

PROPOSED AMENDMENTS TO CLAUSES 17, 21, 22, 23 AND CLASSIFICATION
REVIEW PANEL

PROPOSED AMALGAMATION OF CLAUSES 17 AND 21

[Direction for classification]

Conditions for classification and declassification

[Directions] Conditions for classification and declassification

17. (1) [For the purpose of classification, classification decisions must be guided by section 21 and the following:] The decision to classify information must be based solely on the guidelines and criteria set out in this Act and the regulations.

[(1)] (2) [For the purposes of classification, classification] Classification decisions must be guided by the following:

- (a) Secrecy **[exists]** is justifiable only when necessary to protect **[the]** national **[interest]** security;
- (b) classification of information may not under any circumstances be used to—
 - (i) conceal an unlawful act or omission, incompetence, inefficiency, or administrative error;
 - (ii) restrict access to information in order to limit scrutiny and thereby avoid criticism;
 - (iii) prevent embarrassment to a person, organisation, or organ of state or agency;
 - (iv) unlawfully restrain or lessen competition; or
 - (v) prevent, delay or obstruct the release of information that does not require protection under this Act;

- (c) the classification of information is an exceptional measure and should be conducted strictly in accordance with sections 11 and 15;
- (d) information is classified only when there is—
 - (i) a clear, justifiable and legitimate need to do so; and
 - (ii) a demonstrable need to protect the information in the interest of national [interest] security;
- (e) if there is significant doubt as to whether information requires protection, the matter must be referred to the Minister for a decision;
- [(f)] [the decision to classify information must be based solely on the guidelines and criteria set out in this Act, the policies and regulations made in terms of this statutory framework]**
- (g) State information that does not meet the criteria set out in this Act, the regulations and applicable policies may not be classified;
- (h) the decision to classify may not be based on any extraneous or irrelevant reason;
- (i) classification decisions **[ought to]** must **[be assessed and weighed]** balance openness against **[the benefits of]** secrecy taking into account the following factors:
 - (i) The vulnerability of the information;
 - (ii) the threat of damage from its disclosure;
 - (iii) the risk of loss of the information;
 - (iv) the value of the information to the adversaries of the Republic;
 - (v) the cost of protecting the information; and
 - (vi) the public benefit to be derived from the release of the information;
- (j) scientific and research information not clearly related to **[the]** national security **[and the national interest]** may not be classified;
- (k) information may not be reclassified after it has been declassified and released to the public under proper authority;
- (l) classification must be in place only for as long as the protection is actually necessary; and

- (m) where there is still a need for classification it may be that the information in question no longer requires high level classification and should be downgraded.

[(2) The application of the classification [principles] conditions may not in any way inhibit or prevent officials from informing authorised officials of such information in order to fulfil law enforcement or intelligence functions authorised or prescribed by law.]

[Continued classification of information]

21. (1) In taking a decision whether or not to continue the classification of information, the head of an organ of state must consider whether the declassification of classified information is likely or could reasonably be expected to cause [significant and] demonstrable harm to the national [interest] security of the Republic.]

[2] (3) Specific considerations with regard to the decision whether to classify information may include whether the disclosure may—

- (a) expose the identity of a confidential source, or reveal information about the application of an intelligence or law enforcement investigative method, or reveal the identity of an intelligence or police source when the unlawful disclosure of that source would clearly and demonstrably damage the national security of the Republic or the interests of the source or his or her family;
- (b) clearly and demonstrably impair the ability of government to protect officials or persons for whom protection services, in the interest of national security, are authorised;
- (c) seriously and substantially impair national security, defence or intelligence systems, plans or activities;
- (d) seriously and demonstrably impair relations between South Africa and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the Republic;

- (e) violate a statute, treaty, or international agreement, including an agreement between the South African government and another government or international institution; or
- [(f) cause financial loss to a non-state institution or will cause substantial prejudice to such an institution in its relations with its clients, competitors, contractors and suppliers; or]
- (g) cause life threatening or other physical harm to a person or persons.

[(3) The Minister may after taking into consideration all aspects as indicated in subsection (2), sections 11 and 17(1)(i) authorise the classification or declassification of any category or class of classified information.]

[(2) (4) The application of the classification [principles] conditions may not in any way inhibit or prevent officials from informing authorised officials of such information in order to fulfil law enforcement or intelligence functions authorised or prescribed by law.]

Or FURTHER ALTERNATIVE

Conditions for classification of information

17. (1) The decision to classify information must be determined in accordance with the guidelines and the provisions of the Act.

