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**Title:** Between FOI Law and FOI Culture: The Israeli Experience

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### **Abstract**

The Israeli Parliament adopted Israel's Freedom of Information Law on the 19th of May 1998. The ratification of the law was accompanied by festive declarations regarding a "transparency revolution" and promises for a new era in the relations between citizens and government. Seven years later, this article attempts to examine to what extent the Law has met these expectations. Through an analysis of the Israeli Law, we endeavor to answer a broader question: To what extent does a Freedom of Information Law indeed assure freedom of information and government transparency?

It is argued that an examination of the volume of applications and the way they are treated by the persons in charge in the authorities testify to a very partial implementation of the law. The article examines the role of the government, the public, the media and the courts in the course of the process of implementing the FOI law in Israel, and offers conclusions and suggestions as to necessary elements to be added to the Israeli Law and to be included in future FOI Laws, in order to assure the legislation generates the cultural change required to create true Freedom of Information.

## **1. Introduction**

On Tuesday, May 19, 1998, Israel adopted the Freedom of Information Law (FOI) hereinafter: "the Freedom of Information Law" or "the Law"). Thus Israel joined western countries, which in the course of the 90s, recognized how crucial a Freedom

of Information Law was in order to ensure the rights of citizens, to maintain a healthy democracy and an open civil society and to win the fight against corruption. The discussion in which the Law was adopted bore all the signs of a solemn debate, one that is usually reserved for laws of special importance. The Minister of Justice made a speech full of praise for his opponents in the Opposition, who had directed the legislation (Knesset Chronicles, 1998 p.7211). The discussion took place with almost no objections. After it was adopted, the initiators of the Law met with the non-governmental organizations, which had launched the struggle to adopt the law five years earlier, for a toast in the office of the Speaker of the Knesset (*Ibid*, 7216). At first glance, the harmony that prevailed when the law was adopted, the fact that it was adopted unanimously without reservations, and its warm acceptance by the Opposition, the Coalition and the Government, promised the most convenient climate for the Law's assimilation in the government institutions and for its successful implementation.

A short time before the Law was adopted, the Minister of Justice stated that the adoption of the Law is a "public and Parliamentary drama, which will... constitute a turning point in the relationship between the citizen and government authorities" (*Ibid*, 7214). The Minister admitted that "there would certainly be birth pangs involved in the implementation of the law", however, he added that "in the end, what we will have is an administration that is open, available, accessible to every citizen and every resident, and a more democratic and healthier society" (*Ibid*, *Ibid*).

This article will attempt to examine to what extent the Law has met such expectations, which were prevalent at the time of its adoption. By analyzing the Israeli Law, we shall endeavor to answer a broader question: To what extent does

the Freedom of Information Law indeed assure freedom of information and government transparency? In the course of the discussion we shall mention some conclusions drawn from the experience of other countries. In this paper we shall argue as follows:

1. The Freedom of Information Law constitutes a crucial condition for the maintenance of freedom of information, but is not a sufficient one;
2. In order to promote the Law's prospects of success its text must include "assimilation encouraging mechanisms", and reduce as far as possible the existence of "assimilation inhibiting mechanisms";
3. In addition, the Law's success depends on a cultural change among governmental authorities, which can be achieved only by "activating" the law by public means - campaigns, advertisements, instruction, initiated petitions, legal battles, and the like.

In the second part of the article, we shall describe the situation in Israel prior to the legislation and the principal mechanisms and procedures included in the Israeli Freedom of Information Law. In the third part, we shall examine the role of the public, the media and the various governmental authorities (both executive and judicial) in implementing the Law, and we shall describe the various problems which have arisen in connection with its assimilation. In this part. In the fourth part we shall attempt to indicate a number of conclusions and recommendations of a general nature. We intend to propose general conditions which would enable promoting the success of the Freedom of Information Law in Israel and elsewhere.

## 2. Legislation of the Freedom of Information Law 1998

### (a) The Situation Prior to the Law

Even in the first years after the establishment of the state of Israel, the Supreme Court recognized a series of basic liberties conferred on citizens, among them - freedom of expression. This liberty was recognized as a "superior right" in the "Kol Ha'Am" case in 1953. In his ruling, Judge Agranat quoted the poet Milton, who wrote in 1644: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." However, this ruling did not create a linkage between freedom of expression and freedom of information, or the right to know. Many more years were to pass before the right to freedom of information would be granted solid legal status.

