

COMMITTEE PROPOSALS

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19 August 2011

Clause 1:

["national security" means the resolve of South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life and includes protection of the people and occupants of the Republic from hostile acts of foreign intervention, terrorist and related activities, espionage, and violence whether directed from, or committed within the Republic or not, and includes the carrying out of the Republic's responsibilities to any foreign country in relation to any of the matters referred to in this definition;]

PROPOSAL

"national security [means] includes the protection of the people of the Republic and the territorial integrity of the Republic against—

- (a) the threat of use of force or the use of force;
- (b) the following acts:
 - (i) hostile acts of foreign intervention;
 - (ii) terrorism or terrorist related activities
 - (iii) espionage;

[**(iv) information peddling;**]

- (iv) exposure of a State security matter;
 - (v) exposure of economic, scientific or technological secrets vital to the Republic's stability, security, integrity and development;
 - (vi) sabotage; and
 - (vii) violence
- (c) whether directed from, or committed within, the Republic or not, and includes the capacity of the Republic to respond to the use of or the threat of the use of force and carrying out of the Republic's responsibilities to any foreign country and international organisations in relation to any of the matters referred to in this definition.

FURTHER PROPOSAL

"National Security" means—

- (a) the protection of the Republic from:
 - (i) threats to the sovereignty or territorial integrity of the Republic;
 - (ii) espionage;
 - (iii) terrorism;
 - (iv) sabotage;
 - (v) serious violence aimed at changing the constitutional order of the Republic;
- (b) whether directed from or committed within the Republic;
- (c) but does not include lawful political activity, advocacy, protest or dissent.

FURTHER PROPOSAL

["national security" means the resolve of South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life and includes protection of the people and occupants of the Republic from hostile acts of foreign intervention, terrorist and related activities, espionage, and violence whether directed from, or committed within the Republic or not, and includes the carrying out of the Republic's responsibilities to any foreign country in relation to any of the matters referred to in this definition;]

(a) "national security" means the protection of the people of the Republic as a whole [and] or the territorial integrity of the Republic [against] from any present and clear threat of the following acts when such threat affects the Republic's stability, security, integrity or development:

(b) **[the threat of]** use of generalized force or generalized violence **[the use of force];**

(c) **[the following acts]:**

- (i) hostile foreign intervention,
- (ii) terrorism or terrorist and related activities,
- (iii) espionage
- (iv) information peddling,
- (v) **[exposure of State security matters]¹,**
- (vi) exposure of economic, scientific or technological secrets vital to the Republic's stability, security, integrity and development
- (vii) sabotage, and
- (viii) **[violence],**

whether directed from or committed within the Republic or not, and includes the carrying out of the Republic's responsibilities to any foreign country in relation to any of the matters referred to in this definition

Classification levels

[15.] **13.** (1) State information may be classified as "Confidential" if the information is **[—(a)]** sensitive information, the **[unlawful]** disclosure of which is likely or could reasonably be expected to cause demonstrable harm [may be harmful] to **[the security or]** national **[interest]** security of the

¹ If state security matters are covered by clauses 13 and 15, they are covered. If they are not, they should not be kept secret. Anything that matter can be classified and protected that way. Therefore, this criterion is to be deleted together with the related definition and clause.

Republic or is likely or could reasonably be expected to prejudice the Republic in its international relations;

[(b) [commercial information] the disclosure of which may cause financial clients, competitors, contractors and suppliers.]

(2) State information may be classified as "Secret" if the information is—

(a) sensitive information, the disclosure of which is likely or could reasonably be expected to cause serious demonstrable harm to [endanger] [the security or] national [interest] security of the Republic or is likely or could reasonably be expected to jeopardise the international relations of the Republic; or

[(b) commercial information, the disclosure of which may cause serious financial loss to an entity;]

[(c)] (b) personal information, the disclosure of which **[may]** is likely or could reasonably be expected to endanger the physical security of a person.

