Secrecy Bill: Comments by Steven Friedman and Pierre de Vos

1. Secrecy Bill, Steven Friedman, 22 November 2011

(This article first appeared in the Business Day)

If we want to protect our freedoms, we need to make sure they are not seen as the concern of only a few. The Protection of State Information Bill, which comes before Parliament today, is a threat to the freedom of many of us. But those who have campaigned against it have misread both its intent and its likely effect. In the process, they have revealed how the battle for freedom in this society is still the preserve of only some of us. That the bill is being tabled over their protests may show the weakness of a defence of liberty restricted to the middle classes.

To begin with the intent. Contrary to widespread belief, this bill is not aimed at closing down media coverage of government corruption and incompetence. If it was, it would not say information cannot be classified if it reveals wrongdoing or ineptitude in the government. Nor would changes have been introduced that seek to ensure that only security information is secret. Rather, it is an attempt by the security establishment, particularly the intelligence services, to ensure that it operates in secrecy.

The bill began life, ironically, as an exercise in replacing apartheid-era law — it was meant to replace a restrictive statute passed by the old regime with one in tune with the democratic values of our constitution. But the attempt to further free up information law must have run aground on the obsessive demand for security, which is the stock-in-trade of intelligence agencies. The spies and their political allies seem to have stepped in to insist that too much openness threatens our safety. Government defenders of the bill, from State Security Minister Siyabonga Cwele down, harp on about our vulnerability to foreign spies — without saying who our enemies are and why we would be threatened if foreigners know what our security agencies do. This shows the influence of the intelligence operatives on government thinking.

Why would politicians want to end reporting on corruption? Political insiders know that most of what we hear or read about government wrongdoing comes from politicians fighting their battles by fingering other politicians: they are not about to close down an essential weapon in their armoury. The real problem is the growing influence of the security establishment over the current administration. President Jacob Zuma has staffed the security cluster with trusted allies and this is why their desire to operate in the dark carries so much weight.

Failure to see this has distorted the campaign against the bill. Thus, some campaigners have argued that it is legitimate to protect state secrets but not to deter reporting of corruption. This shuts out a vital debate — on how legitimate it is to allow intelligence agencies to keep secrets from us. All over the world, security and intelligence establishments try to keep information secret which the public should know. Here, repeated revelations that government intelligence is used to fight political battles, not to protect us from threat, should cause us to challenge the spies' demand that we keep our nose out of their affairs. We need to challenge their insistence on secrecy — the misdiagnosis of the problem has prevented us from doing this.

What about the effect? What bills are meant to do, of course, is not always what they really do. It is here that another misdiagnosis shows the elite bias behind the way our mainstream debate sees freedom.

We are told repeatedly that this law will close down investigative journalism and prevent the media from reporting on government wrongdoing. This ignores the point made earlier — that it contains clauses insisting that it cannot be used in this way. Officials who want to protect themselves will no doubt ignore them. But there is no reason why the media should.

Journalists are presumably entitled to take the law at its word and to continue reporting all those government failures the law says they can reveal. If they are prosecuted, they will hire lawyers who will point out that they were protected by the law. As long as our courts remain competent and independent, no journalist reporting on government misbehaviour can be convicted. And so, if the government does try to use this law against the media, it is likely to find that the effort is futile.

The clause is unlikely to offer the same protection to a group of township or shack settlement residents who want to know where the money for their development projects went. If municipal officials use the bill to protect themselves, the activists are unlikely to be able to afford a lawyer to help them fight the prohibition. If we add the reality that media organisations have far more of the resources needed to get hold of documents that officials and politicians do not want us to see, it is clear that the real losers will not be the media but grassroots citizens. Trying to get the government to serve citizens has always been more difficult for the poor than for the middle classes and the affluent. This bill will make it even harder.

Those who have campaigned against the bill have, therefore, presented a threat to the rights of the grassroots poor as one to the media. As usual, rights and freedoms are those of the middle class and the affluent, not the poor. If this does not change, freedom could be in serious trouble.

Since 1994, freedom has been preserved here largely because the suburban elite that dominates business and the professions has been strong enough to dissuade a government they distrust from tampering with their liberties. This does not mean that a desire for freedom is restricted to the suburbs — the evidence suggests that it is shared by many at the grassroots. But it is the affluent who have the resources and the connections to make themselves heard. And the government knows that there are economic costs to ignoring them.

This has benefited the entire society — the poor need freedom at least as much as the better off. While they have often been denied it by local power realities that do not affect the suburbs, poor people would be even worse off if our freedoms go. But for how long can a freedom preserved by only a fraction of the society endure?

