report, on the Zimbabwe elections of 2002 for around six years. This pursuit and the refusal by successive South African administrations to release the report brought about some of the most comprehensive judicial treatment of PAIA section 41(1). In 2002, the then-President Thabo Mbeki obtained leave from the Chief Justice to send two sitting judges to Zimbabwe on his behalf to assess the constitutional and legal challenges that had emerged there, and to then report these findings back to the president. That report was then the subject of a PAIA request by the South African investigative newspaper, the *Mail & Guardian*. This PAIA request was refused on July 28, 2008, under sections 41(1)(b)(i) and 44(1)(a). The *Mail & Guardian*’s subsequent internal appeal was refused on the

same grounds. Thus began the litigation that eventually carried on for more than five years.

The first court ruled in the newspaper's favor. In this High Court judgment in terms of section 78 of PAIA, Sapire AJ noted that none of the deponents utilized by the state were privy to the actual conditions of the appointment of the judges that could serve to justify a refusal under section 41(1)(b)(i).<sup>65</sup> Moreover, there was no evidence given that the information was obtained in confidence, nor could the nature of the information (as "constitutional and legal" matters) naturally infer confidentiality.<sup>66</sup> Still, what is most significant is the robust evidence-led interrogation of section 41. In its consideration of the national security grounds for refusal, the High Court held that when considering the discretionary nature of the section 41 and its wording: "[t]he use of the word 'may' in this instance is an indication of a discretion and it is a discretion that must be exercised in favor of disclosure unless there are reasons, which must be stated, for refusal. These reasons must be identified and established by evidence. This is not so in the present case." As such, the judge ruled in favor of the newspaper. Further, it held that whoever of the respondents had the report were to make it available to the applicants within seven days of the order.<sup>67</sup>

The state appealed the order to the Supreme Court of Appeal (SCA). However, the government lost.<sup>68</sup> Affirming the position adopted by the High Court, the SCA highlighted the "culture of justification" that must exist as a necessary aspect of the constitutional democracy and, further, in considerations of national security.<sup>69</sup> Assessing the evidence before the court of first instance, the SCA noted that the three people with the most pertinent direct knowledge of the events—former President Mbeki and the two judges themselves—had not provided affidavits.<sup>70</sup> The lack of specificity in asserting the section 41 grounds (i.e., the record had been refused because it constituted confidential information by a state *or* international organization) served as an indication that the information officer had not exercised their discretion properly, nor had they done so with the requisite justification.<sup>71</sup> Setting aside the appeal, the SCA concluded that the state had failed to establish an evidential basis for refusing to disclose the report.

The clear message from these two initial decisions is that any notion of national security information including purportedly confidential information obtained from another state must be read within the limits of a culture of proper and considered justification by the state. Even though the litigation continued through three more court hearings, that essential message has remained intact. Indeed, the trial court emphasized (in its second hearing; see below) that much of its initial reasoning and that of the SCA remained valid.<sup>72</sup>

After the SCA decision, the state chose to appeal the decision to the Constitutional Court, where the state prevailed only on a point of procedure rather than one of substance.<sup>73</sup> The point of procedure was this: the Court found that the High Court had erred in not utilizing the tool available to it in



PAIA section 80 to examine the contents of the disputed record itself, in order to assist in adjudicating over the correctness of the refusal. The Constitutional Court thus remitted the matter to the High Court for that court to take a judicial peek. As the Constitutional Court said:

The role of section 80 in our constitutional democracy must be stressed. Its very purpose is to test the argument for nondisclosure by using the record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, rather than obstructs, access to information. The very existence of the court's power to examine the record should, in itself, deter frivolous claims of exemptions. If courts are hesitant to use this powerful tool to examine the record independently in order to assess the validity of claims to exemptions, this may very well undermine the constitutional right of access to information. Quite apart from this, judicial access to the record in cases of this kind is a common feature of other open democracies with well-developed and robust access to information jurisprudence.<sup>74</sup>

Indeed, this was clear support for an active judicial role in the lower courts as well as at the Constitutional Court level in examining the content of documents for which a national security justification is claimed. In robustly emphasizing PAIA section 80, the Constitutional Court reinforced the important role of the courts as an independent adjudicator of establishing the scope of PAIA grounds of refusal as a counter to a purely state-defined national interest. This rationale built on the similar line of reasoning around the culture of justification already established in *Independent Newspapers*.