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to demonstrably cause serious or irreparable harm to the national **[interest] security** of the Republic or **[may]** is likely or could reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) commercial information, the disclosure of which may—

(i) **have disastrous results with regard to the future existence of an entity; or**

(ii) **cause serious and irreparable harm to the security or interests of**

the state;]

(c) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

(4) The classifying authority must use the guidelines for classification levels as prescribed.

PROPOSAL

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to demonstrably cause **[serious]** grave or irreparable harm to the national **[interest]** security of the Republic or **[may]** is likely or could reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) commercial information, the disclosure of which may—

(i) **have disastrous results with regard to the future existence of an entity; or**

(ii) **cause serious and irreparable harm to the security or interests of the state;]**

(c) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

FURTHER PROPOSAL

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to demonstrably cause serious **[or]** and irreparable harm to the national **[interest]** security of the Republic or **[may]** is likely or could reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) commercial information, the disclosure of which may—

- (i) **have disastrous results with regard to the future existence of an entity; or**
- (ii) **cause serious and irreparable harm to the security or interests of the state;]**

(c) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

OR FURTHER PROPSAL

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to demonstrably cause **[serious or]** irreparable harm to the national **[interest]** security of the Republic or **[may]** is likely or could reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) commercial information, the disclosure of which may—

- (i) have disastrous results with regard to the future existence of an entity; or
 - (ii) cause serious and irreparable harm to the security or interests of the state;]
- (c) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

FURTHER PROPOSAL

Classification levels

[15.] 13. (1) State information may be classified as "Confidential" if the information is **[—(a)]** sensitive information, the **[unlawful]** disclosure of which is likely or could reasonably be expected to cause demonstrable harm [may be harmful] to the security or national **[interest]** security of the Republic or could reasonably be expected to prejudice the Republic in its international relations;

[(b)] [commercial information] the disclosure of which may cause financial clients, competitors, contractors and suppliers.]

(2) State information may be classified as "Secret" if the information is—
 (a) sensitive information, the disclosure of which is likely or could reasonably be expected to cause [serious] grave² demonstrable harm to [endanger] the security or national **[interest]** security of the Republic or is likely or could reasonably be expected to jeopardise the international relations of the Republic; or

[(b)] commercial information, the disclosure of which may cause serious financial loss to an entity;]

[(c)] (b) personal information, the disclosure of which **[may]** is likely or could reasonably be expected to endanger the physical security of a person.

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to cause [serious] grave [or] and³ irreparable harm to the national [interest] security of the Republic or [may] is likely or could reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b)] commercial information, the disclosure of which may—

- (i) have disastrous results with regard to the future existence of an entity; or
- (ii) cause serious and irreparable harm to the security or interests of the state;]

² By requiring harm to be "serious" in this section, by necessary implication the harm referred to in (1) needs not to be "serious" at all.

³ See previous footnote. Plus, if an "or" is used rather than an "and" the first test will suffice, which would make the grounds for this classification identical to the preceding one, which is erroneous.

(c) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

(4) Subject to this Act The classifying authority must use the guidelines for classification levels as prescribed. *Where does this come from?? It was not in the Bill and I do not remember it having been agreed to! Without the qualification, given its position, this can only mean that the "prescribed guidelines", (which is a contradiction in terms) can add additional criteria and grounds, which makes this provision not a ceiling but a floor.*

Clause 18 in Bill:

Report and return of classified records

[18.] 16. A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law, must report such possession and return such record to a member of the South African Police Service or the Agency.

PROPOSAL:

18. 16. (a) A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law,

must report such possession and return such record to a member of the South African Police Service or the Agency.

(b) Unless such a classified record:

- (i) reveals an unlawful act or omission, incompetence, inefficiency or administrative error;
- (ii) restricts access to information in order to limit scrutiny and thereby avoid criticism;
- (iii) prevents embarrassment to a person, organisation, organ of state or agency;
- (iv) unlawfully restrains or lessens competition;
- (v) reveals an imminent and serious public safety or environmental risk; or
- (vi) prevents, delays or obstructs the release of information that does not require protection under this Act.

