AAA 9135/03

1. Council for Higher Education
2. Yael Atiya, Director of Freedom of Information at the Council for Higher Education

v.

1. HaAretz Newspaper Publishing
2. Shmuel Rosner, editor
3. Ran Reznick, journalist

AAA 9738/04

Council for Higher Education

v.

Shachar Organization for the Advancement of Education in Israel

The Supreme Court sitting as the Court of Administrative Appeals

[19 January 2006]

Before President A. Barak, Vice-President M. Cheshin
and Justices D. Beinisch, E. Rivlin, M. Naor, S. Joubran, E. Hayut

Appeals of the judgments of the Jerusalem District Court on 11 September 2003 in AP 924/02 (Justice B. Okon) and on 19 September 2004 in AP 489/04 (Vice-President D. Cheshin).

Facts: In the first case, HaAretz Newspaper Publishing submitted a request to the Council for Higher Education for information. The Council gave HaAretz copies of decisions it had made, but refused to allow it access to the minutes of meetings. HaAretz therefore applied to the District Court to order the Council to grant it access to the minutes of the meetings.

In the second case, the Shachar Organization for the Advancement of Education in Israel applied to the Council for a licence to open an institute of higher education in Ashkelon. When the Council refused the licence, Shachar applied to the District Court to set aside the decision, alleging that certain members of the Council had a conflict of interests. In the course of that proceeding, Shachar asked the court to grant it interim relief by ordering the Council to disclose the minutes of the meeting of the Council at which it decided to refuse the licence.

In both cases, the Council argued that it should not be required to disclose the minutes of its meetings, since under s. 9(b)(4) of the Freedom of Information Law, 'internal discussions' are exempt from the general duty of disclosure under that law.

In both cases, the District Court ordered the Council to provide minutes of its discussions, subject to various conditions. The Council appealed on the question of the scope of the exemption in s. 9(b)(4) of the law that concerns 'internal discussions' of a public authority.

Held: Section 9(b) of the Freedom of Information Law does not speak of a prohibition against providing the information, but of information that the authority is not obliged to provide. Therefore, the margin of discretion that the authority should exercise before refusing to provide information of the kinds set out in s. 9(b) of the law is broader than in s. 9(a), which does speak of a prohibition.

The main reason for the exemption in s. 9(b)(4) is the concern regarding the 'chilling effect' that is reflected in the reluctance of members and employees of a public authority to hold frank discussions where they are not guaranteed a certain degree of protection for the opinions expressed in the course of making the decisions.

The authority may refuse to provide information concerning internal discussions, but before doing so it should take into account all the considerations that are relevant to the case, and it needs to find in the specific circumstances of each case the balancing point between the public interest in exempting the information and the public and private interest, in so far as there is one, in disclosing the information.

The decisions of the Council in which it refused the requests for information in both cases did not satisfy the test of administrative reasonableness, and therefore the District Court rightly decided to set them aside.

Appeal denied.

Legislation cited:

Council of Higher Education Law, 5718-1958, ss. 2, 4A, 25C, 25D(b)(13).

Evidence Ordinance [New Version], 5731-1971, s. 44(a).

Freedom of Information Law, 5758-1998, ss. 1, 2, 3, 7(a), 8, 8(1), 9, 9(a), 9(b), 9(b)(1), 9(b)(2), 9(b)(4), 9(b)(5), 9(b)(6), 9(b)(8), 10, 11, 13, 17(d).

Protection of Privacy Law, 5741-1981.

Israeli Supreme Court cases cited:

[1] HCJ 5771/93 *Citrin v. Minister of Justice* [1994] IsrSC 48(1) 661.

[2] HCJ 1601/90 *Shalit v. Peres* [1991] IsrSC 44(3) 353; **IsrSJ 10 204**.

[3] HCJ 3751/03 *Ilan v. Tel-Aviv-Jaffa Municipality* (not yet reported).

[4] HCJ 337/66 *Estate of Kalman Fital v. Assessing Committee of Holon Municipality* [1967] IsrSC 21(1) 69.

[5] AAA 8282/02 *HaAretz Newspaper Publishing Ltd v. State of Israel, State Comptroller's Office* [2004] IsrSC 58(1) 465.

[6] AAA 6103/04 *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* (not yet reported).

[7] HCJ 2534/97 *Yahav v. State Attorney* [1997] IsrSC 51(3) 39 (decision).

[8] CA 4999/95 *Alberici International v. State of Israel* [1996] IsrSC 50(1) 39.

[9] HCJ 243/81 *Yaki Yosha Ltd v. Film and Play Review Board* [1981] IsrSC 35(3) 421.

[10] CA 7759/01 *HaAretz Newspaper Publishing Ltd v. Ministry of Justice, State of Israel* (unreported).

[11] AAA 1825/02 *State of Israel, Ministry of Health v. Retirement Homes Association* (unreported).

[12] HCJ 14/86 *Laor v. Film and Play Review Board* [1987] IsrSC 41(1) 421.

[13] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.

[14] CA 165/82 *Hatzor Kibbutz v. Rehovot Assessment Officer* [1985] IsrSC 39(2) 70.

[15] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.

[16] HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485.

[17] HCJ 2324/91 *Association for Civil Rights in Israel v. National Planning and Building Council* [1991] IsrSC 45(3) 678.

[18] CA 6926/93 *Israel Dockyards Ltd v. Israel Electric Co. Ltd* [1994] IsrSC 48(3) 749.

[19] HCJ 954/97 *Cohen v. President of Israel Bar Association* [1998] IsrSC 52(3) 486.