In line with the Constitutional Court decision, the lower court duly took a judicial peek at the report.<sup>75</sup> As the High Court explained in its February 2013 judgment,

[o]n 14 June 2012 when this matter was called, the court ordered the respondents to produce the report to the court. Once the report was handed to the court in confidence, the court took a short adjournment and took a judicial peek at the record. When the court resumed, parties were afforded an opportunity to address the court [on] the procedure to be followed pursuant to the judicial peek.<sup>76</sup>

Since this case was a matter of first impression with respect to the judicial peek procedure, the parties and the High Court needed to take positions on and work out a number of procedural aspects. One such issue was the status of the rules promulgated for PAIA.<sup>77</sup> Further, the government attempted to introduce new evidence, an affidavit by former President Thabo Mbeki and one by current President Jacob Zuma.<sup>78</sup> Rejecting this evidence, the High Court judge again decided that the government had failed to meet its burden to justify the refusal of access to the record on the grounds of PAIA section 41.<sup>79</sup> Indeed, the High Court further backed up its decision by invoking and applying PAIA's public interest override, implying that the content of the judges' elections report might well disclose an illegality.<sup>80</sup>

The saga next risked descending into farce or worse as the report apparently went missing from the High Court's chambers.<sup>81</sup> By the time it resurfaced, the government was heading to appeal again, forcing a second hearing in the SCA on September 4, 2014.<sup>82</sup> In that court, the government again lost, the Court endorsing the reasoning of the lower court.<sup>83</sup> The Constitutional Court then dismissed the government's application to appeal, finally resolving the matter.<sup>84</sup> By that point, the law on the national security ground, PAIA section 41, had been made, tested, and confirmed.

### **The Protection of Information Bill/Act**

The final development demonstrating the legalization of the process of defining national security in South Africa is a long-running and still ongoing debate in South Africa over the Protection of Information legislation. A legislative reform effort directed toward redrafting the South African secrecy laws started in earnest in about 2006. Along the way, one Minister of Intelligence Services, R. Kasrils, tabled a bill, the Protection of Information Bill in 2008. Another Minister, S. Cele, tabled a significantly different version in 2010. The withdrawal of the 2008 version marked a watershed in the politics of the security sector. The bill was withdrawn for reasons related to the change in African National Congress (ANC) political leadership from Thabo Mbeki to Jacob Zuma in 2008, not for principled reasons such as further consultation.<sup>85</sup>

The legislative reform effort has been met with significant comment from civil society. Perhaps more important, both bills represented serious engagements with the South African parliamentary process, albeit in sharpening differing styles. By the start of 2014 and before the elections of May 7, 2014, the legislation in its various guises had been through a number of parliamentary stages and hearings and referrals and was finally ready to be signed (assented to) by the president's office, as required by the Constitution.<sup>86</sup> A year later, it remains with the president, in this unsigned state.

At least two significant positive purposes were served by the drafting of the Protection of Information Bill in 2008 and the subsequent debate that ensued over that draft and its successor. First, it was significant that at least some legitimate and post-apartheid legislative instrument to govern the classification and protection of security information is in the pipeline. Indeed, this law will replace the admittedly and manifestly unconstitutional 1982 Protection of Information Act.<sup>87</sup> The lack of a constitutionally compliant regulatory instrument for the security services and national security information has simply allowed the security services to make up and play by their own rules, without testing those rules against the Constitution. To take just one example, the MISS allows for authorial classification. There is at least an argument to make that such a practice will fall foul of the Constitution.<sup>88</sup>

Second, and more pertinent for the purposes of this article, the debate over this legislation has at least begun to give some direction on the matter

of defining national security. The vociferous criticism of the concept of national security as national interest (contained initially within the 2008 Protection of Information Bill) as being too broad has apparently been taken to heart within the security sector.<sup>89</sup> The 2010 draft bill uses the narrower military-based definition of national security.<sup>90</sup> Further, the intense criticism over the inclusion of commercial information within the protective ambit of the legislation has also apparently been heeded. The protection of such information in the 2008 bill is not to be found in the 2010 bill.<sup>91</sup> Whatever the debates over application and scope and other issues, at least some clarity with respect to the operative concept of national security for South Africa appears to have been achieved.