FURTHER PROPOSAL

[Report and return of classified records

[18.] 16. A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law, and knowing that such information is classified, must report such possession and return such record to a member of the South African Police Service or the Agency.] *We object to the State turning the citizen into a policeman or an intelligent officer. It is the State's job to look after and retrieve its secrets! If maintained the underlined insertion is necessary.*

Clause 21

Status review

(2) The head of an organ of state upon receipt of a request made in the prescribed manner for a review of the status of classified information must make a decision and in the case of refusal provide reasons within 90 days of date of receipt of such a request.

Pertaining to the question whether or not the time period provided for in section 21 (2) complies with the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000).

Section 5 of PAJA provides that:

“(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

- (i) the objects of the empowering provision;
- (ii) the nature, purpose and likely effect of the administrative action concerned;

- (iii) the nature and the extent of the departure;
- (iv) the relation between the departure and its purpose;
- (v) the importance of the purpose of the departure; and
- (vi) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6) (a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

Appeal to Court

33 A. A person who is aggrieved by a decision made with regard to a request for access to classified information may apply to a court for appropriate relief in the manner provided for in chapter 2 of Part 4 of the Promotion of Access to Information Act.

Disclosure of classified [and related] information

[38] 47. Any person, other than as contemplated in section 42, who unlawfully discloses classified information in contravention of this Act is guilty of an offence and

liable on conviction to ~~a fine or to~~ imprisonment for a period **[not less than three years but]** not exceeding five years, except where such disclosure is-

- (a) protected under the Protected Disclosures Act, 2000 (Act No 26 of 2000); or section 159 of the Companies Act, 2008 (Act No 71 of 2008); or
- (b) authorised by any other law.

PROPOSAL

[38.] 47. (a) Any person who unlawfully discloses classified information in contravention of this Act is guilty of an offence and liable on conviction to ~~a fine or to~~ imprisonment for a period not exceeding five years.

(b) Unless such disclosure:

- (i) reveals an unlawful act or omission, incompetence, inefficiency or administrative error;
- (ii) restricts access to information in order to limit scrutiny and thereby avoid criticism;
- (iii) prevents embarrassment to a person, organisation, organ of state or agency;
- (iv) unlawfully restrains or lessens competition;
- (v) reveals an imminent and serious public safety or environmental risk;
- (vi) prevents, delays or obstructs the release of information that does not require protection under this Act; or

(c) Where such disclosure is:

- (i) Protected under the Protected Disclosures Act, 2000 (Act No. 26 of 2000), or section 159 of the Companies Act, 2008 (Act No. 71 of 2008); or

- (ii) Authorised by any other law.

FURTHER PROPOSAL

[38.] [Any person who discloses classified information or information referred to in section 11(3)(g) outside of the manner and purposes of this Act except where such disclosure is for a purpose and in a manner authorised by law, is guilty of an offence and liable on conviction to imprisonment for a period not less than three years but not exceeding five years, subject to section 1(6).]

47. Any person who unlawfully discloses classified information in contravention of this Act is guilty of an offence and liable on conviction to imprisonment for a period [not less than three years but] not exceeding five years, except where such disclosure is-

- (a) protected under the Protected Disclosures Act, 2000 (Act No 26 of 2000); or section 159 of the Companies Act, 2008 (Act No 71 of 2008); or
 (b) authorised by any other law.

Public Interest, Public domain and erroneous classification defenses

~~Xx (1) Anyone charged with an offence under this Act shall be entitled to raise as an exculpatory defence~~

- ~~(a) the improper classification of the information concerned, or
 (b) the disclosure of the relevant information serving a reason of public interest of importance, which outweighs the reason for its classification.~~

~~(2) Any classified information which falls within the public domain or is disclosed in a manner which can make such information accessible by person other than those authorized to access it shall be deemed no longer classified or classifiable in terms of this Act, save in respect of anyone who first caused such information to become of public domain or so disclosed~~

FURTHER PROPOSAL

[41.] ■. (1) No person is guilty of an offence of unauthorised disclosure under this Act, provided that—

- (a) the person disclosed the information in good faith; and
 (b) the public interest in the disclosure outweighs the public interest in non-disclosure.

