

Protection of Information Bill.

What does this Bill do?

The Bill says its aim is to regulate how **valuable** state information is handled and protected, so that it is not lost, destroyed, altered or given to the wrong people. It provides ways to **classify and declassify** information, and establishes a database of declassified information for the public. It also makes it criminal to spy on South Africa. (sec 4 and sec 2)

The general principles the Bill says it adheres to are (sec 6):

1. Access to information is a basic human right, and promotes dignity, freedom and equality, and accessible information is the basis of a transparent, open and democratic society. The free flow of information can promote safety and security.
2. Some confidentiality and secrecy is necessary, but measures should not infringe unduly on individual rights or liberties.
3. Measures must take into regard the constitution, and consistent with our international obligations.

But

4. In general, **unless the law says otherwise, or 'public or private considerations' apply**, state information should be available.
5. All of these statements are subject to the **security** of the Republic, which means that the Republic must be protected from danger, loss or harm, and be made inviolable (never to be broken) against hostile acts.

Who does this Bill apply to?

The Bill applies to everything that is an organ of state. That means any department or administration in the national, provincial or local sphere of government; or an institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation. (sec 3(1)) Are all organs of state always governed by the Bill?

The Minister can exempt an organ of state from establishing policies for dealing with information, restrict and organ of state from classifying information, give selected organs of state more time to establish ways of dealing with requests to review classification (up from 18 months to 36 months), exempt an organ of state from the duty to review the classification of information before handing it to the National Archive, and exempt an organ of state from being subject to inspection by the State Security Agency. (sec 3(2))

The Minister can declare organs of state to be part of each other, or separate from each other. (sec 3(3)).

Information that you need to protect against disclosure should be restricted to people who have security clearance, which is a certificate issued after a security screening investigation. The clearance tells you what level of information you have access to. (sec 5)

VALUABLE INFORMATION

What is valuable information?

Valuable information is anything an organ of state might need later, or information which, if lost or destroyed would interfere with the state in doing its job. The Bill protects this state information from unlawful disclosure, destruction, alteration or loss. (Sec 4)

How to deal with valuable information

Heads of organs of state must establish policies for dealing with **valuable** information 18 months after the Act becomes law. These must be consistent with the regulations.(sec 8)

Valuable information is determined as valuable when policy identifies it as such. (sec 9 (1)). If it is valuable, it goes in a departmental register. You can determine a kind of information valuable in advance. (sec 9(2)). It must be handled carefully, and in accordance with policy and procedures, but it doesn't have to be marked. Holders must be aware of the regulations. Destruction of records is done in terms of the National Archives Act.

If you destroy or alter valuable information unlawfully, that's 3 – 5 years.

CLASSIFIED INFORMATION: FOR YOUR EYES ONLY

What can be classified?

Information is classified if it is either sensitive, commercial, or personal information. If it is classified it must be safeguarded according to the degree of harm that can result from its unlawful disclosure. It is then made available on a need to know basis, to those who have the right security clearance. (sec 13)

However, the classification of information is an exceptional measure.

Information is classified only when there is—

- (i) a clear, justifiable and legitimate need to do so; and
- ii) a demonstrable need to protect the information in the national interests;
 - if there is significant doubt as to whether information requires protection, the matter must be referred to the Minister for a decision;
 - the decision to classify may not be based on any extraneous or irrelevant reason; classification decisions ought to be assessed and weighed against the benefits of secrecy, taking into account the following

The vulnerability of the information;

the threat of damage from its disclosure;

the risk of loss of the information;

the value of the information to adversaries;

the cost of protecting the information; and

the public benefit to be derived from the release of information

Scientific and research information not clearly related to the national security

and the national interest may not be classified;
information may not be reclassified after it has been declassified and released to the public under proper authority;
classification must be in place only for as long as the protection is actually necessary; and where there is still a need for classification, it may be that the information in question no longer requires high level classification and should be down-graded.
Classification does not prevent you from telling authorized officials about information.

Who is an authorized official?

The Bill doesn't say.

What is the penalty for not applying this correctly?

So, there are three kinds of information I can classify?

Sensitive information is information which must be protected from unlawful disclosure, in order to prevent the national interest being harmed. The national interest is all matters relating to the advancement of the public good; and all matters relating to the protection and preservation of all things owned or maintained for the public by the State.

The national interest is multi-faceted and includes the survival and security of the State and the people of South Africa; and the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations. Matters in the national interest include security from all forms of crime; protection against attacks or incursions on the Republic or acts of foreign interference; defence and security plans and operations; details of criminal investigations and police and law enforcement methods; significant political and economic relations with international organizations and foreign governments; economic, scientific or technological matters vital to the Republic's stability, security, integrity and development; and all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion of Access to Information Act, whether in classified form or not. The determination of what is in the national interest of the Republic must at all times be guided by the values referred to in section 1 of the Constitution.