The difference between the 2008 and the 2010 bills is arguably significant for the constitutional regulation of the security services. The 2008 bill tried to be successful by preempting the debate. If it had been passed as initially intended, then the text and content of the legislation likely would have been used by the Constitutional Court as a platform for resolving and significantly deferring disputes over national security information. By contrast, it would appear as if the 2010 bill will be successful only in part by specifying itself important principles and provisions in the regulation of national security information. Regardless of the president's decision whether or not to sign the bill, the Constitutional Court will need to give an opinion on significant aspects of the bill's purport. The involvement of the Court will put an end to the ambiguity currently existing in some aspects of the legal environment around the intelligence services. The involvement of the Court could happen through a number of Constitutional procedural avenues.<sup>92</sup>

## CONCLUSION

In the *Independent Newspapers* case, Justice Zac Yacoob stated, "Secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception."<sup>93</sup> The continuing elaboration of the degrees of secrecy by judicial and other legal actors has become a firmly established component of the effective regulatory regime for the security services and for defining the concept of national security in South Africa.<sup>94</sup> The ironic consequence of the delay around the passage of the Protection of Information legislation is that the national law on access to information—PAIA—has become the most utilized platform for developing the concept of the national security of South Africa.

## ACKNOWLEDGMENTS

The author gratefully acknowledges the very helpful research assistance of Gabriella Razzano with an earlier version of this article, the assistance of the Open Society Justice Initiative, and the comments of an anonymous peer reviewer.

## NOTES

1. *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another (Independent (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (May 22, 2008), para. 41, <http://www.saflii.org/za/cases/ZACC/2008/6.html> (accessed September 8, 2014).*
2. Sandra Elizabeth Africa, *Well-kept Secrets: The Right of Access to Information and the South African Intelligence Services* (Johannesburg: Institute for Global Dialogue, 2009), 87–96.
3. Kate Allan, *Paper Wars: Access to Information in South Africa* (Johannesburg: Wits University Press, 2009), 4. [http://works.bepress.com/kate\\_allan/2](http://works.bepress.com/kate_allan/2).
4. Africa, *Well-kept Secrets*, 47–63.
5. South Africa Truth and Reconciliation Commission and Desmond Tutu, *Truth and Reconciliation Commission of South Africa Report*, vol. 1 (Truth and Reconciliation Commission, Cape Town, 1998), paras 24–25, Chap. 8.
6. Lauren Hutton, “Intelligence and Accountability in Africa,” Policy Brief, *ISS Africa*, <http://www.issafrica.org/publications/policy-brief/intelligence-and-accountability-in-africa> (accessed June 2, 2009).
7. *Ibid.*
8. *Ibid.*
9. Laurie Nathan, “Intelligence Bound: The South African Constitution and Intelligence Services,” *International Affairs* 86, no. 1 (January 2010): 198. doi:10.1111/j.1468-2346.2010.00875.x.
10. Sandy Africa and Siyabulela Mlombile, “Transforming the Intelligence Services,” October 2001, <http://www.law.harvard.edu/programs/criminal-justice/south-africa.pdf> (accessed September 12, 2014).
11. Nathan, “Intelligence Bound.”
12. *Ibid.*, 198.
13. *Ibid.*
14. Ministerial Review Commission Final Report, September 10, 2008, <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ReviewCommSept08.pdf> (accessed September 12, 2014).
15. Nathan, “Intelligence Bound,” 196.
16. Constitution of the Republic of South Africa, 1996, sec. 210 (b), <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (accessed November 27, 2013).
17. Intelligence Services Oversight Act 40 of 1994, sec. 7, <http://www.ssa.gov.za/Portals/0/SSA%20docs/Legislation/Intelligence%20Services%20Oversight%20Act%2040%20of%201994.pdf> (accessed May 5, 2015).
18. Lauren Hutton, “To Spy or Not to Spy? Intelligence and Democracy in South Africa,” *ISS Monograph* 157 (2009): 35. <http://www.issafrica.org/uploads/Mono157Full.pdf>.
19. Thulani Gqirana and Qaanitah Hunter, “Two More Zuma Allies Lined up for Key State Positions,” *M&G Online*, <http://mg.co.za/article/2015-02-24-two-more-zuma-allies-lined-up-for-key-state-positions/> (accessed February 25, 2015).
20. *Constitution of the Republic of South Africa, 1996*, sec. 199(8).