(2) When deciding whether or not the public interest in disclosure outweighs the public interest in non-disclosure of particular information, a court may have reference to whether the classified information disclosed concerns, shows or tends to show *inter alia* one or more of the following—

- (a) a substantial contravention of, or failure to comply with the law;
- (b) an imminent and serious public safety, public health or environmental risk;
- (c) that an undue advantage is being given to anyone in a competitive bidding process;
or
- (d) that the public is being significantly misled by an action or statement of a person, and the public interest in making the disclosure clearly outweighs the reasonably foreseeable harm in not making the disclosure.

(3) No person shall be guilty of the offence of the unlawful possession or disclosure of classified information if they have reason to believe that the information has been disclosed under section 41(1).

OR FURTHER PROPOSAL

[41.] ■. (1) No person is guilty of an offence of unauthorised disclosure under this Act, provided that—

- (a) the person disclosed the information in good faith; and
- (b) the public interest in the disclosure outweighs the public interest in non-disclosure.

(2) When deciding whether or not the public interest in disclosure outweighs the public interest in non-disclosure of particular information, a court may have

reference to whether the classified information disclosed concerns, shows or tends to show *inter alia* one or more of the following—

- (a) a substantial contravention of, or failure to comply with the law;
- (b) an imminent and serious public safety, public health or environmental risk;
- [(c) that an undue advantage is being given to anyone in a competitive bidding process;
- or
- (d) that the public is being significantly misled by an action or statement of a person, and the public interest in making the disclosure clearly outweighs the reasonably foreseeable harm in not making the disclosure.]

(3) No person shall be guilty of the offence of the unlawful possession or disclosure of classified information if they have reason to believe that the information has been disclosed under section 41(1).

Failure to report possession of classified information

[39.] 48 Any person who fails to comply with section [18] 16 is guilty of an offence and liable to a fine or imprisonment for a period [not less than three years but] not exceeding five years [or to both such fine and imprisonment, subject to section 1(6)].

PROPOSAL

CLAUSE 39

39. **48.** (a) Any person who fails to comply with section 18 is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years **[or to both such a fine and imprisonment].**

(b) Unless the classified record:

- (i) reveals an unlawful act or omission, incompetence, inefficiency or administrative error;
- (ii) restricts access to information in order to limit scrutiny and thereby avoid criticism;
- (iii) prevents embarrassment to a person, organisation, organ or state or agency;
- (iv) unlawfully restrains or lessens competition;
- (v) reveals an imminent and serious public safety or environmental risk; or
- (vi) prevents, delays or obstructs the release of information that does not require protection under this Act.

FURTHER PROPOSAL

[39.] 48 Any person who fails to comply with section **[18] 16** is guilty of an offence and liable to a fine or imprisonment for a period **[not less than three years but]** not exceeding five years **[or to both such fine and imprisonment,]** **[subject to section 1(6)].** See **comments in respect of clause 16**

⁴ **[Report and return of classified records**
[18.] 16. A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law, and knowing that such information is classified, must report such possession and return such record to a member of the South African Police Service or the Agency. *[We object to the State turning the citizen into a policeman or an intelligent officer. It is the State's job to look after and retrieve its secrets! If maintained the underlined insertion is necessary.]*

ADDITIONAL IFP PROPOSALS:

Attempt, conspiracy and inducing another person to commit offence

[37.] 46 Any person who attempts, conspires with any other person, or aids, abets, induces, instigates, instructs or commands, counsels or procures another person to commit an offence in terms of this Act, is guilty of an offence and liable on conviction to half the punishment to which a person convicted of actually committing that offence would be liable. You can't punish the who aids and abets on the basis of the who conceives and executes.