We may not yet have reached a pass at which freedom will be in dire peril if its only advocates are the suburban middle classes. But we are sure to reach it sooner or later. In a limited way, perhaps we already have — would the bill have survived if it had faced the sustained resistance of the grassroots, who stand most to lose from it? The fact that the bill is now before Parliament should serve as a warning. If our mainstream debate remains obsessed with the freedom of the few and ignores that of the many, that freedom will remain fragile.

If, however, we understand that the chief victims of unrestrained official power remain the poor and that poor people must play a key role in protecting all our freedoms, we may yet ensure that we not only hold onto the freedoms we have but ensure that more and more of us enjoy them.

(Friedman is director of the Centre for the Study of Democracy.)

2. Who can we trust?, Pierre de Vos.

22nd November 2011. (http://constitutionallyspeaking.co.za/who-can-we-trust/)

Very few people implicitly and unconditionally trust all government officials, all members of the cabinet and all the members of the intelligence services of their country. Few, surely, believe that they will always act scrupulously, honestly and in strict accordance to the law and the Constitution. (Hell, I am not even sure President Zuma fully trusts all his own ministers.) One might well implicitly trust ministers and government officials if they belong to the politically party that one passionately supports. Thus, some DA members might blindly trust Helen Zille, while some ANC members might blindly trust Jacob Zuma. But very few of those DA supporters would blindly trust Zuma and very few of those ANC supporters would blindly trust Zille.

And whether one is a die-hard ANC supporter or a die-hard DA supporter, there cannot be too many people around who would blindly trust the members of the intelligence services (in other words the spies whose job it is to deceive, to keep secrets, and to obfuscate, all in the name of protecting national security). Given the way in which our spies have been implicated in various political plots relating to various ANC factions, only a fool will tell you that he or she believes our spies always respect the letter and the spirit of the law and always act honestly, and in the best interest of the Constitution and us citizens. Most would worry that our spies might at some point act in the interest of one or other faction in the ruling party, in the interest of members of the police or the military (as some did in attempts to try and protect the corrupt former Police Commissioner) or merely in their own interest. After all, members of the intelligence service has often acted unlawfully and unconstitutionally over the past few years.

This is why a discussion of the dangers of the Protection of State Information Bill passed by the National Assembly today (and now to be discussed by the National Council of Provinces), raises difficult questions. On the one hand the Bill on its face is not nearly as draconian as members of the media keep arguing. The Bill represents a vast improvement on the truly draconian Bill first tabled in Parliament last year and — at least on paper — now contains many safeguards to protect us against the emergence of a secretive national security state or the abuse of the Bill to cover up corruption, maladministration and other kinds of criminality in government.

However, on the other hand, the Bill cannot be judged on paper, but must be judged in the context in which spies and politicians have often been revealed over the past few years to be less than honourable and respectful of the law.

The problem with the new “improved” version of the Bill and the safeguards included in it, is that it assumes that we can blindly trust all government Ministers, state officials and spies to understand the intricacies (and seemingly contradictory aspects) of this Bill and to always apply it in accordance with this perfect understanding of the various provisions of the Bill. It also assumes that those who are empowered to classify documents and review the classification of documents will do so with one eye on the Constitution. Furthermore, it assumes rather optimistically, that the Minister of State Security (whose wife was recently convicted of drug running), other Ministers authorised to classify documents and the spies whose job it is so sow confusion, spread lies and general deceive others while hidden behind a cloak of secrecy, will not abuse their power and will only act in accordance with the letter and spirit of the Bill.

Of course we know that a number of Ministers, including Defence Minister Lindiwe Sisulu and State Security Minister Siyabonga Cwele, have refused to answer questions about their travel costs and hotel stays on the grounds that this would compromise their personal security, displaying a

rather authoritarian view on keeping secrets in the interest of security and abusing the excuse of security to evade accountability for possible wasteful expenditure or, worse. One will therefore have to be an eternal optimist to believe that Ministers, spies and other officials authorised by this Bill to classify documents as secret or top secret will not abuse that power at some point or another.

Having said that, it is clear that the main aim of the Bill is not to protect Ministers or the government more generally from exposure for corrupt and other nefarious activities. Section 3(2) of the Act states that the classification, reclassification and declassification provisions of the Bill apply to the security services of the Republic (in other words, the Army, the Police and the Intelligence Services). However Section 3(2)(b)also allows any organ of state (including any government ministry) to ask the Minister of State Security to empower them to classify documents that could supposedly threaten “national security”. If the Minister exercises this power prudently, the scope of the Bill will be much reduced. However, given the paranoid and defamatory statements by the Minister that those who oppose passage of the Bill are being funded by foreign spy agencies, and given that there is a serious question mark over Minister’s judgement, it is not clear that he will not abuse this power.