(2) The decision to classify information must be guided by the following:

- (a) Secrecy is justifiable only when necessary to protect national security;
- (b) classification of information may not be used to—
 - (i) conceal an unlawful act or omission, incompetence, inefficiency, or administrative error;
 - (ii) restrict access to information in order to limit scrutiny and thereby avoid criticism;
 - (iii) prevent embarrassment to a person, organisation, or organ of state or

- agency;
- (iv) unlawfully restrain or reduce competition; or
- (v) prevent, delay or obstruct the release of information that does not require protection under this Act;
- (c) the classification of information is an exceptional measure and must be conducted in accordance with the provisions of the Act;
- (d) information must only be classified when there is—
 - (i) a clear, justifiable and legitimate need to do so; and
 - (ii) a demonstrable need to protect the information in the interest of national security;
- (e) the decision to classify information must balance openness against secrecy taking into account the following factors:
 - (i) The vulnerability of the information;
 - (ii) the threat of damage from its disclosure;
 - (iii) the risk of loss of the information;
 - (iv) the value of the information to the adversaries of the Republic;
 - (v) the cost of protecting the information; and
 - (vi) the public benefit to be derived from the release of the information;
- (f) scientific and research information not clearly related to national security may not be classified;
- (g) information may not be reclassified after it has been declassified and released to the public under proper authority; and
- (h) classified information must only remain classified for as long as the protection is necessary.

(3) Specific considerations for the decision whether to classify information may include whether the disclosure may—

- (a) expose the identity of a confidential source, or reveal information about the

application of an intelligence or law enforcement investigative method, or reveal the identity of an intelligence or police source when the unlawful disclosure of that source would clearly and demonstrably damage the national security of the Republic or the interests of the source or his or her family;

- (b) clearly and demonstrably impair the ability of government to protect officials or persons for whom protection services, in the interest of national security, are authorised;
- (c) seriously and substantially impair national security, defence or intelligence systems, plans or activities;
- (d) seriously and demonstrably impair relations between South Africa and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the Republic;
- (e) violate a statute, treaty, or international agreement, including an agreement between the South African government and another government or international institution; or
- (f) cause life threatening or other physical harm to a person or persons.

(4) Where there is a need for classified information to remain classified, and such information no longer requires high level classification, the classified information must be downgraded.

(5) The application of the classification conditions may not in any way inhibit or prevent officials from informing authorised officials of such information in order to fulfil law enforcement or intelligence functions authorised or prescribed by law.

NEW CLAUSE

Continued classification of information

XXX. If it is established that the classified information comply with the guidelines in section 17, that information may continue to be classified.

PROPOSED CLAUSE 22

Regular reviews of classified information

22 (1) **[At least once every 10 years, the]** The head of an organ of state must at least every 10 years review the classified status of all classified information held **[or possessed in]** by that organ of state.

(2) The first 10-year period referred to in subsection (1) commences on the effective date of this Act.

(3) The status of classified information must be reviewed when there is a need or a proposal to use that classified information in a public forum such as in a court or tribunal proceedings.

(4) When conducting a review, the head of an organ of state must apply the criteria for the continued classification of information ^{class & decision of info} **[contemplated]** ^{sub out - then} set out in this chapter. ^{could}

[(5) Organs of state inform the Minister and the public of the results of the regular reviews]

(5) Despite subsection (1), the head of an organ of state may review the classified status of classified information at any time.

(6) (a) The head of an organ of state must annually and in the prescribed manner prepare a report on the regular reviews conducted under section 22(1) or (5) by that organ of state and submit such report to the Classification Review Panel for certification.

(b) The Minister must table the report within 30 days of receipt thereof in Parliament if Parliament is in session, or if Parliament is not in session within 14 days after the commencement of the next Parliamentary session.

(c) The head of the organ of state must publish the annual report.

PROPOSED CLAUSE 23

23 (1) If a request is made for information and it is established that the information requested is classified, that request must be referred to the relevant head of the organ of state for a review of the classification status of the information requested.

(2) In conducting such a review the head of an organ of state must take into account the conditions for classification and declassification as set out in this chapter.

(3) If it is established from the application submitted in subsection (1) that the information pertains to information that will reveal evidence of-

(i) a substantial contravention of, or failure to comply with the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the information clearly outweighs the harm that will arise from the disclosure.

the head of the organ of state must declassify the classified information in accordance with section 19 and grant the request for declassification of classified information.

CLASSIFICATION REVIEW PANEL

Establishment of Classification Review Panel

xx. (1) There is hereby established a Panel to be known as the Classification Review Panel.

(2) All organs of state must provide the Classification Review Panel such assistance as may be reasonably required for the effectiveness of the Classification Review Panel in the performance of its functions.

Functions of Classification Review Panel

xx. (1) The Classification Review Panel must—

(a) review and oversee status reviews, classifications and declassifications contemplated in this Act;

(b) receive all reports of 10 year reviews on the status of all classified information conducted by the organs of state; and

(c) receive, once a year, all reviews on status of classified information conducted by the organs of state during the course of a financial year.