Commercial information is information of an organ of state or information which has been given by an organisation, firm or individual to an organ of state or an official representing the State, on request or invitation or in terms of a law, the disclosure of which would prejudice the commercial, business, financial or industrial interests of the organ of state, organisation or individual concerned; or information that could endanger the national interest of the Republic. Commercial information which may prejudice the commercial, business or industrial interests of an organisation or individual, if disclosed, includes— commercial information that is not in the public domain, which if released

publicly would cause financial loss or competitive or reputational injury to the organisation or individual concerned; trade secrets, including all confidential processes, operations, styles of work, apparatus, and the identity, amount or source of income, profits, losses or expenditures of any person, firm, partnership, corporation or association. Only commercial information which the State is not otherwise authorised by law to release may be protected against disclosure.

Personal information is any information concerning an identifiable natural person which, if disclosed, could reasonably be expected to endanger the life or physical safety or general welfare of an individual.

How do I classify information?

You (the head of an organ of state, or someone delegated to do this by them)(sec 16) identify the information, stamp it, and enter it in the register. (sec 14) Only designated staff (designated how? We don't know yet.) can stamp things 'secret', or 'top secret.' And you must be 'sufficiently senior' to ensure that the right decisions are made.

What level of classification can I use?

"Confidential" if it is **sensitive** information and its unlawful disclosure might be harmful to the security or **national interest** of the Republic or could prejudice the Republic in its international relations or **commercial** information, the disclosure of which might cause financial loss to an entity or might prejudice an entity in its relations with its clients, competitors, contractors and suppliers.

"Secret" if it is **sensitive** information, the (not unlawful) disclosure of which might endanger the security or **national interest** of the Republic or could jeopardise the international relations of the Republic; commercial information, the disclosure of which might cause serious financial loss to an entity; or personal information, the disclosure of which might endanger the physical security of a person.

"Top secret" if the information is **sensitive information**, the disclosure of which might cause serious or irreparable harm to the **national interest** of the Republic or might cause other states to sever diplomatic relations with the Republic; **commercial information**, the disclosure of which might have disastrous results with regard to the future existence of an entity; or cause serious and irreparable harm to the security or interests of the State; **personal information** the disclosure of which might endanger the life of the individual concerned.

What is the national interest?

The national interest is multi-faceted and includes the survival and security of the State and the people of South Africa; and the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations. Matters in the national interest include security from all forms of crime; protection against attacks or incursions on the Republic or acts of foreign

interference; defence and security plans and operations; details of criminal investigations and police and law enforcement methods; significant political and economic relations with international organizations and foreign governments; economic, scientific or technological matters vital to the Republic's stability, security, integrity and development; and all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion of Access to Information Act, whether in classified form or not. The determination of what is in the national interest of the Republic must at all times be guided by the values referred to in section 1 of the Constitution.

What can't be classified?

Classification of information may not under any circumstances be used to conceal an unlawful act or omission, incompetence, inefficiency or administrative error; restrict access to information in order to limit scrutiny and thereby avoid criticism; prevent embarrassment to a person, organisation, organ of state or agency; unlawfully restrain or lessen competition; or prevent, delay or obstruct the release of information that does not require protection under this Act.

What is the penalty for classifying information to hide it?

3 years.

Is there a penalty for being unlawfully in possession of a classified record?

Yes, 3 – 5 years in jail.

Can you declassify information?

Yes. The organ of state that classifies the record must declassify the record, and the head can also delegate the powers to do that. If an organ of state ceases to exist the Agency must deal with their classified records, and consult those organs of state having most interest. Categories of information may be declassified.

Does information stay classified forever?

No – not longer than 20 years, unless the head of the organ of state says so, because protection of the information is crucial to the safeguarding of the national security of the Republic; necessary to prevent significant and demonstrable damage to the national interest; or necessary to prevent demonstrable physical or life-threatening harm to a person or person. In this decision, the head of an organ of state must consider whether the declassification of classified information is likely to cause significant and demonstrable harm to the national interest of the Republic.

What is the national interest again?

The national interest is multi-faceted and includes the survival and security of the State and the people of South Africa; and the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations. Matters in the national interest include security from all forms of crime; protection against attacks or incursions on the Republic or acts of foreign interference; defence and security plans and operations; details of criminal investigations and police and law enforcement methods; significant political and economic relations with international organizations and foreign governments; economic, scientific or technological matters vital to the Republic's stability, security, integrity and development; and all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion of Access to Information Act, whether in classified form or not. The determination of what is in the national interest of the Republic must at all times be guided by the values referred to in section 1 of the Constitution.

