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To the Open Government Partnership Steering Committee

I write to you on behalf of the Right2Know campaign, a civil society coalition of over 400 organisations and social movements in South Africa and the international community. We are opposed to the Protection of State Information Bill (widely known as the Secrecy Bill), a piece of draft legislation adopted by the National Assembly (the first house of the Parliament of South Africa) on 22 November 2011, and currently scheduled for adoption by the second house of Parliament by no later than 8 April 2012.

While we accept the need to replace the now defunct apartheid-era official secrets act (the Protection of Information Act of 1982), we believe the Bill in its current form presents an unreasonable limitation on the right to access information and undermines South Africa's own constitution.

Despite a range of progressive amendments made to this Bill over the past 18 months, we continue to be extremely concerned about the broadness and harshness of criminal penalties contained in the Bill, and the lack of adequate protection for whistleblowers, journalists, and ordinary citizens:

Penalties

- The most severe offences in the Bill make it a crime to disclose a state secret which the person "knows or ought reasonably to have known would directly or indirectly benefit" a foreign state or a hostile non-state actor, or prejudice national security. Offenders may receive between three and 25 years in jail, with no distinction between acts of espionage and legitimate whistle-blowing (We note that investigative journalists regularly expose that may benefit foreign states; however, this is not their reason for exposing it);
- It is a crime, punishable by a fine or a maximum jail term of five years, to disclose a state secret even if the disclosure did no demonstrable harm to national security – and even if the information was already in the public domain;
- It is an offence carrying a prison sentence of up to 15 years in prison to receive or disclose information classified by the state security agencies (as opposed to the police, military, or any other organs of state given powers under the Bill), even if the disclosure did no demonstrable harm to national security – and even if the information was already in the public domain;
- If an ordinary citizen receives classified information, failing to report and return it to the authorities will result in a fine or up to five years in prison – in this way, it is a crime merely to possess a state secret;
- Those who harbour people who have illegally disclosed state secrets – currently, encompassing those who may do so for legitimate public interest reasons – also face up to 10 years in prison.

Lack of whistleblower protection

- Supporters of the Bill have insisted it is aligned with international best practice regarding whistleblower protection. However, only the most minor offences in the Bill (simply disclosing a state secret where the national security of the republic is not prejudiced) offer protection for whistleblowers, in terms of existing whistleblower laws.
- However, the protection in those laws only extends to employees who are disclosing information about the body that employs them: in other words, it may offer protection to civil servants, but not to ordinary citizens.
- Even then, the protection offered creates a reverse onus, requiring the whistleblower to prove in a criminal court, and thus beyond reasonable doubt, that they blew the whistle in terms of the Act.

- Furthermore, in terms of those laws a whistleblower may only disclose information to certain authority figures – it does not protect outright disclosure. In addition, any information a whistleblower places in the hands of the media or a member of Parliament means that they too may face a criminal penalty for mere possession of the information, and in addition, criminal penalties for disclosing the information.

Hundreds of civil society organisations have joined to oppose this legislation, believing it will continue to be a direct threat to the principles of open governance until such time as it is reformulated so that:

- Penalties hinge on the extent of demonstrable harm caused to the national security by disclosure of said information, and/or;
- The application of the possession and disclosure offences are reduced so that they apply only to current and former state employees or contractors charged with protecting information, not to journalists, activists and the general public, and/or;
- The legislation contains comprehensive protection for anyone who discloses state secrets if the public interest in that disclosure outweighs the national security imperative, and/or;
- Penalties do not apply to information that has been disclosed and can said to be in the public domain.

Furthermore, we are concerned that the Protection of State Information Bill directly undermines our freedom of information law, the Promotion of Access to Information Act (PAIA). Though PAIA already provides clear guidelines for information that should not be disclosed by the state to citizens (for example, sensitive personal information of a third party, or information crucial to national security) the Secrecy Bill effectively inserts a new ground for refusal into PAIA, allowing officials to refuse access to documents requested under PAIA merely on the basis of their status as a classified document.

We believe that in its current form the Protection of State Information Bill represents a regression in South Africa's commitment to openness, and overlooks a need for global reform in such legislative practice, embodied by the Open Society Justice Initiative's draft *Principles On National Security And The Right To Information*. If passed, we believe it also constitutes a contravention of the OGP principles, which require a collaborative and consultative relationship between government and civil society. This draft legislation has had the unfortunate effect of creating a climate of polarity between civil society and the Executive, and suggesting an atmosphere of hostility on the part of the Executive towards the principles of freedom of expression and access to information. This is embodied by a speech to the National Assembly last month in which the Minister of State Security accused civil society organisations opposed to this legislation of being funded by foreign spies.

Therefore, the Right2Know campaign calls on the OGP steering committee to:

- Write to the South African government drawing its attention to these concern at the next OGP Steering Committee meeting (in December 2011);
- Require the South African government to report back on developments regarding the drafting of this legislation at future meetings of the OGP Steering Committee;
- Suspend South Africa's membership of the OGP should it fail to ensure that this draft piece of legislation is fully brought in line with the OGP principles at the time that President Zuma signs the Bill into law.