[20] HCJ 131/65 *Savitzky v. Minister of Finance* [1965] IsrSC 19(2) 369.

[21] HCJ 557/75 *East Lod Buildings (1953) Ltd v. Lod Local Planning and Building Committee* [1976] IsrSC 30(2) 17.

[22] HCJ 162/78 *Federation Health Fund v. Appeals Board* [1978] IsrSC 32(3) 449.

[23] HCJ 62/75 *9 Hibbat Zion Street Ramat Gan Co. Ltd v. Ramat Gan Local Planning and Building Committee* [1975] IsrSC 29(2) 595.

American cases cited:

[24] *Schell v. United States Department of Health & Human Services*, 843 F.2d 933 (6th Cir., 1988).

[25] *National Labor Relations Board v. Sears, Roebuck & Co*., 421 U.S. 132 (1975).

[26] *National Wildlife Federation v. United States Forest Service*, 861 F. 2d 1114 (9th Cir. 1988).

Australian cases cited:

[27] *Harris v. Australian Broadcasting Corporation* (1983) 50 A.L.R 551.

[28] *Re James and Others and Australian National University* (1984) 6 A.L.D. 687.

[29] *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 A.L.D. 138.

[30] *Re Sunderland and Department of Defence* (1986) 11 A.L.D 258.

[31] *Re Burns and Australian National University* (No. 2) (1985) 7 A.L.D. 425.

Canadian cases cited:

[32] *Canada Inc. v. Canada (Minister of Industry)* (C.A.) (2001), [2002] 1 F.C. 421; 2001 FCA 254.

For the appellants — D. Briskman.
For the respondents in AAA 9135/03 — T. Glick, M. Fridman.
For the respondents in AAA 9738/04 — R. Har-Zahav, Y. Shamir.

JUDGMENT

Justice E. Hayut

The two appeals before us, AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper Publishing* (hereafter — 'the HaAretz appeal') and AAA 9738/04 *Council for Higher Education v. Shachar Organization for the Advancement of Education in Israel* (hereafter — 'the Shachar appeal'), raise the same question with regard to the scope of the duty to provide information that is imposed on a public authority under the Freedom of Information Law, 5758-1998 (hereafter — 'the Freedom of Information Law' or 'the law'), and with regard to the interpretation of the exemption stipulated in this regard in s. 9(b)(4) of the law, according to which the authority is not obliged to provide information:

'Information that should not be provided or that there is no duty to provide

9. …

(b) A public authority is not obliged to provide information that is one of the following:

…

(4) Information concerning internal discussions, memoranda of internal consultations between employees of public authorities, their colleagues or advisers, or of statements made within the framework of an internal inquiry, as well as an opinion, draft, advice or recommendation, which were given for the purpose of making a decision, with the exception of consultations stipulated by law.

…

Both the appeals concern the refusal of the Council for Higher Education (hereafter — 'the Council') to disclose internal documents and minutes of its meetings and the meeting of its subcommittees. Because of the common questions that arise as aforesaid in both of these appeals, it was decided to hear them jointly and with an extended panel (see the decisions of 13 January 2005 and 16 January 2005).

The facts and the judgment of the trial court in the HaAretz case

1. The respondents in the HaAretz appeal, within the framework of their work as journalists, published articles concerning the Council and they wished to continue to report on its activity. *Inter alia*, the respondents wanted to monitor the measures that the Council was adopting as a result of the publication of the findings in the State Comptroller's report concerning it in April 1999. For this purpose, the third respondent requested the Council to allow it to inspect the minutes of its meetings in the five years that preceded the request and its decisions in those years, as well as the minutes of the discussions and the decisions of the Planning and Budgeting Committee of the Council in the four years preceding the request. Following discussions between the parties, the respondents restricted their request to the minutes of the meetings in the three years that preceded the request. The second appellant, who is the person at the Council responsible for making information available to the public, agreed to send to the respondents the

decisions that was made at the meetings of the Council and the meetings of the Planning and Budgeting Committee, but she refused to provide them with the minutes that were requested, in reliance on the provisions of s. 9(b)(4) of the Freedom of Information Law. In response to the refusal, the respondents filed a petition to obtain the material that was requested. The petition was filed in the Jerusalem District Court, sitting as the court for administrative affairs.

2. In its judgment on 11 September 2003, the trial court (his honour Justice B. Okon) discussed the great public interest in the activity of the Council. With regard to the exception provided in s. 9(b)(4) of the Freedom of Information Law, the court held that although it did exclude information originating in internal discussions from the scope of information that required disclosure, nonetheless in order to justify the privilege of information in a concrete case the authority was required to indicate the reason justifying the privilege and the harm that it might suffer as a result of the disclosure. The court said:

> 'It is not sufficient for the authority to say that the information is classified as an internal consultation. The internal consultation is a condition that allows the authority to refrain from providing the information, but it is not a sufficient condition. The authority must point to something else that allows the refusal. In other words, the law provided a list of cases in which the authority is not liable to provide information. The fact that a certain case falls within the scope of this list does not allow the authority to refrain from making the disclosure. It allows the authority to refrain from making the disclosure *only* if there is a reason that justifies this… It is necessary to point to the fact that harm may be suffered in practice as a result of revealing the information. It is not sufficient in this case to mention possibilities or speculations' (para. 9 of the judgment).

