The NCOP Secrecy Bill still **FAILS** the Right2Know 7-Point Freedom Test

(Right2know statement issued on 28 November 2012)

On Thursday 29 November the National Council of Provinces may vote to take the Secrecy Bill one step closer to becoming a Secrecy Law. After more than two years of intensive campaigning the Right2Know returns to our founding statement and concludes that – despite the many amendments we have secured – the Secrecy Bill still fails our Right2Know 7-Point Freedom Test on all counts.

The Right2Know Campaign calls on all members of the NCOP to remember the oath they took to uphold that Constitution and vote with their conscience rather than party loyalty to reject this Bill at Thursday's vote.

The Secrecy Bill still carries the fingerprints of the securocats who have remained the 'hidden hand' behind this process from the start. The finalised NCOP version criminalises the public for possessing information that has already been leaked, protects Apartheid-era secrets, and still contains broad definitions of National Security that will in all likelihood be used to suppress legitimate disclosures in the public interest. In short, the Secrecy Bill remains a clear threat to South Africa's right to know.

The Campaign remains committed to fighting for a just classification law that governs how the State should keeps very limited secrets. The Secrecy Bill remains a threat to our democracy and we will continue our campaign to Stop the Secrecy Bill. If Parliament fails to introduce the necessary amendments and President Zuma signs it into law, the Right2Know will take the fight to the Constitutional Court.

For comment contract:
R2K Spokesperson – Murray Hunter: 072 672 5468, R2K Gauteng – Dale McKinley: 072 429 4086, R2K Western Cape – Nkwame Cedile: 078 227 6008, R2K KZN – Desmond D'Sa: 083 982 6939., R2K Eastern Cape – Thembani Zion Onceya: 078 843 7478.

Right2Know Freedom Test (detailed assessment below)

1. Limit secrecy to core state bodies in the security sector, such as the police, defence and intelligence agencies. – ALMOST MET	
2. Limit secrecy to strictly defined national security matters and no more. Officials must give reasons for making information secret. – PARTLY MET	
3. Exclude commercial information from this Bill. – ALMOST MET	
4. Do not exempt the intelligence agencies from public scrutiny – PARTLY MET	
5. Do not apply penalties for unauthorised disclosure to society at large. – NOT MET	
6. Do not criminalise the legitimate disclosure of secrets in the public interest. – PARTLY MET	
7. An independent body appointed by Parliament, and not the Minister of State Security, should review decisions about what may be made secret. – PARTLY MET	

1. Limit secrecy to core state bodies in the security sector, such as the police, defence and intelligence agencies.

R2K believes that the power to classify information should reside with no more than the state bodies directly charged with national security matters, and that no obstacles should be placed on the free flow of information from and among other state bodies.

Almost met

Who can classify is critical. We got this narrowed down from *all state bodies* to the security services and their oversight structures plus the Cabinet.

This **victory** is tempered by the inclusion of the Cabinet plus the fact that the Minister[1] will be able to include other state bodies too—but only if they "show good cause" at the hand of a number of guidelines, and only if Parliament approves it. Municipalities and municipal entities are explicitly excluded.

Within the state bodies with the power to classify, classification decisions are reserved for the body's head or his/her "sufficiently senior" delegate, which gives some comfort, but this is partly undone by the power given to ordinary police officers or soldiers "who by the nature of his or her work" deal with classified information.

2. Limit secrecy to strictly defined national security matters and no more. Officials must give reasons for making information secret.

R2K believes that even the state bodies entrusted with the power to classify should exercise that power only to the extent it is—and they can show it to be—truly necessary to protect the security of the nation. The Bill must guard against undue and over-classification, and facilitate declassification to the greatest extent possible.

Partly met

What can be classified is critical. The protection of the "national security" lies at the heart of any classification decision. But what does it mean? The definition of "national security" has been tightened considerably—a **victory**--but loopholes remain. These are that the definition is open-ended (the Minister having convinced ANC MPs to use the word "includes" rather than "means") and as the some elements of the definition—for example "the exposure of a state security matter with the intention of undermining the constitutional order" and "the exposure of economic, scientific or technological secrets vital to the Republic"—are wide open to abuse.

There is also an argument that the wording of the Bill's guidelines to classifiers are so messy that over-classification is bound to result.

Classifiers still don't have to give reasons for making things secret; another reason over-classification will occur.

3. Exclude commercial information from this Bill

R2K believes that national security legislation such as this should not stray into the domain of commercial (or private) confidentiality. To the extent that such information may be worthy of protection, very different kinds of measures will do.

Almost met

[1] "The Minister of State Security

The earlier explicit and detailed provisions for the classification of commercial information have been removed—a **victory**—but a loophole remains in that the definition of "national security" includes guarding against the "exposure of economic, scientific or technological secrets vital to the Republic".