Twenty years later, the concept that information held by the government belonged to the government, and not to the citizens, remained extant. In 1973, a former historian in the I.D.F. (Israel Defense Forces) History Department filed a petition against the government's prohibition of publication of a book he had written, describing one of the battles in the War of Independence (*Yitzhaky v. Minister of Justice*, 1973). The Supreme Court held that "public authority controls secret information collected in one of its departments... This information is valuable property, but it is not a commodity, and permission to use it freely is not a service which the authority is obligated to provide its citizens without discrimination, as if it were health, education, housing service, etc... It is property which the State has the right to use (or refrain from using) as it deems proper, for its own needs and purposes (*Ibid*, p. 700)."

The ruling represents a deep-seated tradition of secrecy and a great deal of respect for executive discretion, rooted in the first thirty years of the existence of the State of Israel. A number of factors had converged to establish this phenomenon: one dominant political party that ruled the state; a society of immigrants with a low awareness of their rights; a centralized Socialist government culture; and a difficult security situation, which placed the security establishment at the center of Israel's consciousness. All these contributed to the recognition of the government's need to sometimes act clandestinely and with minimal public supervision.

With the 80s came the first signs of a change in the courts' attitude to the public's right to know, although still characterized by contradictory statements. On the one hand, the Supreme Court issued rulings which refrained from recognizing the right to freedom of information. For instance, in the Ben case of 1989, the journalist Aluf Ben asked the Minister of Justice for information on the scope of permits granted to execute covert phone-taps in the country. When the Minister refused, the reporter and his newspaper petitioned the High Court of Justice, which rejected the petition in a particularly short ruling, arguing that "the petitioners had not succeeded demonstrating the respondents' legal obligation to provide them with the information they sought." (*Ibid*, p. 328) On the other hand, in the same decade, a number of rulings have been handed down which have constantly expanded the public's right to know. In the Zichroni case (1982), the public broadcasting authority's decision not to broadcast interviews with PLO (Palestine Liberation Organization) representatives in the occupied territories was revoked. The court held that the citizen's right to know imposes a duty on the authority to provide it with the full information. In the Shnitzer case of 1988, a reporter appealed against the Military Censor's decision to prohibit

publication of parts of an article criticizing the head of the Mossad (Israeli Intelligence Agency) whose tenure was about to terminate. The Supreme Court presented the case as a clash between security values and freedom of expression and the public's right to know. Judge Barak (current President of the Supreme Court) ruled that the Censor's position, whereby publication of the article would most probably be prejudicial to the State's security, was unreasonable, and revoked the decision. Judge Barak wrote as follows:

"It is, therefore, important that the public know of the forthcoming appointment. This is a manifestation of the importance of freedom of expression and the public's right to know." (*Ibid*, p. 644)

This case is one of the first in which the public's right to know was expressly intertwined with freedom of expression, which had been recognized, as aforesaid, as a basic principle in Israeli law about thirty-five years earlier.

The breakthrough ruling in establishing the right to freedom of information was rendered in the Shalit case of 1990. In this case, a group of private citizens sought to obligate the Knesset factions to disclose agreements signed between them towards the formation of a government. In a major precedent, which recognized the right to freedom of information, the court stated as follows:

"In the case of a political struggle between parties it is therefore obligatory that citizens be informed about the subjects and personalities connected with the political process... exposure of political agreements will influence the legality of their contents. It will enable public review, increase the public's

confidence in the governing authorities... A private person who has information may keep it to himself...This does not apply to a public personality. Information in its possession is not its private "property". It is "property" which belongs to the public, and it must bring it to the notice of the public"

Two years later, following the ruling, the obligation to publish political agreements before the formation of a government was included in the Basic Law: the Government (this obligation is presently stipulated in section 1 of the Government Law (2001)). However, the public debate concerning the legislation of a comprehensive Freedom of Information Law had only just begun. In 1992, a number of non-governmental organizations established the "Coalition for Freedom of Information". The Coalition operated several years with both Opposition and Coalition Knesset members, and led to the submission of draft private laws, which never progressed beyond the first reading.

In 1994, public pressure led to the establishment of a public committee, headed by a District Court judge (retired), which consisted of a journalist, a representative of the Association for Civil Rights, and representatives from the relevant government ministries. After a year of intensive work, the committee submitted its proposal for the text of the Freedom of Information Law to the Minister of Justice. This proposal was integrated with that of some Knesset members, but three more years of discussions in the Knesset committees, and significant changes in the committee's proposal, were required before the Law was ratified, in May 1998.