(2) The Classification Review Panel may, with the concurrence of the Minister, make rules not in conflict with this Act for matters relating to the proper performance of the functions of the Classification Review Panel, including—

(a) time periods within which reports by the heads of organs of state must be submitted;

(b) information to be supplied when a report is submitted;

(c) procedures regarding the deliberations and the conduct of work of the Panel; and

(d) random sampling methods to be employed in reviewing compliance under this Chapter.

(3) The administrative work connected with the performance of the functions of the Classification Review Panel must be performed by officers of the Department designated by the Director-General¹ for that purpose.

Constitution and appointment of Classification Review Panel

xxx. (1) The Classification Review Panel consists of five members appointed by the Minister upon the approval by Parliament by resolution, according to the following principles, namely—

- (a) participation by the public in the nomination process;
- (b) transparency and openness; and
- (c) the publication of a shortlist of candidates for appointment, with due regard to subsections (2), (4) and (5).

(2) The Joint Standing Committee on Intelligence must submit a list of suitable candidates with recommendations to the National Assembly and the National Council of Provinces, at least one and a half times the number of members to be appointed, for approval.

(3) The National Assembly and the National Council of Provinces must upon approval submit the list to the Minister for appointment.

(4) The Classification Review Panel is headed by a Chairperson who must either be an admitted attorney or advocate with at least ten years experience.

(5) Other four members of the Classification Review Panel must be suitably qualified of whom—

- (a) at least one member must have expertise in the Constitution and the law;
- (b) at least one member must have an understanding of national security matters; and
- (c) at least one member must have an understanding of archive related matters.

(6) The members of the Classification Review Panel are appointed for a term of five years which term is renewable for one additional term only.

¹ Definition for the Director General

(7) A person may not be appointed as a member of the Classification Review Panel unless that person has a valid security clearance certificate issued under the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

Disqualification from membership

xx. (1) A person may not be appointed as a member of the Classification Review Panel if he or she—

- (a) is not a citizen of the Republic;
- (b) is not permanently resident in the Republic;
- (c) is a public servant or the holder of any other remunerated position under the State;
- (d) is a member of Parliament, any provincial legislature or any municipal council;
- (e) is an office-bearer or employee of any party, movement or organisation of a party-political nature;
- (f) is an unrehabilitated insolvent;
- (g) has been declared by a court to be mentally ill or disordered;
- (h) has been sentenced to imprisonment without the option of a fine; or
- (i) has been removed from an office of trust on account of misconduct involving theft or fraud.

Vacation of office

xx. A member ceases to be a member of the Classification Review Panel if the member—

- (a) resigns;
- (b) is removed on the grounds of misconduct, incompetence or incapacity after a finding to that effect by the Joint Standing Committee on Intelligence;
- (c) fails to attend two consecutive meetings of the Classification Review Panel, unless his or her apology has been accepted; or
- (d) becomes disqualified in terms of section 29.

Remuneration of members

xx. Members of the Classification Review Panel must be paid such remuneration and allowances as determined by the Minister after consultation with the Director-General and with the approval of the Minister of Finance.

Meetings of Classification Review Panel

xx. (1) The Classification Review Panel meets as often as the circumstances require, but must meet at least four times a year, at such times and places as the chairperson may determine.

(2) The Classification Review Panel may determine its own procedure for its meetings.

(3) The quorum for any meeting of the Classification Review Panel is three members.

(4) No decision taken by or act performed under the authority of the Classification Review Panel shall be invalid by reason only of a casual vacancy on the Classification Review Panel or of the fact that a person who was not entitled to sit as a member of the Classification Review Panel sat as a member at the time when the decision was taken or that act was authorised, if the decision was taken or the act was authorised by the requisite majority of the members of the Classification Review Panel who were present at the time and entitled to sit as members.

Decisions of Classification Review Panel

xx. (1) The Classification Review Panel may confirm, vary or set aside any classification decision taken by the head of an organ of state.

(2) Where the Classification Review Panel sets aside or vary a classification decision taken by the head of an organ of state the Classification Review Panel may substitute its own decision for it.

(3) The Classification Review Panel must before reaching a final decision afford the head of an organ of state an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

(2) A decision of the Classification Review Panel binds an organ of state subject to any appeal that the organ of state may lodge with a competent High Court.

Reporting

xx. (1) The Classification Review Panel must, in respect of each financial year, prepare an annual report on the activities of the Classification Review Panel undertaken during the financial year.

(2) The Classification Review Panel must submit the report contemplated in subsection (1) to the Minister not later than five months after the end of the financial year in question.

(3) The annual report must be prepared in a form and contain information determined by the Minister.

(4) The Minister must table the annual report contemplated in subsection (1) in Parliament within 30 days of receipt thereof if Parliament is in session, or if Parliament is not in session within 14 days after the commencement of the next Parliamentary session.

(5) The Classification Review Panel must, through the Joint Standing Committee on Intelligence, submit any other report that Parliament may require.

(6) The Chairperson of the Classification Review Panel must publish any annual report of the Classification Review Panel.