The court held that the concern that the disclosure of internal consultation might harm proper administration is not a sufficient reason for preventing the disclosure. Even the argument that the members of the Council are representatives of various institutions and therefore it will be difficult for them to speak freely about a matter concerning their colleagues and the fear that the information will be taken out of context do not justify a refusal to provide the information. The court went on to hold that the decisions of the Council in this context were laconic and did not reflect the various opinions

that were expressed with regard to adopting them, and therefore it was insufficient merely to provide the decisions, and the Council should also provide the respondents with the minutes that preceded them. The court rejected the Council's argument that the scope of the material requested justified the refusal to provide the information and it also rejected the Council's argument that the petition sought to impose the duty of disclosure retroactively; the court held that retroactive disclosure could not be compared to retroactive application of the law and that the disclosure was limited to the current composition of the Council, which should have anticipated the duty of disclosure. For these reasons, the trial court granted the petition but allowed the Council to refrain from disclosing information that violates the privacy of third parties or information that is protected by established rules of privilege, in accordance with the following rules: first, it held that if the Council was of the opinion that certain minutes or certain decisions harmed the interests of a third party, it could remove those passages from the minutes, provided that it indicated that the passage had been removed, the date on which the minutes were recorded and the reason why the privilege was sought. The court also held that the Council was entitled to remove passages that were privileged under the law, including consultations with lawyers, provided that it expressly mentioned that the passage was removed, the exact reasons for this and the dates of the discussions. Finally, the court held that the Council could apply to the court in order to omit the names of certain speakers or the names of speakers in certain minutes, while giving the reason for this based on the content of the discussion or the statement, and that the disclosure process should be completed in its entirety within 30 days. With the respondents' consent, the disclosure was restricted to minutes of the current composition of the Council only, but the respondents retained the right to petition the court once again with regard to the restrictions and privileges that the Council would seek to impose pursuant to the rules that the court determined as aforesaid.

This led to the filing of the HaAretz appeal before us. At the same time as it filed the appeal, the Council applied for a stay of execution of the judgment, and on 13 October 2003 this court (*per* Justice S. Joubran) granted the application.

The facts and the judgment of the trial court in the Shachar case

3. The respondent in the Shachar appeal, the Shachar Organization for the Advancement of Education in Israel, submitted to the Council, at the end of 2001, an application to receive a licence under s. 25C of the Council of

Higher Education Law, 5718-1958 (hereafter — the Council of Higher Education Law), to open an institution in Ashkelon that would teach courses for a degree of MD that would be given by the University of Gdansk in Poland. The respondent withdrew this application after it found out that the Ministry of Health, as well as senior members of the Council, expressed their objection in principle to holding medical courses within the framework of a branch of a foreign university. In January 2003 the respondent filed another application, and this time it asked for a licence to establish in Ashkelon an institution for paramedic courses only, which would give an entitlement to a credit point for a degree of MD from the University of Gdansk. The Council's subcommittee for the extensions of foreign institutions (hereafter — the extensions committee) examined the new application and recommended giving a temporary licence to the respondent subject to various conditions that it stipulated. This recommendation was considered at the meeting of the Council on 25 November 2003, during which the position of the deans of the medical schools in Israel was heard as well as the position of the respondent's representatives. On 16 December 2003, the council decided, by a majority, to refuse the application notwithstanding the recommendation of the extensions committee. In its decision, the Council said that it saw no reason to increase the scope of the activity of extensions to include the sensitive field of medical studies and it explained this by saying that:

> 'The experience that has been accumulated with regard to the activity of extensions of foreign institutions in Israel since the enactment of amendment 11 of the Council of Higher Education Law in 1998 is in general not positive, and therefore it is inconsistent with an increase in the scope of the activity of extensions of foreign institutions to such a sensitive field as medical studies.'

The Council also said in its decision that there is no research activity taking place within the framework of the institution in Israel that is the subject of the petition, and therefore it held that the respondent does not satisfy the condition provided in s. 25D(b)(13) of the Council of Higher Education Law, according to which the institution in Israel should provide the education 'at an appropriate place with suitable conditions, including conditions that are required for ensuring a proper standard of education.' At the end of its decision, the Council further said that the scope of the teaching at the institution by lecturers whose main position was at recognized and subsidized Israeli institutions *prima facie* exceeds what is permitted by the

Planning and Budgeting Committee, but in view of the other reasons that decided the application the Council did not address this issue in detail.

4. The respondent in the Shachar appeal applied to the Jerusalem District Court sitting as the court for administrative affairs and it petitioned the court to set aside the decision. In its petition it argued, *inter alia*, that some of the members of the Council who took part in making the decision had a conflict of interests since they were the representatives of universities where there were medical faculties that wished to prevent competition in this field. As interim relief the respondent applied to the court to order the Council of Higher Education to disclose to it all the minutes of the discussions that took place with regard to it in the plenum of the Council and the extensions committee, as well as the report of the licensing unit concerning it which was submitted to the extensions committee. At the suggestion of the trial court, the part of the petition attacking the actual decision of the Council was struck out because of lack of jurisdiction, and the hearing before the court continued only with regard to the rest of the original petition, which concerned the disclosure of the minutes and the report of the licensing unit. To complete the picture it should be stated that with regard to the actual decision of the Council, which rejected the application to receive the licence, the respondent filed a petition to this court sitting as the High Court of Justice. This petition is still pending and no decision has yet been made (HCJ 6671/04 *Shachar Organization for the Advancement of Education in Israel v. Council for Higher Education*).

5. In its judgment on 19 September 2004, the trial court (his honour the vice-president, Justice D. Cheshin) granted the administrative petition with regard to providing the documents, in which it said the following:

> ‘Even if the authority is not obliged to provide the information, this does not mean that it can refuse to provide it contrary to the rules of administrative law with regard to the manner of making an administrative decision. Therefore, when we are speaking of the minutes of internal discussions, there is admittedly no obligation to provide them, as there would be under the general provision of s. 1 of the law, but a decision not to provide them cannot be made solely because they are the minutes of internal discussions… but the public authority should consider each case on its merits and decide it according to the best administrative tradition’ (para. 13 of the judgment).