21. Nathan, "Intelligence Bound," 208.
22. Africa, *Well-kept Secrets*, 36.
23. Hutton, "To Spy or Not to Spy?," 37.
24. *Ibid.*, 39.
25. Klaaren, "Open Justice and Beyond 126 SALJ," 126 *South African Law Journal* 24 (2009).
26. Jonathan E. Klaaren, "The Promotion of Access to and Protection of National Security Information in South Africa," in *National Security and Open Government: Striking the Right Balance* (Syracuse: Campbell Public Affairs Institute, Syracuse University, 2003), 189–209. <http://escholarship.org/uc/item/18c3p5kd>.
27. "Promotion of Access to Information Act," [http://www.saflii.org/za/legis/consol\\_act/poatia2000366/](http://www.saflii.org/za/legis/consol_act/poatia2000366/) (accessed July 7, 2014); Iain Currie and Jonathan Klaaren, *The Promotion of Access to Information Act, Commentary* (Cape Town: Siber Ink CC, 2002).
28. Constitution of the Republic of South Africa (as Amended by 17th Amendment, August 23, 2013), <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (accessed November 27, 2013).
29. Protection of Personal Information Act sec. 39, [file:///C:/Users/09300606/AppData/Local/Temp/37067\\_26-11\\_Act4of2013ProtectionOfPersonalInfor\\_correct.pdf](file:///C:/Users/09300606/AppData/Local/Temp/37067_26-11_Act4of2013ProtectionOfPersonalInfor_correct.pdf) (accessed September 8, 2014).
30. *Promotion of Access to Information Act*, sec. 41.
31. Klaaren, "The Promotion of Access to and Protection of National Security Information in South Africa," 3.
32. Anthoni van Nieuwkerk, "South Africa's National Interest," *African Security Review* 13, no. 2 (2004): 89–101. doi:10.1080/10246029.2004.9627289.
33. *Constitution of the Republic of South Africa, 1996*, sec. 198.
34. "First draft model law: Access to information," sec. 41(2), [http://www.chr.up.ac.za/images/files/news/news\\_2011/draft\\_model\\_law\\_access\\_info.pdf](http://www.chr.up.ac.za/images/files/news/news_2011/draft_model_law_access_info.pdf) (accessed September 8, 2014). Section 41(3) further provides "For the purpose of this section, subversive or hostile action means: (a) an attack against the State by a foreign element; (b) acts of sabotage or terrorism aimed at the people of the State or a strategic asset of the State, whether inside or outside the State; or (c) a foreign or hostile intelligence operation."
35. African Commission on Human and Peoples' Rights, "English Model Law Booklet Access to Information," sec. 30, [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf) (accessed September 8, 2014). The final draft differs from the quoted first draft in only two minor ways.
36. *Ibid.*, sec. 31.
37. *Fakie NO v. CCII Systems (Pty) Ltd.* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (March 31, 2006), <http://www.saflii.org/za/cases/ZASCA/2006/52.html> (accessed September 8, 2014).
38. *Ibid.*, para. 17.
39. This case is also discussed in an analysis by a former intelligence official. Africa, *Well-kept Secrets*, 123–132.
40. *Fakie NO v. CCII Systems (Pty) Ltd.* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (March 31, 2006), para. 20.

41. Sapire, AJ, *M & G Limited and Another v. President of the Republic of South Africa and Others* (1242/09) [2010] ZAGPPHC 43 (June 4, 2010), <http://www.saflii.org/za/cases/ZAGPPHC/2010/43.html> (accessed September 8, 2014).
42. Ibid.
43. Ibid.
44. “The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (November 1996),” <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> (accessed September 12, 2014); Sandra Coliver, “Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information,” *Human Rights Quarterly* 20, no. 1 (1998): 12–80. doi:10.1353/hrq.1998.0005.
45. Coliver, “Commentary to,” 18.
46. Ibid.
47. T. Mendel, “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in *National Security and Open Government: Striking the Right Balance* (Syracuse: Campbell Public Affairs Institute, 2003), 1–30, <http://www.maxwell.syr.edu/uploadedFiles/campbell/events/NSOG.pdf> (accessed September 12, 2014).
48. *Promotion of Access to Information Act*, sec. 44; *ibid.*, sec. 42.
49. Bill B6G of 2010 (Parliament of the Republic of South Africa), “Protection of Information Bill [B6G-2010],” *Parliamentary Monitoring Group*, <http://www.pmg.org.za/bill/20131015-protection-information-bill-b6-g-2010> (accessed July 7, 2014).
50. Currie and Klaaren, *The Promotion of Access to Information Act, Commentary*, 54–57.
51. Fred Koetje, “South African National Security Policy: An International Relations Perspective,” *African Security Review* 8, no 6 (1999), <http://www.issafrica.org/PUBS/ASR/8NO6/SASecurity.html> (accessed September 12, 2014).
52. *Masetlha v. President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (October 3, 2007), <http://www.saflii.org/za/cases/ZACC/2007/20.html> (accessed September 15, 2014).
53. *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another* (Independent (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (May 22, 2008), para. 3, 4, and 6.
54. *Ibid.*, para. 76; Klaaren, “Open Justice and Beyond 126 SALJ.”
55. Klaaren, “Open Justice and Beyond 126 SALJ.”
56. *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another* (Independent (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (May 22, 2008), para. 54.
57. *Ibid.*, para. 163.
58. Klaaren, “Open Justice and Beyond 126 SALJ,” 26.
59. *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another* (Independent (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (May 22, 2008), para. 55–57, 86.

