

COMMITTEE PROPOSALS

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23 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;]

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"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 to undermine the constitutional state in the Republic;
 - (v) exposure of economic, scientific or technological secrets vital to the Republic's stability, security, integrity and development;
 - (vi) sabotage; and
 - (vii) violence directed at overthrowing the constitutional system of government in the Republic;
- (c) whether directed from, or committed within, the Republic or not, and **[includes]** acts directed at undermining 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,¹.

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;

¹ but does not include lawful political activity, advocacy, protest or dissent

- (b) whether directed from or committed within the Republic;
- (c) but does not include lawful political activity, advocacy, protest or dissent.

FURTHER PROPOSAL *(11/11)*

["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]²,**
 - (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

Application of Act

² 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.

3. (1) The provisions of this Act with regard to the protection of valuable information against alteration, loss and destruction apply to all organs of state.

(2) The classification, reclassification and declassification provisions of this Act—

(a) apply to the security services of the Republic and the oversight bodies referred to in Chapter 11 of the Constitution; and

(b) may be assigned by the Minister, on good cause shown, by publication in the Gazette, to any organ of state that applies in the prescribed manner, to have those provisions apply to it.

PROPOSAL

(b) may be assigned by the Minister, on good cause shown, by publication in the Gazette, to any organ of state that applies in the prescribed manner, to have those provisions apply to it, and which can demonstrate that the information to be classified relates directly to national security.

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 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.

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- (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] grave³ 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] and⁴ 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) 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*

³ 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.

⁴ 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.

remember it having been agreed to! Without the qualification, given its positions, 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.*

[Appeal] Application 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 after the requester has exhausted the internal appeal procedure against a decision of the relevant Minister of the organ of state in question.] in the manner provided for in chapter 2 of Part 4 of the Promotion of Access to Information Act.]

Transfer of public records to National Archives

[26.] 34. (1) The head of an organ of state must review the classification of state information before it is transferred to the National Archives or other archives established by law.

(2) Subject to section 18, at the date on which this Act takes effect, public records, including records marked classified that are transferred to the National Archives or other archives **[are considered to be automatically declassified]** must be declassified in accordance with section 17⁵.

(3) The head of an organ of state that holds classified records that originated in another organ of state must—

- (a) notify the originating organ of state before transferring classified records to the National Archives or other archives; and
- (b) abide by the reasonable directions of the originating organ of state.

(4) Classified records held by the National Archives or other archives at the commencement of this Act, which have been classified for less than 20 years, are subject to the provisions of this Act.

(5) An organ of state, which transferred classified information to the National Archives or other archives before the commencement of this Act, retains its responsibilities in terms of this Act.

[(6) Where an organ of state fails to act in terms of part B of Chapter 6, classified records in possession of the National Archives or other archives are regarded as being automatically declassified at the expiry of the relevant protection periods referred to in section [20] 18.]

Hostile activity offences

[33] 42. (1) It is an offence punishable on conviction by imprisonment for a period [not less than 15 years but] not exceeding [25] 20 years [subject to section 1(6)] for any person to —

- (a) [to] unlawfully and intentionally communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known [or suspected] would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic; or
- (b) [to] unlawfully make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known [or suspected] would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic.

(2) It is an offence punishable on conviction by imprisonment for a period [not less than 10 years but] not exceeding 15 years, [subject to section 1(6)] for any person to —

- (a) **[to]** unlawfully and intentionally communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the **[state]** Republic; or
- (b) **[to]** unlawfully make, obtain, collect, capture or copy a record containing state information classified secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the **[state]** Republic :

(3) It is an offence punishable on conviction by imprisonment for a period **[not less than three years but]** not exceeding five years, **[subject to section 1(6):]** for any person to —

- (a) **[to]** unlawfully and intentionally communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the **[state]** Republic; or
- (b) **[to]** unlawfully make, obtain, collect, capture or copy a record containing state information classified confidential which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the **[state]** Republic.

PROPOSAL

[33] 42. (1) It is an offence punishable on conviction by imprisonment for a period **[not less than 15 years but]** not exceeding **[25]** 20 years **[subject to section 1(6)]** for any person to —

- (a) **[to]** unlawfully and intentionally communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security; or
- (b) **[to]** unlawfully make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security;

(2) It is an offence punishable on conviction by imprisonment for a period **[not less than 10 years but]** not exceeding 15 years, **[subject to section 1(6)]** for any person to —

- (a) **[to]** unlawfully and intentionally communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security; or
- (b) **[to]** unlawfully make, obtain, collect, capture or copy a record containing state information classified secret which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security;

(3) It is an offence punishable on conviction by imprisonment for a period **[not less than three years but]** not exceeding five years, **[subject to section 1(6):]** for any person to —

- (a) **[to]** unlawfully and intentionally communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security; or
- (b) **[to]** unlawfully make, obtain, collect, capture or copy a record containing state information classified confidential which the person knows or ought reasonably to have known **[or suspected]** would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the [state] Republic in its national security.

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.

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[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 or 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.] 47. (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.] 47. (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)].**

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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

⁶ [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 subsection is necessary.]