The trial court went on to hold that for the purpose of the decision whether or not to disclose the minutes, the Council should take into account all the considerations relevant to the issue, including general public considerations and principles concerning the sensitivity of internal discussions and concrete considerations concerning the facts of the specific case and the harm that would actually be caused as a result of the disclosure, on the one hand, and the non-disclosure, on the other. In our case, the trial court held that the Council had not proved any actual harm that it might suffer as a result of a disclosure of the requested documents; the decision leads to the problematic outcome of shutting the respondent out; in addition, public confidence is likely to be harmed if the Council's deliberations are not transparent. The court went on to hold that it was not persuaded that the material that was given to the respondent was sufficient in order to allow it to argue in an 'informed and effective' manner against the decision made in its case. The court denied the alternative application of the Council to exclude the names of the speakers from the documents, since it held that this might undermine the purpose for which the information was requested in the first place. Finally, the trial court held that it could not accept the general argument that the Council raised to the effect that disclosing the minutes of the internal deliberations of public authorities would result in a reduction in the scope of recording the minutes so that essential information would be missing from the authority's files. The trial court emphasized in this context that the Council could not do what it wished when recording the minutes and it had a duty to record complete and full minutes of the deliberations that it held in order to allow scrutiny of its decision-making process. For these reasons, as we have said, the trial court accepted the respondent's arguments and ordered the Council to provide the documents that were the subject of the petition for the respondent's inspection, after removing the parts that concerned legal advice.

This led to the filing of the Shachar appeal before us. Together with the appeal, the Council filed an application for a stay of execution of the judgment and its application was granted (see the decision of his honour Justice Y. Adiel of 7 November 2004).

The arguments in the appeals

6. In both of the appeals, the Council complains of the interpretation given in the judgments against which it is appealing to the exemption contained in s. 9(b)(4) of the Freedom of Information Law. It also complains of the finding in those judgments, which in its opinion is erroneous, that a

public authority must point to the harm that it will suffer as a result of disclosing the information that was requested, and that it is not sufficient for it to show that the documents that were requested are minutes of internal deliberations, in order that the information included in them should be privileged. This finding, so it is alleged, is contrary to the language and the purpose of the section, which is to protect the free and honest speech of the members of the authority within the framework of the closed discussions that it holds. According to the Council, an internal discussion is a discussion that is held prior to making a decision or formulating a policy, and it is not open to the public. Therefore, it is sufficient for the authority to show that we are dealing with an internal discussion for it to be able to refuse to provide the minutes of that meeting. The Council also argues that, contrary to the rulings of the trial court in both judgments that are the subject of the appeals, the burden of persuading the court that there is a special interest justifying the requested information being provided should rest with the party asking for the information, and not with the authority. In this context, the Council refers to the provisions of s. 17(d) of the Freedom of Information Law, according to which the court has the power, notwithstanding the provisions of s. 9 of the law, 'to order the requested information to be provided… if in its opinion the public interest in the disclosure of the information takes precedence over the reason for rejecting the request…' and in its opinion this section supports its approach with regard to the burden imposed on the person requesting information in such a case. The Council further emphasizes that the approach adopted by the District Court, according to which minutes of internal discussions should be disclosed unless the authority can show that this harms or is likely to harm the public interest in the specific case overlooks the fact that disclosing such minutes harms the public interest and that this reason is what *prima facie* lies at the heart of the exemption contained in s. 9(b)(4) of the law. According to the Council, the disclosure of information from internal discussions as aforesaid is not only likely to cause harm to the process of making the decisions, since the members of the authority and its representatives will be deterred from expressing their opinions in an honest and open manner, but there is an additional concern that the desire to protect the participants in the discussions from a disclosure of their positions will lead to the result that the authorities will refrain from keeping exact minutes that reflect the discussions as they really took place, with all of the different opinions and doubts that are characteristic thereof. Alternatively, the Council argues that even if we assume that it is obliged to provide the requested

information, the trial court should have held that it is entitled to exclude the names of the speakers from the minutes.

In the HaAretz appeal, the Council further emphasizes that there is no justification for holding it liable to make clarifications with third parties who may be harmed by the disclosure and that in view of the large number of these third parties, this will involve an unreasonable burden in its work, a burden that is in itself a reason for nor providing the information under s. 8(1) of the Freedom of Information Law. The Council reiterated its argument that the disclosure involves a retroactive dimension, since its members could have assumed that their names would not be disclosed unless the person requesting the information showed a specific reason for this. Finally, the Council argues that it does not object to providing the respondents in the HaAretz case with those parts of the minutes that discuss general issues which do not directly concern the interests of a third party and which do not involve other reasons as to why they should be privileged, although this should be without the names of the speakers. The Council says that it has already provided the respondents with hundreds of pages of minutes, as well as the letter of the chairman of the Planning and Budgeting Committee, which reviews the actions that were carried out in response to the publication of the State Comptroller's report.

In the Shachar appeal, the Council further argues that the fact that the information relates to the respondent itself does not justify its disclosure. It also argues that the trial court erred when it held that that material that it supplied to the respondent was insufficient to allow it to make effective and informed argument with regard to the decision that was made, and the proof of this is the petition that the respondent filed in this regard in the aforesaid HCJ 6671/04, within which framework the respondent may avail itself of procedural methods for receiving additional information that is required for the petition. The Council also argues that there is nothing to prevent the respondent being given the minutes of the meeting in which it participated and that, as a rule, it would agree to provide information from internal discussions in various cases, when these concerned discussion of matters of principle with wide-ranging ramifications, which do not harm any third party, after removing the names of the speakers.

