

REPUBLIC OF SOUTH AFRICA

**AD-HOC COMMITTEE AMENDMENTS
TO**

**PROTECTION OF STATE
INFORMATION BILL**

[B 6B—2010]

*(Ad hoc Committee on Protection of State Information Bill
(National Council of Provinces))*

[B 6C—2010]

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AMENDMENTS PROPOSED

PROTECTION OF STATE INFORMATION BILL [B 6B—2010]

LONG TITLE OF THE BILL

1. Long title rejected.

NEW LONG TITLE

1. That the following be the new Long title:

To provide for the protection of sensitive state information; to provide for a system of classification, reclassification and declassification of state information; to provide for the protection of certain valuable state information against alteration, destruction or loss or unlawful disclosure; to regulate the manner in which state information may be protected; to repeal the Protection of Information Act, 1982 (Act No. 84 of 1982); and to provide for matters connected therewith.

PREAMBLE

1. On page 2, after the second paragraph, to insert:

“**ACCEPTING** that the right of access to information is a cornerstone of our democracy;”.
2. On page 2, in the third paragraph, after “**ACKNOWLEDGING**”, to insert “in accordance with section 36 of the Constitution”.

CLAUSE 1

1. On page 5, in line 19, to omit “12” and “14” and to substitute “11” and “8”, respectively.
2. On page 5, in line 21, to omit “under” and to substitute “in terms of”.
3. On page 5, in line 23, to omit “20” and to substitute “18”.
4. On page 5, in line 24, to omit “12(1)” and to substitute “11(1)”.
5. On page 5, in line 27, to omit “16” and to substitute “14”.
6. On page 5, after line 33, to insert the following definition:

“**espionage**” means the offences referred to in section 34;
7. On page 5, in line 38, after “(Proclamation No. 103 of 1994),” to insert “or section 1 of the Intelligence Services Oversight Act, 1994 (Act No. 40 of 1994),”.
8. On page 5, in line 43, after “other” to insert “state”.
9. On page 6, in line 9, to omit “45” and to substitute “43”.

10. On page 6, in line 63, to omit “54” and to substitute “51”.
11. On page 7, in line 11, to omit “12(2)” and to substitute “11(2)”.
12. On page 7, in line 18, after “means” to insert “state”.
13. On page 7, in line 29, to omit “54” and to substitute “51”.
14. On page 7, in line 30, to omit “12(3)” and to substitute “11(3)”.
15. On page 7, in line 32, to omit “deny” and to substitute “infringe on the constitutional rights of”.
16. On page 7, in line 32, after “individuals” to insert “ or deny them”.
17. On page 7, in line 39, after “conflict” to insert “taking into consideration the need to protect and classify certain state information in terms of this Act”.
18. On page 7, from line 40, to omit subsection (4) and to substitute:

“(4) For the purposes of this Act, a person has knowledge of a fact if—

 - (a) the person has actual knowledge of that fact; or
 - (b) the court is satisfied that—
 - (i) the person believes that there is a reasonable possibility of the existence of that fact; and
 - (ii) he or she fails to obtain information to confirm the existence of that fact.

(5) For the purposes of this Act, a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both—

 - (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
 - (b) the general knowledge, skill, training and experience that he or she in fact has.”.

CLAUSE 3

1. On page 8, from line 11, to omit subsection (1).
2. On page 8, in line 13, to omit “(2)” and to substitute “(1)”.
3. On page 8, in line 14, after “to” to insert “the cabinet,”.
4. On page 8, in line 17, after “*Gazette*,” to insert “after approval by Parliament,”.
5. On page 8, in line 18, after “manner,” to insert “excluding all municipalities and all municipal entities,”.
6. On page 8, after line 18, to add the following subsections:

“(2) In determining what constitutes ‘good cause’ in subsection (1)(b) regard may be had to any one or more of the following factors:

 - (a) The nature of the information handled by the organ of state, including its implications for national security, its impact on international relations and related confidences;
 - (b) the need for the protection of South African innovations and the desirability of the continued availability of information to members of the public;

- (c) the competence and ability of the officials on the organ of state to classify, reclassify and declassify the information in accordance with the Act; and
 - (d) whether the existing dispensation cannot protect the information.
- (3) The provisions of this Act with regard to the protection of valuable information against unlawful alteration, destruction or loss apply to all organs of state.”.