60. Ibid., para. 55.
61. Ibid., para. 9.
62. Ibid., para. 11.
63. Ibid., para. 77, 152.
64. Klaaren, “Open Justice and Beyond 126 SALJ,” 31.
65. *M & G Limited and Another v. President of the Republic of South Africa and Others* (1242/09) [2010] ZAGPPHC 43 (June 4, 2010), 8.
66. Ibid., 9.
67. Sapire, AJ, *M & G Limited and Another v. President of the Republic of South Africa and Others* (1242/09) [2010] ZAGPPHC 43 (June 4, 2010).
68. *The President of the Republic of South Africa and Others v. M & G Media Ltd.* (2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA); [2011] 3 All SA 56 (SCA)) [2010] ZASCA 177; 570/2010 (December 14, 2010), <http://www.saflii.org/za/cases/ZASCA/2010/177.html> (accessed September 8, 2014).
69. Ibid., para. 11.
70. Ibid., para. 20.
71. Ibid., para. 25.
72. Raulinga J, *M & G Media Ltd. v. President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (February 14, 2013), para. 36, <http://www.saflii.org/za/cases/ZAGPPHC/2013/35.html> (accessed September 8, 2014).
73. *President of the Republic of South Africa and Others v. M & G Media Ltd.* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (November 29, 2011), <http://www.saflii.org/za/cases/ZACC/2011/32.html> (accessed September 8, 2014).
74. Ibid., para. 52.
75. *M & G Media Ltd v. President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (February 14, 2013).
76. Ibid., para. 6.
77. Ibid., para. 18.
78. Ibid., para. 25 and 33.
79. Ibid., para. 56.
80. Ibid., para. 65–67.
81. Gylinnis Underhill, “Khampepe Report on Zim Election Miraculously Resurfaces,” *M&G Online*, <http://mg.co.za/article/2014-05-23-khampepe-report-miraculously-resurfaces/> (accessed May 26, 2014).
82. Sarah Evans, “Another ‘Judicial Peak’ to Determine Khampepe Release,” *M&G Online*, <http://mg.co.za/article/2014-09-04-another-judicial-peak-to-determine-khampepe-release/> (accessed September 5, 2014).
83. *President of the Republic of South Africa and Others v. M & G Media Limited* (998/2013) [2014] ZASCA 124; 2015 (1) SA 92 (SCA); [2014] 4 All SA 319 (SCA) (September 19, 2014), accessed May 5, 2015.

84. Chantelle Benajmin, "M&G Wins Right to View Khampepe Report on Zim Elections," *M&G Online*, <http://mg.co.za/article/2014-11-14-mg-wins-right-to-view-khampepe-report-on-zim-elections/> (accessed May 5, 2015).
85. Nathan, "Intelligence Bound."
86. *Constitution of the Republic of South Africa, 1996*, sec. 79.
87. Protection of Information Bill, B6H-2010 (Parliament of South Africa), "Protection of Information Bill," sec. 53, <http://db3sqepoi5n3s.cloudfront.net/files/131112b6h-2010.pdf> (accessed September 15, 2014).
88. Open Society Justice Initiative, "OSJI-Global Principles on National Security," <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf> (accessed September 15, 2014).
89. Protection of Information Bill, B28-2008 (Parliament of South Africa), "Protection of Information Bill, B-28 2008," sec. 15, [http://www.saha.org.za/resources/docs/PDF/Projects/POI\\_Bill.pdf](http://www.saha.org.za/resources/docs/PDF/Projects/POI_Bill.pdf) (accessed May 5, 2015).
90. Protection of Information Bill, B6H-2010 (Parliament of South Africa), "Protection of Information Bill B6h-2010," sec. 1, <http://db3sqepoi5n3s.cloudfront.net/files/131112b6h-2010.pdf> (accessed September 15, 2014).
91. "Protection of Information Bill."
92. *Constitution of the Republic of South Africa, 1996*, sec. 79–80.
93. *Independent Newspapers (Pty) Ltd. v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another* (Independent CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (22 May 2008), para. 41.
94. David Pozen, "Deep Secrecy," *Stanford Law Review* 62(2), <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/papers/reading/Pozen.pdf> (accessed September 12, 2014).