7. The respondents in the two appeals rely on the judgments of the trial court and argue that a restrictive interpretation of the exemption contained in s. 9(b)(4) of the Freedom of Information Law realizes the right of the public to receive information from public authorities, which is a supreme principle

that underlies the Freedom of Information Law. Therefore they are of the opinion that the rulings of the trial court should be upheld in both cases; according to these, the fact that we are concerned with information that relates to internal discussions is an insufficient justification for the authority to refuse to provide the information, and it needs to show that in the circumstances of the case there is a real reason that justifies the information being privileged. The respondents further argue that it is not right that meetings of the Council, which is a public body with extensive powers, should remain privileged; the Council, as a statutory body, should conduct its discussions transparently. They also argue that public authorities have a duty to keep full and complete minutes of their meetings, and it is questionable whether meetings of the plenum of the Council fall within the scope of the term 'internal discussions' in s. 9(b)(4) of the law, in view of the fact that these are not merely preparatory discussions but the official discussions of this body, in which its decisions are made.

The respondents in the HaAretz appeal further argue that inspecting the decisions of the Council and the Planning and Budgeting Committee, without inspecting the minutes, cannot help them since the decisions are laconic and do not give the reasons underlying them. In response to the Council's argument concerning the protection of third parties, the respondents argue that the mechanism determined by the trial court in this regard is effective and it properly balances the rights of third parties against the public's right to know. The respondents also argue that the Council's argument that the substantial amount of minutes justifies their refusing to provide them should be rejected. Finally the respondents argue that the names of the speakers should not be removed from the minutes, and since the duty of disclosure has only been directed at the current composition of the Council, there are no grounds for the argument of retroactivity.

The respondent in the Shachar appeal further argues that its right to inspect the minutes derives not merely from the right enshrined in the Freedom of Information Law that is given to every citizen and resident, but also from the right of inspection that it has because of its personal interest in the information. The respondent further argues that in order to substantiate its argument that the Council's decision was not based on any valid reasons, the identity of the speakers needs to be disclosed, and in any case even if it had sufficient information in its possession to attack the decision, this would not be a reason for denying the application.

Deliberations

The right to receive information from public authorities

8. The right to receive information concerning the activity of public authorities is one of the cornerstones of a free society. It concerns the very existence of democracy, it nourishes and is nourished by the freedom of expression and it reflects the legal outlook that the authority is a public trustee that is obliged to look after the interests of the public, rather than itself, when carrying out its duties (see A. Barak, 'Freedom of Information and the Court,' 3 *Kiryat HaMishpat* 95 (2003), at pp. 96-99. On the relationship between the right of the public to information and the freedom of expression, see HCJ 5771/93 *Citrin v. Minister of Justice* [1], at p. 673, and see also A. Mason, 'The Relationship between Freedom of Expression and Freedom of Information,' *Freedom of Expression and Freedom of Information* (J. Beatson and Y. Cripps eds., 2000), at p. 225). This was already discussed by John Adams in the eighteenth century, when he said:

> '… liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings and a desire to know. But, besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers. Rulers are no more than attorneys, agents, and trustees for the people; and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed, and to constitute abler and better agents, attorneys, and trustees' (J. Adams, *A Dissertation on the Canon and Feudal Law* (1765)).

In HCJ 1601/90 *Shalit v. Peres* [2], at p. 361 {216}, this court emphasized the importance of the principle of freedom of information from an additional perspective, namely scrutiny of the propriety of the actions of the public authority, when it said: 'The public eye is not merely an expression of the right to know, but also a reflection of the right to scrutinize.' Indeed, the transparency of the actions of government authorities allows citizens to monitor their actions and the considerations underlying them, and so to criticize them, where justified, and it makes a decisive contribution to 'public hygiene' and to improving the quality of the authority's conduct when it knows that its actions and its decision-making process are exposed and

transparent to the public eye (see N.S. Marsh, 'Introduction,' *Public Access to Government-Held Information* (N.S. Marsh ed., 1987) 1, at p. 4). The positive correlation between the right of the public to information and public confidence in government authorities was discussed by Justice M. Cheshin in HCJ 3751/03 *Ilan v. Tel-Aviv-Jaffa Municipality* [3], at para. 15:

> 'When we realize that the civil servant acts as a trustee and as an agent of the public, he is therefore bound by the duties of an agent, including the duty to account for his actions, i.e., to disclose to his principals — the entire public — what he has done and what he has not done, why he has done one thing and not another, and when he takes no action, why he took no action. He is obliged to disclose all his acts and omissions, together with the reasons for them. Only in this way can the public know whether the civil servant has acted faithfully; only in this way will the public have confidence in the administration and its employees. The administration therefore has a duty of transparency in its actions and decisions.'

The access of the individual to information, as opposed to making the information privileged and keeping it secret, brings the individual closer to the authority and increases his confidence in government decisions. The remarks of Gerald Wetlaufer in this regard (G. Wetlaufer, 'Justifying Secrecy: An Objection to the General Deliberative Privilege,' 65 *Ind. L. J.* 845, at p. 886) are also pertinent:

> 'There is a strong association between secrecy and bad acts. Not that secrecy always entails a bad act, but that bad acts always seek out secrecy… secrecy operates to alienate — to create subjective distance between — the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.'