CLAUSE 4

1. Clause rejected.

CLAUSE 5

1. Clause rejected.

CLAUSE 6

1. On page 8, in line 32, to omit “6.” and to substitute “4.(1)”.
2. On page 8, in line 47, to omit “some confidentiality and secrecy” and to substitute “the protection and classification of certain state information”.
3. On page 9, in line 4, to omit “and”.
4. On page 9, after line 4, to insert the following paragraph:

“(ii) promote and support the functions and effectiveness of the Constitutional Institutions Supporting Democracy; and”.
5. On page 9, in line 5, to omit “(ii)” and to substitute “(iii)”.
6. On page 9, after line 11, to add the following subsections:

“(2) Certain state information may, in terms of this Act, be protected against unlawful disclosure, alteration, destruction or loss.

(3) State information in material or documented form which requires protection against unlawful disclosure may be protected by way of classification and access to such information may be restricted to the Cabinet, institutions referred to in section 181 of the Constitution and certain individuals who carry a commensurate security clearance.”.

CLAUSE 7

1. On page 9, in line 15, to omit “7” and to substitute “5”.
2. On page 9, from line 15, to omit subsection (1) and to substitute:

“(1) The head of an organ of state, where applicable, must establish—

 - (a) policies, directives and categories for classifying, downgrading and declassifying state information;
 - (b) in terms of section 51(1)(m), conditions for the treatment and protection of classified information that is accessed by the institutions mentioned in section 181 of the Constitution; and

- (c) conditions for the protection against alteration, destruction or loss of state information created, acquired or received by that organ of state.”.
- 3. On page 9, in line 21, to omit “54(4)” and to substitute “51(4)”.
- 4. On page 9, in line 23, to omit “54(4)” and to substitute “51(4) and the Constitution”.

CLAUSE 8

- 1. On page 9, in line 28, to omit “8” and to substitute “6”.

CLAUSE 9

- 1. On page 9, in line 34, to omit “9” and to substitute “7”.

CHAPTER 5

- 1. On page 10, in line 2, before “**CLASSIFICATION**” to insert “**SYSTEM OF**”.
- 2. On page 10, in line 2, after “**CLASSIFICATION**”, to insert “, **RECLASSIFICATION**”.

NEW CLAUSE

- 1. That the following be a new clause:

Conditions for classification, reclassification and declassification

8. (1) The decision to classify information must be based solely on the conditions set out in this Act.

(2) (a) Classification of state information is justifiable only when it is necessary to protect national security.

(b) Classification of state information may not under any circumstances be used to—

- (i) conceal breaches of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) or any other an unlawful act or omission, incompetence, inefficiency or administrative error;
- (ii) restrict access to state 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 state information that does not require protection under this Act.

(c) The classification of state information is an exceptional measure and should be conducted strictly in accordance with section 11.

(d) State 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 state information in the interest of the national security.

(e) If there is significant doubt as to whether state information requires protection, the matter must be referred to the relevant Minister for a decision.

(f) The decision to classify may not be based on any extraneous or irrelevant reason.

(g) Classification decisions must balance the right to access to state information against the need to classify state information in terms of this Act.

(h) Scientific and research information not clearly related to the national security may not be classified.

(i) State information may not be reclassified after it has been declassified and released to the public under proper authority.

(j) Classification must be in place only for as long as the protection is actually necessary.

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

(3) Specific considerations with regard to the decision whether to classify state information must include whether the disclosure may—

- (a) expose the identity of a confidential source, or reveal information about the application 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 the national security, are authorised;
- (c) seriously and substantially impair the 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 South African government and another government or international institution;
- (f) cause life threatening or other physical harm to a person or persons; or
- (g) cause demonstrable, irreparable or exceptionally grave harm to the national security of the Republic.