The classification of information is also reviewed at least once every 10 years, and when information is needed by a court or tribunal. This review must be published.

Is the review only done every 10 years?

No, a request for a review can be submitted to an organ of state, by an interested ngo or person. The request has to be made in the legitimate public interest, or for genuine research. You have to tell them what you want reviewed, and they must answer you in 90 days if they refuse the review, with reasons. You can then appeal to the Minister.

Head of organs of state must develop review procedures within 18 months, and let people know they can appeal decisions.

The head of the organ of state might say that they can't confirm or deny the existence of a document, if to do that is itself a secret.

Do classified documents just stay where they are, forever?

In terms of the National Archives Act, state documents must be transferred to the National Archives. The head of an organ of state must review the documents that are classified before they go to national archives. If they are already in archives, they are automatically declassified. However, classified records held for less than 20 years by archives, are subject to the provisions of this act, and are only declassified after the 20 years is up, even if the head of the organ of state forgot to declassify them when handing them over to Archives.(?) Archives don't have to explain this to any organ of state.

Can you request information that is classified?

Yes, but it must be declassified before release, by the agency that originally classified it. So if I have the document now, but you classified it, I have to give it to you to make a decision first.

How do I know what information is held?

The National Declassification database will hold all the documents declassified.

Who will make sure this is all happening?

The Agency will ensure that all organs of state will implement this law. They will monitor policies and programmes, conduct on site inspections, provide expert support and advice, promote partnerships to enhance co ordination, develop education materials, run training, create pilot projects, explore the use of technology to facilitate the declassification process, and report annually to the Minister.

What happens if you steal or sell or give away classified information?

You go to jail for 15 to 25 years for a top secret, 10 - 15 years for a secret, and 3 to 5 years for confidential information .

What happens if you intercept classified information, or alter it?

5 - 10 years.

What happens if you come up with something like a computer programme to hack classified information? Or use such a programme?

5 - 10 years.

Or get unauthorized access to a government computer, or use such a computer?

2 years.

Or damage the data on such a computer.

3 - 5

What happens if you hide someone who is guilty of stealing, selling or giving away secrets?

Up to 10 years.

Any person who is in the Republic, and who is employed as an agent, or who might be activated as an agent, must register with the agency.

And if you don't?

3 – 5 years.

Any person who discloses classified information which is subject to mandatory non disclosure in terms of the sections of PAIA is guilty of an offence, and 3 -5 years in jail is the penalty.

If you have information which is classified, and you ailt o turn it in at the police station, that's 3 – 5 years.

If you give false information to Intelligence, 3 – 5 years.

There is a penalty for disclosing “state security matter”.

What happens if classified information goes before the courts?

The information can only be disclosed if the court orders it. Unless the court orders it, the court must safeguard the information during legal proceedings. The court can't order disclosure without getting the submissions of the classification authority or the Agency. The submissions may not be disclosed, and the hearing of the submissions must be in camera, and anyone giving evidence can't have the classified information. The classification authority must declassify information required in a court, unless it is strictly necessary. A court has the same powers as in sec 154 of the Criminal Procedure Act. If you disclose anything in contravention of orders issues by the court, 10 years.

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 a open court record, which, if publicly disclosed or published, may undermine the national interest.

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.

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.

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

Reports

The head of an organ of state must submit a report to his or her Minister, and forward a copy of such report to the Minister and the Agency, once a year, that describes the application of the protection of information policies and procedures. The Agency also has to report, to the Minister and to Parliament.

Regulations

The Minister will say how categories of **valuable** information must be handled in practice, in regulations. (sec 7)

These regulations (the Bill says in sub 1a, but must mean sub 1b) can deal with the organization of information security, screening, training, technology, and physical security, and continuity planning. The regulations must be published for comment. No regulation should stop archives from preserving and managing public records. (sec 7)

The Minister can make regulations –

- for the control and protection required to protect valuable and classified information
- what a head of organ of state must do to protect information
- for training and guidance
- the establishment of things like security committees and policies
- the effective operation of a personnel security clearance system
- the procedure for classifying commercial information
- for the marking for classified documents
- restrictions on passing classified information from one person to another
- measures to prevent over classification
- the role of national intelligence structures
- the reporting of security breaches

These must be made in 18 months.

Some provisions come into operation straight away, and some wait on the regulations by the Minister. Until those are in operation the MISS governs information.