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Title: Case Comment: The new Freedom of Information Law in Israel is tested by its Supreme Court

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Abstract

Israel's Freedom of Information Law is relatively new and therefore Israel's highest court has not been afforded many opportunities to rule on its parameters. A recent 2005 petition to obtain information from the Ministry of Health pursuant to this law provided the Israeli Supreme Court with such an opportunity. Although the intention of this underused law was to encourage transparency by government bodies and free access to information by the public, the ruling on the petition by the Supreme Court has raised concern as to whether this law has been sufficiently internalized so that it can be adequately applied to achieve real significance in Israeli society.

In this instance, the Supreme Court, dismissing lower district court rulings that were designed to encourage access to information, designed a balancing test weighing the importance of the requested information to the petitioner against the right of the state body to withhold the information. By doing so, the Court ignored the test proposed by the district court which enabled free access to information unless the state agency could demonstrate that disclosure of the information would pose a "special harm or damage" to the public body.

This case is one of a few that illustrate the Supreme Court's narrow approach to freedom of information issues. By failing to uphold the bold rulings of the lower district courts, the Supreme Court is unfortunately acting to constrain the freedom of information revolution instead of acting as its natural leader.

Foreword

Israel's Freedom of Information Law (hereinafter: Freedom of Information Law) was enacted only 7 years ago and is therefore relatively new to Israeli jurisprudence. The District Courts, due to their lower court status, naturally adjudicate many more cases dealing with petitions to access public information under this law than does the Supreme Court. However, while the District Courts have given broad interpretation to this important piece of legislation, the Israeli Supreme Court has not been as benevolent in its interpretation of this law. Acting as the highest court in the land and having heard very few cases challenging the Freedom of Information Law, each ruling by the Supreme Court on this issue has wide ranging implications and great significance.

Freedom of information is a vital and crucial value of a democratic regime. The underlying principle supporting this right is that information held by governmental bodies does not belong to any specific authority but rather to the public at large, and the public authority acts as the public's trustee for the information. Under this approach, acts of the government must be transparent and open to public review.

This idea is impressively achieved by article 1 of Israel's Freedom of Information Law, which states: "every Israeli citizen or resident has the right to obtain information from a public authority in accordance with the provisions of this law". However, like all other legislation, the actual affect of the Law rests in its application by the courts. The application of the Freedom of Information Law in Israel, as in other states

around the world, has encountered many obstacles, both by the public bodies who are requested to produce the information, and also unfortunately, by the courts.

A recent Supreme Court ruling from this past January (2005) has raised concern as to whether this relatively new law has been sufficiently internalized so that it can be adequately applied to achieve real significance.

This article discusses the specific incident that led to a Supreme Court ruling on the interpretation of the Freedom of Information Law and compares the Court's holding to the stated objective of the Law which is maximum transparency by public bodies.

The case

The case arose from an administrative petition filed by the Association of Homes for the Elderly (hereinafter – the Association) against the Ministry of Health requesting information as to the basis of the Ministry's computation of the daily cost of hospitalization in a nursing home (which was fixed at 274 Israeli shekels per day – approximately \$54 dollars). According to Israel's National Health Insurance Law, the Israel Ministry of Health finances hospital services for geriatric patients. These services are provided by government hospitals and through the outsourcing of geriatric in-patient services in other institutions, some of which are members of the Association.

The Administrative Petition was filed with the Jerusalem District Court by the Association which acts as the national umbrella organization for old age homes and residential homes for the elderly. The purpose of the petition was to obtain the factual assumptions and basis of the Ministry's determination of the cost of daily

hospitalization, in order to prepare for a hearing arranged by the Ministry of Health for this purpose. The Ministry acceded to a part of the request for information but failed to produce all of the requested data, namely three Excel sheets used in the computation of the final figures.

The District Court, sitting as an Administrative Court, is the court of first instance for cases involving public bodies that refuse the request of a petitioner to produce any type of information.