9. These important reasons that underlie the principle of the freedom of information are a daily occurrence in every democracy that is based on a culture of rights. For this reason, the Israeli legal system recognized the right of the citizen to receive information from public authorities for many years before the legislator expressly enshrined this right in the Freedom of Information Law (see HCJ 337/66 *Estate of Kalman Fital v. Assessing Committee of Holon Municipality* [4], at pp. 71-72; AAA 8282/02 *HaAretz Newspaper Publishing Ltd v. State of Israel, State Comptroller's Office* [5],

at pp. 469-472; AAA 6103/04 *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* [6], at para. 9. See also, Z. Segal, *The Right to Know in Light of the Freedom of Information Law* (2000), at pp. 15-64). The explanatory notes to the draft Freedom of Information Law also address the reasons and rationales underlying the principle of the freedom of information, where they say:

> 'The right to receive information from public authorities is one of the basic rights in a democracy. It is a basic condition for realizing freedom of expression and for realizing a person's political and other rights in all spheres of life. Greater access to information will promote the advancement of social values, such as equality, the rule of law and respect for human rights, and it will also allow better public scrutiny of government actions. The right to information has indeed been recognized in case law; but in practice it appears that the public has not been given an adequate amount of access to the information held by the authorities, and it is difficult to eradicate the tendency of the authorities to regard the information as their property rather than property that is held by them in trust for, and on behalf of, the public' (see *Draft Laws* 5757, at p. 397).

The Freedom of Information Law and the exemption in s. 9(b)(4) of the law

10. In furtherance of the purposes that the Freedom of Information Law is intended to realize, the law begins, in s. 1, with a general and broad declaration of the existence of the right to receive information from public authorities. It states:

> 'Freedom of information — 1. Every Israeli citizen or resident has the right to receive information from a public authority pursuant to the provisions of this law.

In his book *The Right to Know in Light of the Freedom of Information Law*, *supra*, Prof. Segal says that this section is 'the key section on which the whole law is based. It is the "cornerstone" on which the legal right to receive information from a public authority is based' (at p. 97). Because of the great importance that the legislature attributed to the realization of this right, it even saw fit to require every head of an authority to appoint one its employees as a 'person responsible for making information available to the public,' who is in charge of dealing with requests to receive information and of implementing the provisions of the law (s. 3 of the law). But like other

constitutional rights, no matter how important they are, this is not an absolute right but a relative right, which in appropriate cases needs to yield to other rights that are also deserving of protection, such as the right to privacy, dignity, property and reputation, and also to important public interests such as state security, foreign relations or the proper functioning of the public authority (see Barak, 'Freedom of Information and the Court,' *supra*, at pp. 99-102). The expression given in the Freedom of Information Law to the need to strike a balance between the freedom of information and other rights and interests was recently discussed by Justice Rivlin in *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* [6], and I can do no better than to cite his illuminating remarks in that case:

> '… The Freedom of Information Law lists various cases in which the freedom of information yields to other rights and interests. Thus the law provides, in s. 8, a list of cases in which the public authority may *reject* an application to receive information. It speaks, in principle, of circumstances in which dealing with the application or finding the information involves real difficulties or requires the allocation of unreasonable resources, and also of circumstances in which the information has been published and is available to the public or is in the possession of another public authority. Section 9(a) of the law lists types of information that the authority is *prohibited* from providing. This concerns information whose disclosure gives rise to a fear of harm to Israel's foreign relations or the security of the state, security of the public or the safety of an individual, and also information whose disclosure constitutes a violation of privacy or whose disclosure is prohibited under any law. Section 9(b)… provides an additional list of items of information that the authority *is not obliged* to provide… Sections 8 and 9 do not stand alone… Section 10 provides that when considering a refusal to provide information under ss. 8 and 9, the public authority should consider, *inter alia*, the interest of the applicant in the information, if he states it in his application, and also the public interest in the disclosure of the information for reasons of maintaining public health or safety, or preserving the environment. Section 11 adds to this that information falling within the scope of s. 9, which can be disclosed without allocating unreasonable resources or placing a significant burden on the activity of the authority, by excluding details, making

> changes or stipulating conditions with regard to the manner of receiving and using the information, should be provided accordingly. And as if all of this were not enough, s. 17(d) comes and provides that, notwithstanding the provisions of s. 9, the court may order that requested information should be provided, in whole or in part and under such conditions as it shall determine, if in its opinion the public interest in the disclosure of the information takes precedence over and overrides the reason for rejecting the application, provided that disclosure of the information is not prohibited by law' (*ibid*. [6], at para. 21; see also *HaAretz Newspaper Publishing Ltd v. State of Israel, State Comptroller's Office* [5], at pp. 472-474).

11. In the two appeals before us, the Council bases its arguments on the exemption in s. 9(b)(4) of the Freedom of Information Law, and it argues that the information requested should not be given to the respondents because it is 'information concerning internal discussions.' The main issue in this case therefore revolves around the interpretation of this exemption and the scope of its application. Let us therefore take a closer look at s. 9(b)(4) of the law, which we already cited at the beginning of our remarks:

> 'Information that should not be provided or that there is no duty to provide
>
> 9. …
>
> (b) A public authority is not obliged to provide information that is one of the following:
>
> (1) …
>
> (2) …
>
> (3) …
>
> (4) Information concerning internal discussions, memoranda of internal consultations between employees of public authorities, their colleagues or advisers, or of statements made within the framework of an internal inquiry, as well as an opinion, draft, advice or recommendation, which were given for the purpose of making a decision, with the exception of consultations stipulated by law.