The lack of such a law was noted by various scholars and judges. Supreme Court Judge, Yitzhak Zamir, wrote in 1996:

"The court places great importance on the public's right to know, and it would have welcomed it if it had found it in the book of laws. However, the court itself refrains from establishing a precedent determining this right... In countries where the right has been recognized, it was also not established by the court but by the legislator. Indeed, the public's right to know... is a complex right by its very nature.... It is more suited to formalization by way of legislation than by judgment." (Zamir, *Administrative Power* (1991), pp. 871-872 (in Hebrew).

The passing of the Law marked the end of the campaign for the Freedom of Information Coalition. The non-governmental organizations which had participated in the Coalition felt that their goal had been achieved and their task completed.

#### (b) The Freedom of Information Law

The Freedom of Information Law in Israel is basically similar to FOI laws legislated in the 90's in European countries. Section 1 of the Law stipulates as follows:

"Every Israeli citizen and resident has the right to obtain information from a public authority."

In the course of the debate in the Knesset's Constitution, Legislation and Law Committee, the scope of the Law was expanded to grant a right, albeit limited, to non-residents (mainly foreign workers). Section 12 stipulates as follows:



"The stipulations of this law shall also apply to a person requesting information who is neither a citizen, nor a resident, with regards to information concerning his rights in Israel."

This definition is broader than is customary in some of the freedom of information laws, which confer rights only on citizens and residents, such as the Canadian law (Section 4 of the Canadian Freedom of Information Act, 1985) but narrower than customary in laws legislated in recent years conferring the right to information on every person, such as the Section 1 of the UK Freedom of Information Act, 2000.

Section 2 applies the law to a long list of public authorities, among them government ministries, the Office of the President, the Knesset, the State Comptroller, the Courts, government corporations, and "any other agency fulfilling a public function, which is a controlled agency." Section 9 sets forth the exemptions, similar to those in practice in other countries, including information the disclosure of which might be detrimental to State security, to its foreign relations, to public safety, invasion of privacy as defined in the Privacy Protection Law, information concerning policy in formulation, information concerning internal discussions, information that is a commercial secret of economic value. Section 10 qualifies the exemptions and stipulates as follows:

"In considering a refusal to provide information under this law ... the public authority will take into account, among other things.... the public interest in the disclosure of the information ..."

Section 14 provides a sweeping exemption for intelligence agencies.

Section 17 stipulates that, in the case of refusal to grant an application for information, the decision may be appealed to the Administrative Court, which may obtain all the information that has been refused, and may direct to hand it over if, in the court's opinion, the public interest in the disclosure of the information is superior to and is greater than the reason for denying the request.

Section 18 authorizes the Minister of Justice to set fees for requests for information, with the exception of information requested by an individual regarding him- or herself. The section stipulates explicitly that the Minister of Justice shall specify circumstances in which the fee shall be waived. Nevertheless, the regulations legislated after the Law was passed specified no waivers beyond those already stipulated in the Law concerning information requested by a person about him/herself.

Section 3 of the Law stipulates that every public authority shall appoint from among its employees an official to be in charge of implementation of the Law. The appointed represent the authority vis-a-vis applicants, deal with their applications and provide positive or negative responses. They are subordinate to the head of their respective authority. However, Section 19 of the Law, stipulating that the Minister of Justice shall be in charge of implementing the Law, does not establish any specific mechanism for supervising the execution of the provisions thereof. Therefore, the Law specifies no entity whatsoever which could supervise the activity of the officials and serve as an address for public complaints concerning the manner in which the Law is being implemented by the ministries. The first appeals instance against refusal

of a request for information is the Administrative Court, the application to which involves considerable financial resources and is time consuming.