(4) 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.

(5) When the conditions for classification contemplated in this section no longer exist classified information must be declassified.

- 2. On page 10, in line 3, to omit “**Part A**”.
- 3. On page 10, in line 4, to omit “**Classification**”.

CLAUSE 10

- 1. On page 10, in line 6, to omit “**10**” and to substitute “**9**”.
- 2. On page 10, in line 15, to omit “**12**” and to substitute “**11**”.

CLAUSE 11

- 1. On page 10, in line 17, to omit “**11**” and to substitute “**10**”.
- 2. On page 10, in line 18, to omit “**14**” and to substitute “**8**”.
- 3. On page 10, in line 26, to omit “**14**” and to substitute “**8**”.

CLAUSE 12

1. On page 10, in line 28, to omit “**12**” and to substitute “**11**”.
2. On page 10, in line 36, after “cause”, to omit “serious or”.
3. On page 10, in line 36, after “irreparable”, to insert “or exceptionally grave”.

CLAUSE 13

1. On page 10, in line 38, to omit “**13**” and to substitute “**12**”.
2. On page 10, in line 39, to omit “12” and to substitute “11 or other provisions of this Act”.
3. On page 10, in line 39, after “Constitution”, to insert “, excluding ordinary members of the South African Police Service and the South African National Defence Force, except those,”.
4. On page 10, in line 51, to omit “12” and to substitute “11”.
5. On page 11, in line 1, after “Services”, to insert “authorised in terms of subsection (6)”.

CLAUSE 14

1. Clause rejected.

CLAUSE 15

1. On page 12, in line 2, to omit “**15**” and to substitute “**13**”.
2. On page 12, in line 6, to omit “or” and to substitute “,”.
3. On page 12, in line 6, after “Agency” to insert “or the relevant classifying organ of state”.
4. On page 12, in line 8, to omit “*Part B*”.
5. On page 12, in line 9, to omit “*Declassification*”.

CLAUSE 16

1. On page 12, in line 11, to omit “**16**” and to substitute “**14**”.

CLAUSE 17

1. On page 12, in line 24, to omit “**17**” and to substitute “**15**”.
2. On page 12, in line 28, to omit “12” and “14” and to substitute “11” and “8”, respectively.

CLAUSE 18

1. On page 12, in line 33, to omit “**18**” and to substitute “**16**”.

2. On page 12, in line 39, to omit “12” and to substitute “11”.
3. On page 12, in line 40, to omit “14” and to substitute “8”.

CLAUSE 19

1. On page 13, in line 2, to omit “19” and to substitute “17”.
2. On page 13, from line 6, to omit subsection (2).
3. On page 13, in line 8, to omit “(3)” and to substitute “(2)”.
4. On page 13, in line 9, to omit “14” and to substitute “8”.
5. On page 13, in line 11, to omit “a substantial” and to substitute “any”.
6. On page 13, in line 15, to omit “(4)” and to substitute “(3)”.
7. On page 13, in line 20, to omit “(5)” and to substitute “(4)”.
8. On page 13, after line 21, to insert the following subsection:

“(5) 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.”.

9. On page 13, from line 22, to omit sub-clause (6).

CLAUSE 20

1. On page 13, in line 29, to omit “20” and to substitute “18”.

CLAUSE 21

1. On page 13, in line 40, to omit “21” and to substitute “19”.

CLAUSE 22

1. On page 14, in line 2, to omit “22” and to substitute “20”.
2. On page 14, in line 7, to omit “the National Assembly” and to substitute “Parliament”.
3. On page 14, in line 8, to omit “The National Assembly” and to substitute “Parliament”.

CLAUSE 23

1. On page 14, in line 26, to omit “23” and to substitute “21”.
2. On page 14, in line 34, after “any”, to insert “political”.
3. On page 14, in line 40, to omit “and” and to substitute “or”.
4. On page 14, in line 42, after “theft”, to insert “, corruption, maladministration”.