4. Do not exempt the intelligence agencies from public scrutiny

R2K believes that even if the work of intelligence agencies may need to be protected from exposure where national security is at stake, this should be limited as far as possible—and the agencies themselves should remain transparent and accountable like any other democratic institution.

Partly met

The controversial clause 49, which created a special regime prohibiting the "disclosure of a state security matter", has been deleted altogether—a **victory**. However, the definition of "national security" still includes guarding against "the exposure of a state security matter with the intention of undermining the constitutional order", and the definition of "state security matter" remains extremely wide: "any matter … which is dealt with by the [State Security] Agency or which relates to the functions of the Agency or to the relationship existing between any person and the Agency".

The effect is that the State Security Agency, which is the main intelligence agency, will regard anything about its activities or its organisational being as potentially classifiable, allowing it to draw a comprehensive veil of secrecy over itself.

5. Do not apply penalties for unauthorised disclosure to society at large.

R2K believes that the protection of state secrets is a matter that should concern the state and not be burdened on society as a whole. The state should protect its secrets at source and not criminalise ordinary people for exercising their Constitutional rights to access information and speak it freely when the state has failed its task.

NOT MET

The Bill still makes simple possession and simple disclosure by *any person* a crime, meaning the state's obligation to protect its classified information is transferred to society as a whole. Once the horse has bolted, any person can be locked up for taking the information into their possession or proliferating it (i.e. doing no more than the entire world did with the Wikileaks cables).

This is so blunt an intrusion on the rights of access to information and freedom of expression that it will fail the constitutionality test. We do not want South Africa to become a society where ordinary people are afraid to exchange information at the apprehension they might fall foul of secrecy provisions – which is exactly what will happen after a few such prosecutions.

The problem is compounded by the complete absence of a public domain defence: it will not help a person charged with unlawful possession or disclosure of classified information to point out that the information was already widely available.

6. Do not criminalise the legitimate disclosure of secrets in the public interest.

R2K believes that any protection of state information regime should allow "escape valves" to balance ordinary people's rights of access to information and freedom of expression with the state's national security mandate, in the interest of open and accountable democracy.

Partly met 

A limited public interest exception has been inserted in the Bill—a significant **victory**. It will cover any person who would otherwise have been guilty of unlawful possession or disclosure of classified information if another law—e.g. the Protected Disclosures Act, the Prevention and Combating of Corrupt Activities Act or the National Environmental Management Act—authorises or protects them, or if they want to expose criminality.

But the exemption does not go far enough as it does not explicitly allow disclosure to prevent an imminent public safety or environmental risk, and as regulations, which are not yet known, will set rules for whistleblowing by state employees, former employees, contractors, etc.

The danger also remains that the offences of "espionage", "receiving state information unlawfully" and "hostile activity" may be abused to charge whistleblowers, journalists and activists who legitimately disclose classified information believing themselves to be covered by the public interest exception. These offences, which carry extremely harsh penalties of up to 25 years' imprisonment, are not covered by the public interest exception and do not require that the "perpetrator" must have intended to benefit a foreign state or hostile actor.

7. An independent body appointed by Parliament, and not the Minister of State Security, should review decisions about what may be made secret.

R2K believes that the Minister of State Security is not the appropriate authority to adjudicate classification and declassification decisions in other state departments as there is likely to be a bias in favour of secrecy.

Partly met 

The Bill will create a Classification Review Panel, which will have significant powers, previously reserved for the minister, to oversee and revise classification decisions—a **victory**.

However, the panel may not be sufficiently independent. Although Parliament will approve candidates for appointment, the secretive Joint Standing Committee on Intelligence will make the selection, and the Minister will have significant say in the panel's rules and members' remuneration.

It is also problematic that there is no provision for members of the public to approach the panel.

Other issues which have arisen

Remove the override of the Promotion of Access to Information Act (PAIA)

Met 

The clause saying that the Bill overrules PAIA has been taken out – a significant **victory**. Among other things this will augment and strengthen the Bill's own, inadequate, provision allowing for applications for the declassification and release of classified information.

Allow Chapter 9 institutions access to classified information

Met 

The Chapter 9 institutions can now be cleared to receive classified information – another **victory –** although the devil may be in the detail of regulations and policies still to be made.

Do not criminalise the possession of information classified under unconstitutional laws and policies

Not met 

Persons who are in possession of information that was classified under constitutionally problematic laws and policies – information that would often not qualify at all for classification under the Bill – will be instant criminals simply for hanging onto their valued troves of e.g. apartheid-era files. This is constitutionally problematic.

ENDS