### **3. FOI in Israel, Seven Years after the Legislation**

Seven years after the Law was passed, the current state of affairs is very different from that envisaged by its initiators. The hopes placed in the Law have been realized only to a very limited extent. Henceforth, we shall examine the involvement of several entities - the government, the public, the media and the courts - in the process of the law's implementation. (Thus we follow the classification presented in Sommer, 2003)

#### **(a) The Government**

Officials of the Civil Service Commission who appeared before the Committee advised, that in order to implement the Law it would be necessary to establish a 3-4 person unit to provide advice and assistance, and to monitor its execution (this unit could have fulfilled a role similar to that of the Information Commission in many countries). In addition, the Committee estimated that in order to implement the Law in the various authorities, an additional 220 government employee positions would be required. The Committee also estimated that courses and training for Civil Servants would be necessary in order to train them to implement the Law. The Committee estimated the demand for information, based on reports submitted to it, at 5,000-10,000 requests per year. Based on these figures, the Committee estimated the cost of the Law at about NIS 20-40 million a year (5-10 million euro in 2005 values). It is important to state, in light of this estimate, that the representative of

the Ministry of Finance in the Committee refused to add his signature to its final report.

The said Civil Service Commission unit was never set up. In actual fact, there is presently no entity to supervise implementation of the Law. There is no address for appeals on refusals of requests within the administration. There is nobody to receive the annual reports of the officials in charge of executing the Law. No budget has been allocated specifically for the purpose of assimilating the Law. Every public authority has its own official, who is subordinate to the head of the authority. All officials are employees of the authority who fulfill this function in addition to their regular duties. Sometimes, the duties of the employees in question actually contradict compliance with the provisions of the Law. Thus, for instance, the person in charge for implementing the Law in the IDF is the IDF Spokeswoman, who is in charge of preserving the image of the army and concealing embarrassing information from the public. Rick Snell argues that FoI officers are "the secret to the success or failure of FoI legislation" (Snell, 2001). Lack of training and of a supportive environment make them much more likely to be the key to failure than to success.

The lack of a central commissioner to supervise the implementation of the law was also felt in Australia, where the issue was discussed widely in the report of a committee appointed in 1995 to recommend measures to promote the assimilation of the Australian Freedom of Information Act (Committee on legislative reforms of the Government of Australia, 1982).

The training for the Civil Servants amounted to one study day, held ahead of the enactment of the Law, attended by 140 senior Civil Servants (Civil Service

Comission, 1999 p.46). No further training was held in subsequent years until 2005, when one study day took place. The lack of suitable training entails lacking understanding on behalf of civil servants to the importance of their FOI duties. In 2003, only half the government ministries published their annual report on implementation of the Law, as required in Section 6 thereof. The report of the Canadian Access to Information Review Task Force, appointed by the Canadian government to review all aspects of the federal government's access to information (ATI) regime, and to make recommendations on how it might be improved, discussed the cultural change required from civil servants. It stated that:

" There can be no significant and lasting improvement of access to information without their understanding, co-operation and support... Officials in many jurisdictions told us that a common mistake they made in implementing their access regime was failing to assess the extent of the cultural change involved" (Access to Information Review Task Force, 2002. c. 11)

Without stipulating sanctions in the Law against government officials, and without a central authority responsible for supervising the implementation of the Law, the authorities' officials have no incentive for publishing reports, and there is nobody to monitor the government's inaction in this context. The public Committee which drafted the Law, considered the possibility of imposing sanctions on employees who do not comply with its provisions, but eventually decided to refrain from dealing with this aspect in "recognition that when the time comes, it will be necessary to discuss such an arrangement on the basis of further examination of and accumulated experience in implementing the Law." (*Ibid*, p.32) It is doubtful whether under the Israeli legal system it is possible to define failure to comply with provisions of the Freedom of Information Law as a criminal offence, entailing penalties such as fines or

imprisonment, as is the case with the Indian Freedom of Information Law (Section 17 of the Indian Right to Information Bill, 2004). Never the less, disciplinary offences in the context of the Civil Service do exist in other legislations. The accumulated experience concerning implementation of the Freedom of Information Law testifies, at the very least, to the need to reconsider the idea of imposing sanctions on officials who do not fulfill their duties.

The failure of the government to take any of the above mentioned measures, resulted in little if any change in its tradition of secrecy, and information exposure on "need to know" basis. The issue of generating cultural change among government officials in order to promote better FOI conduct, has been discussed in a research paper submitted to the Canadian Task Force in 2002. The report suggests that allocation of more resources for an efficient information management system, better training better training for public servant's as well as managerial support, are vital condition for the creation of a cultural change among officials.

