

COMMITTEE PROPOSALS

Working document 20

24 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 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;
- (d) ~~but does not include lawful political activity, advocacy, protest or dissent.~~

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

Objects of Act

2. The objects of this Act are to—
- (a) regulate the manner in which state information may be protected;
 - (b) promote transparency and accountability in governance while recognising that state information may be protected from disclosure in order to safeguard the national **[interest]** security of the Republic;
 - (c) establish general principles in terms of which state information may be **[handled]** made available or accessible **[and]** or protected in a constitutional democracy;
 - (d) provide for a thorough and methodical approach to the determination of which state information may be protected;

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.

- (e) provide a regulatory framework in terms of which protected state information is safeguarded in terms of this Act;
- (f) ~~[define]~~ describe the nature and categories of state information that may be protected from destruction, loss or unlawful disclosure;
- (g) ~~[provide for]~~ regulate the conditions for classification ~~[and designation of state information]~~ and the declassification of classified information ~~[and the lifting of the designated status of state information]~~;
- (h) create a system for the review of the status of classified ~~[and designated]~~ information by way of regular reviews and requests for access to classified information and status [for] review;
- (i) regulate the accessibility of declassified information to the public;
- ~~(j)~~ to establish a Classification Review Panel to review and oversee status review, classification and declassification procedures;
- ~~[(j)]~~ harmonise the implementation of this Act with the Promotion of Access to Information Act, 2000, and the National Archives and Records Service of South Africa Act, 1996 (Act No. 43 of 1996);]
- ~~[(k)]~~ [(j)] establish a National Declassification Database of declassified information that will be made accessible to members of the public;]
- ~~[(l)]~~ [(k)] criminalise espionage and activities hostile to the Republic and provide for certain other offences and penalties; and
- ~~[(m)]~~ [(l)] repeal the Protection of Information Act, 1982 (Act No. 84 of 1982).

Application of Act

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 or part thereof that applies in the prescribed manner, to

have those provisions apply to it.

Or FURTHER PROPOSAL

(3) The relevant head, in consultation with his or her Minister, may file an application with the Minister in the prescribed manner to apply to have the classification, reclassification and declassification provisions of the Act apply to a part of the specific organ of state concerned.

FURTPROPOSAL

(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, and which can demonstrate that the information to be classified relates directly to national security to have those provisions apply to it,

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.

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;]

[(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 positions, this can only mean that the "prescribed guidelines", (which is a contradiction in terms) can add*

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.

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!*

Transfer of public records to National Archives

[26.] 34. ..

~~[(7) There is no onus or obligation on the part of the National Archives or other archives to advise or notify organs of state of their responsibilities and obligations with regard to classified information in the possession of the National Archives or other archives].~~

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 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)].

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 ordered 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 16⁴

⁴ [Report and return of classified records

[18.] 16. A person who is in possession of a classified record knowing that such record

PREAMBLE

Recognising the national security is subject to the authority of Parliament and the national executive, as contemplated in Section 198 of the Constitution;

Mindful of the right to access to any information held by the State provided for in Section 32 of the Constitution;

Acknowledging that the right to access to any information held by the State may be restricted when necessary for national security;

Recognising the harm caused by excessive secrecy;

Desiring to put the protection of state information within a transparent and sustainable legislative framework; and

Aiming to promote the free flow of information within an open and democratic society without compromising the security of the Republic,

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 intelligence officer. It is the State's job to look after and retrieve its secrets. If maintained the underlined insertion is necessary.