Sincerely,

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Right2Know campaign membership: South African Civil Society Organisations

Abahlali baseMjondolo, Afesis-Corplan, Anti Privatization Forum (APF), Anti Eviction Campaign, African Centre for Citizenship and Democracy, African Network Constitutional Lawyers, Alternative Information and Development Centre, AIDS Foundation of South Africa, AIDS Legal Network, Aksie Gleniqua Foundation, Alliance for Children's Entitlement to Social Security, Alternative Media Forum, Amnesty International (Durban), Athlone Backyarders, Arepp: Theatre for Life, Association for Freedom of Thought and Expression, Association for Progressive Communication, Association for Independent Publishers, Bedfordview Methodist Church, Biowatch South Africa, BirdLife South Africa, Black Sash, Blikkies Informal Committee, Boggomsbaai Belastingbetalersvereniging, Book Southern Africa, CAF Southern Africa, Cape Environmental Trust, Ceasefire Campaign, Centre for Civil Society Environmental Justice Project (UKZN), Centre for Conflict Sensitive Reporting, Centre for Constitutional Rights, Centre for Economic Governance and AIDS in Africa, Centre for Environmental Rights, Centre for Justice and Crime Prevention, Centre for Policy Studies, Change the World Trust, Channel Managed PR, ChrioJIRAH Academy, Childrens Rights Centre, CIVICUS, Clairwood Social Forum, Coalition Against Nuclear Energy, Community Law Centre, Community Media Trust, COPART, Cooperative and Policy Alternative Centre, Cullinan Residents Association, Daily Dispatch, Delft Integrated Network, Democracy Development Programme, Desmond Tutu Peace Centre, DGR Writing and Research, Diakonia Council of Churches, Durban YMCA, Earthlife Africa (Johannesburg), Earthlife Africa (Cape Town), Earthlife Africa (eThekweni), Eastern Cape Communication Forum, EcoDoc Africa, ECOPEACE, Economists Allied for Arms Reduction, Engender, Ensure Viable Environment, Environmental Monitoring Group, Equal Education, Equal Rights Foundation, Far South Peninsula Community Forum, Federation for a Sustainable Environment (FSE), Forum for African Investigative Reporters, Free Society Institute, Freedom of Expression Institute (FXI), FW de Klerk Foundation, Gay & Lesbian Network, Glencairn Action Group, Global Campaign for Education, Global Integrity, GM South Africa Foundation, Greater Cape Town Civic Alliance, Greater Lynfrae Civic Association, Greenpeace Africa, Greyton Genadendal Education Fund, GroundWork, Gun Free South Africa, Habitat Council, Health-e News Service, Helen Suzman Foundation, Historical Society of Southern Africa, Hout Baai Farm McGregor, Highlands Herald, Human Rights Watch, Idasa, Imara Consulting, Impumelelo Innovations Award Trust, Indaloyethu Environmental Cooperative, Institute Advancement of Journalism, Institute for Accountability in Southern Africa, Institute for Justice and Reconciliation, Institute for Security Studies, Institute for Zero Waste In Africa, International Centre of Nonviolence, Durban University of Technology, International Fund For Animal Welfare, Inyathelo: The South African Institute for Advancement, Journalism Department (Stellenbosch University), JUSTICE, Keep SA Media Free, KhoeSan Womens Circle, KZN AVP Network, KZN Inter-religious council, Khulumani Support Group, Koeberg Alert, Lesbian and Gay Equality Project, Litnet, M&G Centre for Investigative Journalism (amaBhungane), Media Workers Association of South Africa, Media Institute of Southern Africa (MISA-SA), Mandela Park Backyarders, Media Monitoring Africa, Modjaji Books, National Press Club, National Welfare Forum, New Womens' Movement, Ndifuna Ukwazi, Nomonde Development Association, Ons Plek Project, Open Democracy Advice Centre, Open Society Foundation, South Africa, Other-Wise media, Out of the Box, Overstrand Conservation Fund, Palestine Support Committee (Durban), Paradise Beach Community Association, Parliamentary Monitoring Group, Pelindaba Working Group, Participation Junction, Poetry International- South Africa, Politicsweb, Positive Women's Network, Professional Journalists' Association, Peoples' Health Movement (PHM) South Africa, Primary Science programme, Project for Conflict Resolution and Development, Public Service Accountability Monitor, Quindiem Consulting, Rainbow UCT, Rape Crisis, Reclaim Camissa, Rural Health Advocacy Project, SA Council for English Education, SANGONeT, SA Pen, Sannieshof Ratepayers Association, Save the Vaal Environment, Section27, Sector 5 Umbilo Policing Forum, Sedgfield Community Intelligence Centre, Serengeti Media, Shadow Films, Sikhula Sonke, Social Justice Coalition, Social Movements Indaba, Socio-Economic Rights Institute of South Africa, Sonke Gender Justice Network, South African Education and Environment Project, South African Faith Communities Environment Institute, South African History Archives (Freedom of Information Programme), South African History Online (SAHO), South African Labour Bulletin, South African Litigation Centre, South African National Editors Forum (SANEF), South Durban Community Environmental Alliance, Southern African Faith Communities Environment Institute, Southern African Historical Society, Southern African Litigation Centre, Southern African Media and Gender Institute, St Francis Bay Residents Association, St Martin's Anglican Church, StreetSmart SA, Students for Law and Social Justice, Students for Social Justice, SynergyWORKS, Tafelsig Development Forum, The AIDS Consortium, Timbila Poetry Project, The Arkwork Collective, The Book Lounge, The Centre for Applied Legal Studies, The Circle Connection, The Greater Kyalami Conservancy, The Media School, The Shine Centre, The South African Gay & Lesbian Alliance Against Defamation (SA GLAAD), The Umbilo Action Group, The World AIDS Campaign, Third World Investment Gateway Trust, Treatment Action Campaign, Tshwaranang Legal Advocacy Centre, Ubuntu Ministries, University of Cape Town, UCT Press, Uitkamp Action Group, Umbilo Park Conservancy, Umphilo waManzi, Unemployed People's Movement, Unemployment Secretariat, Walmer Estate Civic Association, Western Cape Street Childrens Forum, Wildlife & Environment Society of SA: Lowveld Region, Wildlife and Environmental Society of South Africa, Women's Legal Centre Trust, Zwartkops Trust.