Destruction or alteration of valuable information

41. 50. [Any person who unlawfully and intentionally destroys or alters valuable information, except where such destruction or alteration is for a purpose and in a manner authorised by law, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years].

Any person who intentionally and unlawfully destroys, removes, alters or erases valuable information is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years [or to both such fine and imprisonment].⁵

Prohibition of disclosure of a state security matter

[43.] 52. (1) Any person who has in his or her possession or under his or her control or at his or her disposal information which he or she knows or reasonably should know is a state security matter, and who—

(a) discloses such information to any person other than a person to whom he or she is authorised to disclose it or to whom it may lawfully be disclosed;

(b) publishes or uses such information in any manner or for any purpose which is prejudicial to the security or interests of the State;

(c) retains such information when he or she has no right to retain it or when it is contrary to his or her duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or

(d) neglects or fails to take proper care of such information, or so to conduct himself or herself as not to endanger the safety thereof.

is guilty of an offence and liable on conviction to imprisonment for a period [not less than five years but not exceeding 10 years, [subject to section 1(6)], or, if it is proved that the publication or disclosure of such information took place for the purpose of its being disclosed to a foreign state to imprisonment for a period [not less than 10 years but] not exceeding 15 years, [subject to section 1(6)]. Delete if state security matters are covered by clauses 13 and 15, they are covered. If they are not, they should not be kept secret. Anything that matters can be classified and protected that way. Otherwise this makes 13 and 15 meaningless.

Protection of state information before courts (clause flagged)

[46.] 55. (1) Classified information that is placed before a court may not be disclosed to persons not authorised to receive such information unless a court, in the interests of justice, and upon considering issues of national security, [national interest] security of the Republic as referred to in section 11 and any other law, orders full or limited disclosure, with or without conditions.

(2) Unless a court orders the disclosure of classified information or orders the limited or conditional disclosure of classified information, the court must issue directions for the proper protection of such information during the course of legal proceedings, which may include, but not limited to—

- (a) the holding of proceedings, or part thereof, *in camera*;
- (b) the protection from disclosure and publication of those portions of the record containing the classified information; or
- (c) the implementation of measures to confine disclosure to those specifically authorised to receive the information.

(3) A court may not order the disclosure of classified information without taking reasonable steps to obtain the written or oral submissions of the classification authority that made the classifications in question or alternatively to obtain the submissions of the Director-General of the Agency.

(4) The submissions referred to in subsection (3) may not be publicly disclosed and any hearing held in relation to the determination referred to in subsection (1) must be held *in camera* and any person not authorised to receive such information may not attend such hearings unless authorised by a court.

(5) A court may, if it considers it appropriate, seek the written or oral submissions of interested parties, persons and organisations but may not disclose the actual classified information to such persons or parties prior to its order to disclose the information in terms of subsection (1).

⁵ not required provided for in the Adjustment of Fines Act

(6) A classification authority or the Director General of the Agency, as the case may be in consultation with the Minister, must declassify information required in legal proceedings, either in whole or in part, unless it is strictly necessary to maintain the classification in terms of this Act; alternatively, provided that any information capable of being used as a defence in criminal proceedings must be declassified. Under no condition of the State can the information which the States withhold from its processes.

(7) In addition to the measures set out in this section, a court in criminal proceedings has the same powers as those conferred upon a court under section 154(1) and (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and the said section applies with the necessary changes.

(8) Any person who discloses or publishes any classified information in contravention of an order or direction issued by a court in terms of this section is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 10 years.

(9) (a) The head of an organ of state may apply to a court for an order restricting the disclosure of unclassified state information that is part of, or is intended to be part of an open court record, which, if publicly disclosed or published, may undermine the national [interest] security.

(b) A court hearing such an application may determine its own procedures and may impose limitations on the disclosure of the information in question pending its decision.

(10) A court which acts in terms of this section must endeavour to accommodate the principle of open justice to as great an extent as possible without risking or compromising the national [interest.] security.

(11) At any court hearing relating to this Act it is mandatory that a minimum of three judicial officers preside over the matter.