Section 12 of the Act states that state information may be classified as confidential “if the information is sensitive information, the disclosure of which is likely or could reasonably be expected to cause demonstrable harm to national security of the Republic”. State information may be classified as secret “if the information is sensitive information, the disclosure of which is likely or could reasonably be expected to cause serious demonstrable harm to national security of the Republic”, while state information “may be classified as top secret if the information is sensitive information, the disclosure of which is likely or could reasonably be expected to demonstrably cause serious or irreparable harm to the national security of the Republic”.

‘‘National security’’ is defined as including (and one therefore presume not limited to) the protection of the people of the Republic and the territorial integrity of the Republic against the threat of use of force or the use of force; as well a hostile acts of foreign intervention directed at undermining the constitutional order of the Republic; terrorism or espionage; exposure of a state security matter with the intention of undermining the constitutional order of the Republic; and exposure of economic, scientific or technological secrets vital to the Republic. It explicitly excludes lawful political activity, advocacy, protest or dissent. With the exception of the subsection dealing with economic or technological secrets, this list looks innocuous. However, it must be read together with section 14(3) of the Bill which states that those classing Bills as secret must consider whether the disclosure may:

* expose the identity of a confidential source, or reveal information about the application of an intelligence or law enforcement investigative method, or reveal the identity 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;
* clearly and demonstrably impair the ability of government to protect officials or persons for whom protection services, in the interest of national security,are authorised;
* seriously and substantially impair national security, defence or intelligence systems, plans or activities;
* seriously and demonstrably impair relations between South Africa and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the Republic;
* violate a statute, treaty, or international agreement, including an agreement between the South African government and another government or international institution; or
* cause life threatening or other physical harm to a person or persons.19

If a spy (or a Minister who wishes to hide the fact that he or she has been living it up at the Mount Nelson or has visited a girlfriend in a Swiss jail) read section 14(3) in isolation, he or she may well classify information that would clearly have very little to do with national security. What is therefore limited by the definition of "national security" might well be smuggled back into the act via the back door in section 14(3) of the Bill. I can already imagine Minister Lindiwe Sisulu from pointing to the second bullet point above to justify the classification of all sorts of documents that might embarrass Ministers or might expose the corruption they have been involved in. Because the Bill is so complicated, it would be difficult to make plausible arguments in the public domain that the Minister is abusing the Bill. But this is not the end of the matter. Section 32(1) does provide a safeguard which could in certain circumstances be effective. It states that a person who wants to gain access to a classified document may apply to a court for appropriate relief after the requester has exhausted the internal appeal procedure against a decision of the relevant Minister of the organ of state in question. If one has every reason to know that a document exists (for example, that a document exist setting out the cost of a Minister's travel and Hotel stays) , this avenue will be costly but mostly effective (unless one is unlucky enough to have to argue one's case before a slavishly pro-executive judge).

The problem arises where one receives a document that is classified and the only way one would have known of the existence is if one had been leaked the document. One must then immediately hand back the document to the Police before one can challenge the wrongful classification. If one fails to do so, one could be prosecuted and sentenced to jail. If one holds on to the document, the Minister might say that such a document does not exist and one would not be able to contradict him or her as this would amount to an admission of committing a crime. Moreover, how one would convince a court that a document should be declassified if one does not have access to the document, is not clear.

In short, on paper the Bill that was passed today is not as bad as many in the media argue. But in practice it might be devastating as it might protect our spies and our politician from scrutiny required to keep them on the strait and narrow. It might set us on the slippery slope towards a secretive national security state – as Steven Friedman argued today in Business Day. As an afterthought, it might also help to protect the venal and the corrupt. Although safeguards do exist in theory, in practice these safeguards will often be illusory (especially for anyone without access to very clever lawyers and pots of money) unless those entrusted with applying the law will always act absolutely honestly, with brilliant insight into the law and with one eye towards the Constitution. The chances of this happening is about as slim as the chances of me winning the Miss World Competition.

This means, for example, that where activists of Abahlali baseMjondolo or the Landless People's Movement are illegally targeted by the security services because they are perceived to be a threat to the ANC government and their phones bugged, their houses attacked or their leaders tortured and murdered, it would be almost impossible for the organisation to prove this when all the documents that could do so will be classified. Ironically, only the media will have the resources to expose such abuse of power, but this would require the media targeted at the middle classes to display far more concern for the well-being of these social movements whose interests do not always align with the interests of the middle classes served by the serious media. In a state in which trust has been eroded, a Bill like the one passed today becomes even more scary than it otherwise would have been. The strong reaction of civil society to the Bill therefore says just as much about the specific provisions of the Bill than it says about the fact that the governing party and state institutions have squandered the trust and goodwill it had acquired over many years of struggle. No wonder the ANC politicians are so upset.