(b) The Public

Since its legislation, the public has not shown the anticipated interest in the Freedom of Information Law. Six years have passed since it took effect, yet the majority of government ministries receive only a few dozen applications each year. According to figures published by half the government ministries in 2003, a combined total of 675 applications were submitted to these ministries (as will be remembered, the public Committee expected some 5,000-10,000 applications a year) (The figures do not

include applications submitted to the local authorities and other agencies).<sup>\*</sup> Almost 20% of these applications were never dealt with, due to non-payment of the application fee. About another 20% received a negative response due to the various exemptions specified in the Law. Less than 10% of the negative replies led applicants to seek the intervention of the Administrative Court.<sup>\*</sup>

These figures should be read also in light of the fact that some of the information requested under the Freedom of Information Law had been accessible even before the law was legislated, in light of specific legislation in the past. It is difficult to assess which part of these requests constitutes the exercise of the right created by the FOI Law, but it is a considerably smaller figure than the overall number of applications.

In order to examine the problem from the point of view of the public in need of information, it would be appropriate to distinct between two aspects of the Law: The first is the establishment of the actual right to receive the information; the second is the formalization of the procedure for obtaining such information, which is no less important for the realization of the right. As was observed by Prof. Roberts of Syracuse University (2002): "The letter of the law matters, but an access to information *system* has many more components... these less obvious elements may play an important role in what the right to information means in practice".

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<sup>\*</sup> At the same time, an examination of the reports of the persons in charge of implementation of the law in the large municipalities shows that the use of the law was not more frequent.

<sup>\*</sup> These figures were collected on the basis of annual reports for 2003 by the officials for the implementation of the Freedom of Information Law in the eleven government ministries which published reports. The other ministries did not submit annual reports on implementation of the Law.

As for the first aspect, the public very quickly discovered that the actual legislation of the Law made no difference to the government officials' perception of the essence of the information they are expected to provide. Many of the applications submitted to the authorities concern citizens' personal affairs, or other non-controversial matters. Information in respect thereof was provided quite freely even before the Law was legislated. Moreover, there is reason to assume that so long as requests for information were submitted informally, the handling of such non-controversial requests was more rapid and efficient. On the other hand, requests for information which the authorities wish to refrain from giving still encounter mountains of bureaucracy that have not been removed on the initiative of the government officials. Such requests are often ignored, and it is only due to the applicant's insistence that they produce the negative reply. The Administrative Courts have become an almost structural part of the effort required to obtain information on controversial issues.

As for the second aspect, i.e. formalizing the procedure for obtaining information, it may be argued that the citizens' situation in this aspect is inferior to that prevailing prior to the legislation of the Law. In the past, information on non-controversial issues could be obtained after a written or telephone application to the relevant official in the ministry. Now the citizen is required to negotiate a much more complicated bureaucratic procedure. He/she has to perform a number of activities: The first is to pay a fee of about \$20\*. The second is to send a receipt evidencing payment of the fee to the relevant government ministry\*. The third is to submit a written application to the person in charge in the relevant authority - and to that

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\* Israel is one of the few countries which charge for the actual submission of an application. Other countries with similar regulations are Australia, Japan and Canada

\* This stage is gradually being replaced with online payments.



person only. After submitting the application, the citizen must wait for 30 days to receive a reply, and sometimes a longer period to receive the information itself.

Administration officials who rely on the procedural provisions of the law, often succeed in exhausting the applicants, and in about 20% of the cases the process is stopped after submission of the application, due to failure to pay the fee or because the applicant abandoned his application in the course of the process. In such a situation, it is quite possible that many citizens apply to receive information other than on the basis of the Freedom of Information Law. This means that in such cases, on the one hand, those in charge of freedom of information are not required to fulfill their function and are not challenged by the public, and, on the other, applicants who are denied information cannot enjoy the Law's protection of their right to obtain information. Thus, for instance, the Tel Aviv Administrative Court recently rejected the petition of two citizens concerning refusal to provide information, because their application had not been submitted to the person in charge of implementing the Law in the ministry, but to a lower ranking official. The court directed them to re-apply, in accordance with the procedure stipulated in the Law.