As distinct from the absolute exemptions in s. 9(a) of the law, which prohibit the authority from providing information, *inter alia*, when there is a concern that its disclosure will harm state security, Israel's foreign relations, public security or the security or safety of an individual, or information whose disclosure constitutes a violation of privacy within the meaning thereof in the Protection of Privacy Law, 5741-1981, the exemptions that are addressed in s. 9(b) of the Freedom of Information Law are more moderate. The subsection does not speak of a prohibition against providing the information, but of information that the authority is not obliged to provide. Therefore, the margin of discretion that the authority should exercise before refusing to provide information of the kinds set out in s. 9(b) of the law is broader. These types of information include, *inter alia*, information whose disclosure is likely to undermine the proper functioning of the public authority or its ability to discharge its functions (s. 9(b)(1)), information that concerns a policy that is in the planning stages (s. 9(b)(2)) and 'information concerning internal discussions, memoranda of internal consultations between employees of public authorities, their colleagues or advisers, or of statements made within the framework of an internal inquiry…' as stated in s. 9(b)(4) of the law, which is the subject of this case.

12. The main reason for justifying the exemption for providing information of the kind mentioned in s. 9(b)(4) lies in the concern regarding the 'chilling effect' that is reflected in the reluctance of members and employees of the public authority to hold frank discussions where they are not guaranteed a certain degree of protection for the opinions expressed in the course of making the decisions. Making it possible for the employees of the authority to hold an open and frank dialogue, without any concern that the remarks that are spoken by them in internal discussions or in internal advice will be exposed to the public is therefore intended to protect the quality of the decisions of the public authorities and the effectiveness of the process of making them; this is the main purpose underlying the exemption (see *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* [6], at para. 28; Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at p. 201; and cf. HCJ 2534/97 *Yahav v. State Attorney* [7] (decision); CA 4999/95 *Alberici International v. State of Israel* [8], at pp. 45-46; HCJ 243/81 *Yaki Yosha Ltd v. Film and Play Review Board* [9], at p. 424). This purpose is expressed in the explanatory notes to s. 9(b)(4) of the draft law, which say:

> 'In order to discharge its duties, the public authority holds internal discussions or internal investigations and its employees

> prepare various opinions, which are essential for formulating policy and making decisions. Some of the opinions mature into binding policy and some are shelved. It is an accepted assumption that it is not possible to hold frank discussions in the course of the authority's activity, unless a certain degree of protection can be guaranteed for the process of formulating the authority's discretion and the authority's internal scrutiny process' (*Draft Laws* 5757, at p. 404).

For the same reason, many countries around the world have recognized, within the framework of the legislation that guarantees the freedom of information, the need to protect information that relates to consultations, opinions and internal discussions that constitute a part of the decision-making process of public authorities (see D. Banisar, *Global Survey: Freedom of Information and Access to Government Record Laws Around the World* (Freedominfo.org, 2004)). It seems to me that it is not superfluous to examine the normative arrangements provided in this regard in different legal systems, before we turn to examine the interpretation of the provisions of s. 9(b)(4) of the Freedom of Information Law and the scope of its application.

Comparative law

13. American law distinguishes between the disclosure of information concerning internal discussions and the disclosure of information concerning documents such as internal memoranda and letters that are sent within the authority itself or between one authority and another in the course of the decision-making process. The disclosure of information of the second type is addressed by the Freedom of Information Act, 5 U.S.C. § 552, which in subsection (a) addresses the general duty imposed on authorities to give information to the public with regard to their activity, and it gives details in subsection (b) of the matters that are not subject to this duty. Section 5(b), which is referred to as Exemption 5, speaks of:

> '(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;'

American case law has discussed the main reason for providing Exemption 5, which is similar in essence to the reasons that we have discussed with regard to the exemption set out in s. 9(b)(4) of the Freedom of Information Law:

> 'The ultimate goal that Exemption 5 seeks to achieve is to prevent the quality of agency decisionmaking from deteriorating

> as a result of public exposure' (*Schell v. United States Department of Health & Human Services* [24], at p. 939; *National Labor Relations Board v. Sears, Roebuck & Co.* [25], at p. 151).

The chapter in the *Justice Department Guide to the Freedom of Information Act* (2004) that deals with Exemption 5[1] gives three secondary reasons for the exemption, which are a part of this main reason:

> 'Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action' (*ibid*., in the text referred to by footnote 65).

14. In so far as the interpretation of Exemption 5 is concerned, American case law has adopted a restrictive approach, by making its application dependent upon two conditions. First, the document protected by this exemption is required to relate to the stages that precede the making of the decision (i.e., to be 'predecisional,' as opposed to 'postdecisional'). The reason for this condition is that the public interest in information that concerns binding decisions is more significant and also there is no concern that disclosures of discussions that took place after the decision was formulated will affect the quality of the decision that has already been made (see *National Labor Relations Board v. Sears, Roebuck & Co.* [25], at pp. 151-153). Second, the document needs to include an opinion or recommendation that constitutes an integral part of the deliberative process, and the exemption does not apply to information that is merely factual (see *National Wildlife Federation v. United States Forest Service* [26], at p. 1117; *Justice Department Guide to the Freedom of Information Act* (2004), in the text referred to by footnotes 73-76).

15. As I have already said, internal discussions of public authorities do not fall within the scope of Exemption 5 of the Freedom of Information Act and the premise with regard to these discussions is that they are available for public inspection, pursuant to the Open Meetings Act, 5 U.S.C. § 552b,

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[1] Published at http://www.usdoj.gov/oip/exemption5.htm.

which is referred to as the Government in the Sunshine Act, apparently in reference to the immortal words of Justice Brandeis that 'sunlight is said to be the best of disinfectants' (L. Brandeis, *Other People's Money, and How the Bankers Use It* (1914)) (with regard to the relationship between the laws, see M.P. Cox, 'A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act,' 46 *U. Cin. L. Rev.* (1977) 969).