CLAUSE 24

1. On page 14, in line 44, to omit “**24**” and to substitute “**22**”.
2. On page 14, in line 48, to omit “the National Assembly” and to substitute “Parliament”.
3. On page 14, in line 50, to omit “the National Assembly” and to substitute “Parliament”.
4. On page 14, in line 52, after the second “the”, to insert “National”.
5. On page 14, in line 52, after “Assembly”, to insert “the National Council of Provinces”.
6. On page 14, in line 55, to omit “a committee of the National Assembly” and to substitute “the Joint Standing Committee on Intelligence”.
7. On page 14, in line 57, to omit “the National Assembly” and to substitute “Parliament”.

CLAUSE 25

1. On page 15, in line 10, to omit “**25**” and to substitute “**23**”.

CLAUSE 26

1. On page 15, in line 14, to omit “**26**” and to substitute “**24**”.

CLAUSE 27

1. On page 15, in line 24, to omit “**27**” and to substitute “**25**”.

CLAUSE 28

1. On page 15, in line 34, to omit “**28**” and to substitute “**26**”.

CLAUSE 29

1. On page 15, in line 40, to omit “**29**” and to substitute “**27**”.
2. On page 15, in line 40, to omit “the National Assembly” and to substitute “Parliament”.

CLAUSE 30

1. On page 15, in line 43, to omit “**30**” and to substitute “**28**”.
2. On page 16, in line 3, after “Panel” to insert “by 31 December of each year”.

CLAUSE 31

1. On page 16, in line 14, to omit “**31**” and to substitute “**29**”.
2. On page 16, in line 14, after “to”, to insert “state”.

3. On page 16, in line 18, to omit the second “an” to substitute “the classifying”.

CLAUSE 32

1. On page 16, in line 22, to omit “**32**” and to substitute “**30**”.
2. On page 16, in line 27, to omit “19(3)” and to substitute “17(3)”.
3. On page 16, in line 28, to omit “31” and to substitute “29”.

CLAUSE 33

1. On page 16, in line 33, to omit “**33**” and to substitute “**31**”.
2. On page 16, in line 36, to omit “17” and to substitute “15”.
3. On page 16, in line 38, to omit “14” to substitute “8”.

CLAUSE 34

1. On page 17, in line 2, to omit “**34**” and to substitute “**32**”.
2. On page 17, in line 3, after “Act”, to omit “and” and to substitute “, 2000 (Act No. 2 of 2000), or”.

CLAUSE 35

1. On page 17, in line 14, to omit “**35**” and to substitute “**33**”.

CLAUSE 36

1. On page 17, in line 22, after “**Espionage**”, to insert “**and related**”.
2. On page 17, in line 23, to omit “**36**” and to substitute “**34**”.

CLAUSE 37

1. On page 18, in line 2, to omit “**37**” and to substitute “**35**”.
2. On page 18, in line 4, after “knows”, to omit “or ought reasonably to have known”.
3. On page 18, in line 5, after “state”, to insert “to the detriment of the national security of the Republic”.
4. On page 18, in line 8, after “knows” to omit “or ought reasonably to have known”.
5. On page 18, in line 9, after “state”, to insert “to the detriment of the national security of the Republic”.
6. On page 18, in line 12, after “knows”, to omit “or ought reasonably to have known”.
7. On page 18, in line 13, after “state”, to insert “to the detriment of the national security of the Republic”.

CLAUSE 38

1. On page 18, in line 15, to omit “**38**” and to substitute “**36**”.
2. On page 18, in line 18, after “knows”, to omit “or ought reasonably to have known”.
3. On page 18, in line 20, to omit the first “or” and to substitute “that would”.
4. On page 18, in line 22, after “knows”, to omit “or ought reasonably to have known”.
5. On page 18, in line 24, to omit “or” and to substitute “that would”.
6. On page 18, in line 29, after “knows” to omit “or ought reasonably to have known”.
7. On page 18, in line 33, after “knows” to omit “or ought reasonably to have known”.
8. On page 18, in line 39, after “knows” to omit “or ought reasonably to have known”.
9. On page 18, in 44, after “knows” to omit “or ought reasonably to have known”.