#### (c) The Media

The attitude of the media towards the Freedom of Information Law deserves special attention. In the first month of the implementation of the Freedom of Information Act in the U.K., half of the 4,000 applications for information submitted to the authorities came from those who identified themselves as journalists. In Canada, with its much longer tradition of FOI, some 10% of the requests submitted annually come from the Media (Attallah P., Pyman, H. 2002). In Israel, journalists had played an important

role in creating the legal precedents which established the right to obtain information even before the Law was legislated. The media reported extensively on the triumph of the adoption of the Law, but since their interest seems to have waned together with that of the general public. In the course of the seven years since the legislation, 18 articles monitoring its implementation have been published in the daily newspapers, only two of which were in the two most highly-circulated daily newspapers, and all the other 16 were published in "Ha'Aretz" newspaper, which initiated the majority of applications to the courts, both before and after the legislation.\* Journalists submit very few applications for information pursuant to the Law. In the growing media competition, Journalists have little patience to wait out the periods stipulated in the Law. They fear that information obtained pursuant to the Law will reach the public domain thus negating their exclusivity. The majority do not believe in the prospects of obtaining real information with the help of this Law. In the relatively restricted political circles such as those existing in Israel, reporters believe in their ability to obtain all the information they require through leaks. Information that requires a month-long waiting period, and rummaging among many documents, bears no attraction for them. At the same time, in a few specific cases in which the public was aware of the existence of documents of great public interest, there were news organizations who tried to make use of the Law. The first petition under the Law was filed by the editor of the Arab-Israeli newspaper "Kul el-Arab", and led to the exposure of a critical report prepared following suspicions of irregularities in the operation of the Nazareth branch of the National Insurance Institute (Andreos v. National Insurance, 2000). The second, and more famous petition was submitted by "Ha'Aretz", and led to the exposure of the State Prosecutor's opinion in regard to a corruption scandal in the Prime Minister's office, whereby then Prime Minister,

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\* These figures are based on an examination made in the computerized data banks of the daily press in the Sha'ar Zion library in Tel Aviv. The examination was conducted at the end of 2004.

Benjamin Netanyahu, should be brought to trial, although this opinion was given as part of an internal consultation, and eventually was rejected by the Attorney General. The Administrative Court denied the newspaper's petition, (*Ha'Aretz v. Ministry of Justice*, 2000) as it was not convinced "that the public interest in this case was greater than or superior to the need to defend the regular functioning of the prosecuting authorities." (*Ibid*, paragraph 10 of the judgement rendered by judge Yashaya) However, the Supreme Court overturned the decision and established that "exercise of the public's right to know depends on the reporters' access to sources of information." As aforesaid, despite the great public reverberations caused by this ruling, apart from these cases, only few petitions for disclosure of information were filed by the media under the Law.

#### (d) The Courts

In light of the authorities' very partial implementation of the provisions of the Law, and the lack of a supervisory or appeals authority within the administration, the courts remain the sole refuge for those seeking information which the authorities are not willing to provide.

Section 17 of the Law grants the Administrative Courts the power to order the disclosure of information that is exempt from disclosure under the law, if it is convinced that the public interest in disclosure of the information is superior to and greater than the reason for denying the application. This is an exception to the rule, whereby the Administrative Court examines the feasibility of the authority's decisions, but does not replace the authority's discretion with its own. Thus the court

has been granted power, similar to that provided under the American Freedom of Information Act of 1966, to consider petitions on these issues de novo.

The President of the Supreme Court, Judge Aharon Barak, in a lecture in the year 2000, expressed his thoughts on the courts' function in implementing the Law (Barak, 2003). He stated that the exemptions in the Law should be interpreted narrowly, and that the concern for State security or prejudice to the function of the authorities that might preclude disclosure of information must be "strong, serious and severe, and the probability of its occurrence very high."

In actual fact, the accumulated rulings on petitions under the Freedom of Information Law testify to contradictory trends in the courts' approach to the Law, and contain a number of worrying signals. Often there is a gap between the courts' rhetoric and their actual decisions, showing excessive lenience for the budgetary and organizational constraints of government ministries.

On the one hand, in the Amutat Shazar case, the court created the precedent of a narrow interpretation of the exemptions stipulated in the Law. In this case, the appellant sought to disclose the minutes of the discussions of the Higher Education Council in which it was decided not to approve the request to set up an extension of the Faculty for Medical Studies of the Gdansk University in Israel. The court stipulated that even if the authority was not duty-bound to provide the information, since it is covered by the exception of "internal discussions", it was duty-bound to consider the public interest in the disclosure thereof. Since in this case the authority had not properly considered the damage that might be caused to the public's faith in

its activities, and no "actual damage" to the Council's function had been proven, the court obligated it to provide the requested information.