The holding of the District Court

The Jerusalem District Court held that the Ministry of Health had a duty to produce all the requested data, including the three Excel sheets that contained various calculations related to the computation of the hospitalization rates.

The District Court had already heard arguments by the State that the requested information constituted a draft and a record of internal discussions by the Ministry of Health and therefore the Ministry had no duty under the Freedom of Information Law to produce the data. The State based itself on the Law, which determines that:

“9 (B) A public body is not obligated to deliver information that is one of the following:

- (4) Information pertaining to internal discussions, records of internal consultations among employees of public authorities, their friends or consultants, or pertaining to matters that were said during an internal investigation, or an opinion,

draft or recommendation, that were given in order to arrive at a decision, with the exception of consultations set by law".

In a remarkable ruling, the Jerusalem District Court Judge, Moshe Gal, held that it was not sufficient for the State to merely point to one of the listed exceptions in order to claim privilege of information. There are many exceptions listed in the Freedom of Information Law that justify the concealment of information and the withholding of such information from the public. In this case the State claimed that the reason for withholding the information was that the information constituted internal discussions of the public body and thus was one of the exceptions that could justify invoking immunity under article 9(B)(4) of the Law. Judge Gal, however, stated that the public body invoking privilege must demonstrate that disclosure of the information would cause special harm or damage, particularly if the special interest of the petitioner in obtaining the information can be successfully shown. In this case, the petitioner was able to demonstrate a clear economic interest in knowing the cost of daily hospitalization and the method by which the cost was calculated. Under this ruling, if a public body is not able to prove special damages then it must produce the information.

The Health Ministry objected to the lower court's decision and filed an appeal with the Israeli Supreme Court.

The deliberations and decision of the Supreme Court

The Supreme Court's deliberations focused on the three Excel sheets used by the Ministry of Health to reach its calculation. During the Supreme Court hearing the Ministry of Health agreed to produce all of the data and figures that it had used to

reach the end result but refused to hand over the Excel sheets containing the actual calculation to the Petitioners.

The firm stand taken by the District Court in support of freedom of information was sadly not equally appreciated by the Supreme Court. Justice Miriam Naor, one of the outstanding Supreme Court Justices and Justices Michael Cheshin and Dorit Beinish, thought otherwise.

The Supreme Court began its deliberations with full recognition of the principle of freedom of information as fixed by article 1 of the Law. The Court noted the distinction designated by the Law between the instances where a public body is prohibited from disclosing information (article 9(A) of the Law lists these instances: for example, when the disclosure of such information would harm the security of the State or the privacy of another person), and those instances where the public authority is "not obligated" to produce the information (as stated in article 9 (B) of the Law).

The case in discussion clearly belongs to the second category. Under such circumstances, while the public authority is not obligated to produce the information, each case is evaluated on its own merits and in a number of situations the public body will be obligated to reveal the information, notwithstanding the privileges set out in article 9.

Article 10 of the Law deals with the considerations to be taken into account by the public authority in its determination of whether or not to disclose information for which it is under no obligation to disclose under article 9. Article 10 states as follows:

"10. When considering a refusal to produce information under this Law, pursuant to articles 8 and 9, the public authority will consider, inter alia, the interest of the petitioner in the information, . . . as well as the interest of the public in the disclosure of the information for reasons of protecting the public's health or security, or protection of the environment."

Significantly, the exceptions enumerated in the Freedom of Information Law are not absolute but are relative, and each case is individually evaluated by balancing the right of the citizen to receive the information against the considerations of the public authority. The public authority's considerations in withholding information must be based and influenced by the nature and strength of the petitioner's interest in obtaining the information, as well as the interest of the public in the disclosure of the information.

Even when the public body reaches a decision to withhold information, the decision is not always final. Article 17(D) of the Law explicitly sets out the role of the court in these instances:

"17(D) Notwithstanding the provisions of article 9, the court may order the production of the requested information, in whole or in part and under such terms as it shall determine, if, in its opinion, the public's interest in the disclosure of the information takes precedence and prevails over the reason for rejecting the petition, provided that the disclosure of the information is not prohibited by law."