CLAUSE 39

1. On page 18, in line 49, to omit “**39**” and to substitute “**37**”.
2. On page 18, in line 51, to omit “36 or 38” and to substitute “34 or 36”.

CLAUSE 40

1. On page 18, in line 54, to omit “**40**” and to substitute “**38**”.

CLAUSE 41

1. On page 20, in line 14, to omit “**41**” and to substitute “**39**”.

CLAUSE 42

1. On page 20, in line 25, to omit “**42**” and to substitute “**40**”.

CLAUSE 43

1. Clause rejected.

NEW CLAUSE

1. That the following be a new clause:

Disclosure and possession of classified information

41. Any person who unlawfully and intentionally discloses or is in possession of classified state information in contravention of this Act is guilty of an offence and is liable to a fine or imprisonment for a

period not exceeding five years, except where such disclosure or possession—

- (a) is protected or authorised under the Protected Disclosures Act, 2000 (Act No. 26 of 2000), the Companies Act, 2008 (Act No. 71 of 2008), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the National Environmental Management Act, 1998 (Act No. 107 of 1998), or the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (b) is authorised in terms of this Act or any other Act of Parliament; or
- (c) reveals criminal activity, including any criminal activity in terms of section 45 of this Act.

CLAUSE 44

1. On page 20, in line 38, to omit “**44**” and to substitute “**42**”.

CLAUSE 45

1. On page 20, in line 41, to omit “**45**” and to substitute “**43**”.

CLAUSE 46

1. On page 20, in line 45, to omit “**46**” and to substitute “**44**”.
2. On page 20, in line 47, to omit “three” and to substitute “two”.

CLAUSE 47

1. On page 21, in line 2, to omit “**47**” and to substitute “**45**”.
2. On page 21, in line 8, to omit “law” and to substitute “Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), as well as any other unlawful act or omission, incompetence, inefficiency or administrative error”.
3. On page 21, in line 10, to omit “agency” and to substitute “the Agency”.

CLAUSE 48

1. On page 21, in line 19, to omit “**48**” and to substitute “**46**”.

CLAUSE 49

1. Clause rejected”.

CLAUSE 50

1. On page 21, in line 43, to omit “**50**” and to substitute “**47**”.

CLAUSE 51

1. On page 21, in line 48, to omit “**51**” and to substitute “**48**”.

CLAUSE 52

1. On page 22, in line 4, to omit “**52**” and to substitute “**49**”.

CLAUSE 53

1. On page 23, in line 5, to omit “**53**” and to substitute “**50**”.

CLAUSE 54

1. On page 23, in line 23, to omit “**54**” and to substitute “**51**”.
2. On page 23, in line 23, to omit “may” and to substitute “must”.
3. On page 23, in line 49, after “or”, to insert “the”.
4. On page 23, after line 50, to insert:
 - “(l) the procedure to be followed and the manner in which employees, officials, staff members or any other person who in any manner assists or has in the past assisted in carrying on or conducting the business of an organ of state may disclose breaches of the law or unlawful acts or omission, incompetence, inefficiency or administrative error;
 - (m) the procedure to be followed by the institutions referred to in section 181 of the Constitution to access classified information and conditions relating to the treatment and protection of such information in terms of section 7(1) for the fulfilment of their constitutional and legislative mandate, including investigating and reporting.”.

CLAUSE 55

1. On page 24, in line 37, to omit “**55**” and to substitute “**52**”.
2. On page 25, in line 2, to omit “agency” and to substitute “the Agency”.
3. On page 25, in line 9, to omit “14” and to substitute “8”.

CLAUSE 56

1. On page 25, in line 17, to omit “**56**” and to substitute “**53**”.

CLAUSE 57

1. On page 25, in line 20, to omit “**57**” and to substitute “**54**”.