On the other hand, in a recent judgment rendered by the Supreme Court in the matter of the Union of Old Age Homes, the limiting interpretation of the exemptions in the Law given by the District Court was revoked. The Union of Old Age Homes demanded to order the Ministry of Health to reveal the Excel spread-sheets which it used to determine the tariffs paid by the Ministry to old age homes. The District Court held that even if the Ministry considers this prejudicial to its function as a public authority, exempting it from the duty of disclosing information under Section 9(b)(2) of the Law, only "special damage", as it defined it, could constitute a defense for it. The Supreme Court stipulated that no test of "special damage" appears in the Law, nor is it required thereunder. The Supreme Court saw this as an unnecessary burden on the discretion of the public authority, to which Section 10 of the law gives the power to strike a balance between public interest in the disclosure of the information and the grounds for the exemption.

In light of the above, an interesting process is emerging: until the Law was legislated, the courts showed some boldness in their rulings, which were intended to promote the public's right to obtain information, a right which had never been anchored in legislation. The right to obtain personal information was created by the precedents, and the right to obtain information on public issues, although never enjoyed such resolute and detailed judgments as its predecessor, received extended recognition in a number of judgments, such as those reviewed in the introduction to this article. Now that the right to information has been established by the legislator, its boundaries and limits set, and the methods of access to information formalized,

the courts depend on the legislator's instructions. For this reason, petitions against a refusal to provide information are denied, because the request was not submitted to the correct address, or was submitted after the 30 days stipulated in the Law for filing a petition concerning refusal had elapsed. The courts also use limiting interpretations with respect to the entities to which the Law applies. While prior to the legislation of the Law, each case was considered on its merits, now petitions submitted against entities with obviously public characteristics, such as state-funded universities, are denied due to the fact that the entities were not included in the list of entities to which the law applies.

As we have seen, the courts have, so far, issued contradictory responses to a series of questions that will determine the manner of implementing the Freedom of Information Law. The public and the authorities still await clear decisions by the Supreme Court on a number of questions, including the following: What means should an authority invest in locating information? To what entities should the Law be applied? What is the extent of "public interest" making it justifiable to overcome the exemptions in the Law? What is the court's attitude to non-compliance with the timetables stipulated in the Law? Only sharp and consistent answers on these and other issues will assist the public authorities to internalize the duties imposed on them by the Law, and will encourage the public to apply to the courts to protect its right to obtain information.

#### **4. Summary and Conclusions**

It is inarguable that the Freedom of Information Law promoted freedom of information in Israel. The public is presently able to obtain information which was not

available to it in the past. Thus, for instance, the disclosure of the State Prosecutor's opinion given during an internal consultation in her office on bringing the Prime Minister, Benjamin Netanyahu, to trial, was made possible to a large extent due to the law, contrary to the legal outcome of a similar case that was discussed in the Supreme Court one year prior to its legislation. At the same time, the developments of the past seven years cannot be described as a "transparency revolution", a term used to describe the expected impact of the law upon its ratification. The government authorities, despite their progressive declarations, continue to act as if they consider the information in their possession to be the authority's property. The public shows little willingness to fight for its right to information, and very often prefers to forego the requested information or to obtain it by informal methods. The courts continue to show a large measure of respect for the organizational considerations of the authorities, as well as for their freedom of action and their discretion, when asked to compel them to disclose information.

From this Israeli scene a number of conclusions may be drawn with respect to the legislation and implementation of freedom of information laws:

1. **The process of legislating the Freedom of Information Law should include as many mechanisms as possible that encourage assimilation, and should avoid mechanisms that inhibit assimilation.** It would be proper for the Freedom of Information Law to include the following assimilation encouraging mechanisms: broad definitions of those who are entitled to the information and the entities who are duty-bound to provide it; the appointment of an effective Freedom of Information Commission to supervise implementation of the law; the establishment of a user-friendly procedure for

submitting applications; the obligation of public authorities to actively assist applicants in the process of submitting applications; the arrangement of a simple and inexpensive method of appealing against refusals to provide information; the obligation of the authorities to initiate the publication of information; emphasis on the duty to consider the public interest in the publication of information, even when it falls under the exemptions specified in the Law; the allocation of budgets to the Commission or other entities to execute advertising campaigns that will encourage the public to make use of the Law; the imposition of sanctions on government officials who do not comply with the provisions of the Law; furthermore, the Freedom of Information Law should not contain the following assimilation inhibiting mechanisms: complex procedures for submitting applications for information; inordinately long periods for providing a response to a request for information; limited timetables for filing appeals; fees imposed on the actual submission of the application (other than fees for the production of information); administrative exemptions enabling the authority to refrain from allocating sufficient resources to implement the aims of the Law; definitions of material exemptions that are too broad; broad protections of the interests of third parties which entered into contracts with the public authority.