As mentioned above, the courts must weigh carefully the different interests underlying petitions for access to information. The public of course has a great interest in knowing certain facts and information that can affect its health and welfare. On the other hand, state agencies and other governmental bodies have a recognized interest to protect the state from the dissemination of information that may compromise the security of the state and the authority itself. As part of this calculation the courts must balance the civil liberties of each party. In this case, the interest of the petitioner to obtain the information was balanced against the statutory right of the state agency to be able to withhold that information.¹

Part of the new balancing act designed by the court requires the court to take into account how important the information is to the petitioner. Does the absence of the information make the petitioner any less capable of making his case? Or is the information crucial for the petitioner's cause, without which he could not operate or succeed in reaching his stated goals? In other words, the stronger the interest of the petitioner to the information, whether private or public, the greater the inclination of the court to order the disclosure of the information, notwithstanding the privilege clause.

Nonetheless, despite the Supreme Court's acquiescence with most of the holding of the District Court, it was not prepared to fully extend itself in protecting the principle of freedom of information.

¹ See on the issue of the balancing act performed by courts when deliberating on competing interests involving civil liberties, Aharon Barak (2004), *A Judge in a Democratic Society* (Joint publication of Haifa University, Nevo Press, and Keter Publications, 2004).

As previously noted, the lower court had established that in the required balance of interests between the parties, the disclosure of information was the preferred path and the withholding and non-disclosure of information should only be tolerated in instances where “special harm” to the public body is demonstrated.

The Supreme Court Justices held that the requirement of “special harm” is not derived from the Law. Justice Naor opined that the disadvantage of this type of test is that it is unyielding and inflexible. In the instance case the test would bring about an improper result that without taking the public body into account.

Justice Naor created another balancing test between interests and parties in dispute. In her opinion, a petitioner’s interest must be evaluated as well. According to her approach, the Association of Homes for the Elderly did have an interest in the information found in the Excel sheets but in her opinion this interest was not so formidable and therefore the Association would be able to achieve its goals without the information. Consequently, the raw data that had been produced by the Ministry of Health was deemed sufficient for the Association’s purposes.

The Supreme Court thus rejected the test of “special harm” to the public body and adopted a general balancing test, one that takes into account all the circumstances of a case. The significance of this test is that the determination of whether to disclose information is subject to the judge’s perspective and not necessarily to the advancement of the principle of freedom of information. Moreover, the court can now scrutinize a petitioner’s interest to the requested information, and if the court finds it insufficient, the non-disclosure of the information will be upheld.

Analysis and conclusion

On its face, this case is really about an insignificant and small detail, namely an internal calculation of a daily cost. Justice Naor's position that the petitioners in this instance could manage without the Excel sheets that demonstrated the Ministry of Health's method of calculation, especially as the Petitioner was provided with all the numerical figures that went into the calculation and could have done the calculation on its own, is probably accurate. However, this Supreme Court ruling should be a source of concern to all those who hold freedom of information of paramount importance. The decision by the Supreme Court is contrary to the underlying principle of freedom of information and the idea that information held by public authorities belongs to the public and should be transparent and available. The idea of transparency does not warrant a strict scrutiny of the interest of a petitioner. Under this principle everyone is entitled to information and there is no reason for an analysis of the necessity of obtaining the information or the purpose of the information itself. The only justification for not disclosing public information would be under rare circumstances when the public bodies or other essential interests are in danger of incurring material damage.

The "special harm" test proposed by the District Court is the proper test, in that it enables a public body or agency to defend itself against the disclosure of information that may cause such public body harm, but imposes a burden on the agency or body to specify the harm and not rely exclusively on slogans and old habits. The excuse that requested information constitutes a draft or a summary of an internal discussion cannot serve as justification for withholding information.

This case is one of a few that illustrate the Supreme Court's more narrow approach on freedom of information issues. By failing to uphold the bold rulings of the lower district courts, the Supreme Court is unfortunately acting to constrain the freedom of information revolution instead of acting as its natural leader.

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