2. **The initial years of implementing the Freedom of Information Law are critical for the creation of the public's faith in its ability to obtain information from the authorities.** As soon as this faith is undermined, a high level of the public's use of the Law cannot be anticipated. Therefore, it is vital to maintain explanatory activity to educate the public and encourage it to utilize the rights granted to it under the Law. Such explanatory activities



require government budgeting, and they must be conducted on a regular basis or, at least, over a period of time that will make it possible to monitor the change in the quantity of applications for information. Such a campaign was launched in February 2005 in Scotland, on the initiative of the Information Commissioner, titled "It's Public Knowledge", and it will be interesting to follow the results.

3. **Public activity for freedom of information must continue after the legislation of the Law.** In many countries, the legislation of the Freedom of Information Law was achieved due to the activity of non-governmental organizations, such as India, where the public campaign for the FOI law legislation was commenced by popular organizations in Rajasthan; (Slough & Rodrigues, 2005) the German Freedom of Information Law, with the Bertelsman Fund playing a central role in the struggle for its promotion; and the English Freedom of Information Act, which was legislated after a public crusade by the Freedom of Information Campaign in Britain. Without activating and challenging the authorities, the right to freedom of information would be at the mercy of the bureaucrats. Therefore, ongoing public activity is mandatory even after legislation of the Law. This activity must encourage the public to make use of the Law, to arouse public debate concerning freedom of information, to spur the media to make use of it and to provide the tools that will enable application to the courts in order to create legal precedents on the interpretation of the Law.

A few months ago, this recognition led to the establishment of the Freedom of Information Movement in Israel. The movement was founded on the initiative of a journalist (political commentator Raviv Drucker), who had despaired of the

prospects of promoting the use of this Law through the media, and had reached the conclusion that the existence of a dedicated entity for this purpose is crucial. The movement has taken action to lead to full implementation of the Law, and to alter the way of thinking concerning the right of access to information, by both the public and the authorities.

4. **No change in the practices of governmental authorities can be expected, unless pressure is brought to bear by supervisory administrative entities or by means of court judgments:** Without an authoritative administrative, and yet independent, external entity to supervise those responsible for implementing the law in the ministries, the prevailing culture of secrecy will not change. The courts in Israel presently fulfill this function with partial success. After the accumulation of a number of decisions which forced the governmental authorities to hand over information that was refused at first, the authorities have begun to recognize the fact that it is no longer possible to keep information from citizens arbitrarily. At this stage it is not yet possible to indicate a change in the manner of handling the initial applications. At the same time, the General Attorney often intervenes following the submission of applications to the Administrative Court over refusals to provide information, and causes the disclosure of the information before a judgment is rendered on the issue. This happened recently in a petition filed by the Freedom of Information Movement, demanding the disclosure of conflict of interest agreements of senior officials in the Civil Service. (Freedom of Information Movement v. Ministry of Health, 2004) This behavior demonstrates a concept from the world of computerized information presented by Dr. Niv Ahituv, whereby an increase in the cost of concealing information will cause

governments and organizations to abandon the policy of secrecy, which will contribute to the promotion of an open and transparent society (Ahituv, 2004). Similarly, the cost of handling applications to court, and the administrative burden borne by the State, will probably be the most effective tool to bring about a change in the authorities' policy on requests for information submitted to them. Another device that could lead to a change in the attitude of officials dealing with citizens' requests for information is to impose significant sanctions on officials or authorities who consistently refrain from giving information on unjustified grounds.

The road to a governmental culture that recognizes the fact that the public is the owner of the information and that it is entitled to inspect it at any time it deems appropriate, as well as the way to educate the public to awareness of its status as the owner of the information, is a long and winding one. Single individuals of the public do not usually have the know-how and resources to progress along this road, and the governmental authorities have no desire to do so. Only organized and continuing public action, characteristic of public organizations and media organizations, met by courts willing to compel the authorities to alter their overall perception, with all the inconvenience entailed thereby, can bring this campaign to completion.

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