Subsection (b) of the Open Meetings Act provides in this regard that:

> '… Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.'

The principle concerning the publicity of the meetings of the authorities is based on the recognition that the public should be given as much information as possible with regard to the decision-making process and it should be allowed to examine this process without any intermediaries (see B.S. Baird, 'The Government in the Sunshine Act — An Overview,' 1977 *Duke L. J.* (1977) 565, at p. 566). In a case where the discussions took place *in camera*, the authority has a general duty to give the public the minutes that document them (see subsection (f)(2) of the Open Meetings Act), with certain exemptions that are set out in subsection (c), to which subsection (k) of the Open Meetings Act refers. These exemptions address exceptional cases in which the authority is entitled to hold meetings *in camera* and to refuse to provide minutes of the discussions, and they are similar to those provided in s. 9(a) and ss. 9(b)(1), (5), (6) and (8) of Israel's Freedom of Information Law. In addition, subsection (c) of the Open Meetings Act includes specific exemptions that concern financial institutions (see paragraph (8) and subparagraph (9)(A) of subsection (c)) and an exemption that concerns legal proceedings in which the authority is involved (see paragraph (10) of subsection (c)). Subsection (d) of the Open Meetings Act provides a detailed and strict mechanism for the manner in which the authority should act with regard to voting and providing a public explanation for a decision to close a meeting and not to disclose the content of the discussions that it is holding.

16. In England, the Freedom of Information Act 2000 came into effect in January 2005. Section 1 of the law, like the Freedom of Information Law in Israel, gives rise to a general right of access to information held by public authorities, and the other sections of the Act give details of specific exemptions, including the exemption concerning information regarding government policy, which is provided in s. 35 of the Act, and the general exemptions provided in s. 36 of the Act concerning access to information

held by a public authority that is not exempt by virtue of s. 35. The following is the main provision of the aforesaid s. 36:

> '36. (1) …
>
> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act —
>
> (a) …
>
> (b) would, or would be likely to, inhibit —
>
> (i) the free and frank provision of advice, or
>
> (ii) the free and frank exchange of views for the purposes of deliberation, or
>
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
>
> …'

In their book, *The Law of Freedom of Information*, Macdonald and Jones say that the power to refuse a request for information under s. 36 of the Act is given to the qualified person in each authority, who is usually the most senior person in that authority, as defined in s. 36(5), on the assumption that giving the power solely to this person will serve as a restraint on the use made of the exemption and will prevent it from being used excessively (see J. Macdonald and C.H. Jones, *The Law of Freedom of Information* (2003), at p. 199).

17. In Australia, s. 36 of the Freedom of Information Act of 1982 provides that the authority does not have a duty to disclose information concerning an opinion, advice, recommendation or consultation before making a decision, if giving the information is contrary to the public interest. In the words of s. 36(1):

> 'Internal working documents
>
> 36. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:
>
> (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and

(b) would be contrary to the public interest.

…'

Australian case law addresses the cumulative condition in s. 36(1)(b), according to which it must be shown that providing the information is contrary to the public interest. It holds:

> 'That a document is an internal working document does not of itself make the document an exempt document under cl. 36. To justify refusal of access to a document under this clause, the agency concerned must also form a view that it would be contrary to the public interest to give access to the document and specify the ground of public interest involved… In evaluating where the public interest ultimately lies in the present case, it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other' (*Harris v. Australian Broadcasting Corporation* [27]; *Re James and Others and Australian National University* [28], at paras. 87-89; R. Tomasic and D. Fleming, *Australian Administrative Law* (1991), at pp. 436-437).

It has also been held that for information to be exempt, the authority needs to show that *in the circumstances of the specific case* all of the considerations taken into account justify the information being exempt, and it is insufficient merely to raise a general argument to this effect (see *Re McKinnon and Secretary, Department of the Treasury* [29], at paras. 27 and 30; *Re Sunderland and Department of Defence* [30]; Tomasic and Fleming, *Australian Administrative Law*, *supra*, at pp. 439-440). In its arguments, the Council referred us to the Australian case of *Re Burns and Australian National University* (No 2) [31], and it sought to derive from it that notwithstanding the general position in Australian case law that tends not to give decisive weight to the concern that the frankness of discussions will be affected, the court held in that case that this interest prevailed. This is of no significance. As we have seen, the public interest is examined on its merits on a case by case basis, and in *Re Burns and Australian National University* (No 2) [31] the Australian court based its conclusion on the circumstances of the case before it and on the special characteristics of the University and its discussions, which were the subject of the dispute in that case (see *ibid*. [31], at para. 41).

18. In Canada, s. 21 of the Access to Information Act of 1982 concerns the exemption given to information that constitutes a stage in the decision-making process of government institutions. It states:

> '21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains
>
> (a) advice or recommendations developed by or for a government institution or a minister of the Crown,
>
> (b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,
>
> …
>
> if the record came into existence less than twenty years prior to the request.
>
> (2) Subsection (1) does not apply in respect of a record that contains
>
> (a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or
>
> (b) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.'

According to Canadian case law, the burden of proving that the head of a government institution has not exercised his discretion lawfully rests with the party applying for the information, but the head of the institution has the initial duty of giving explanations for his refusal to provide the information by virtue of the duty of fairness imposed on him under the rules of administrative law and in order that the court can examine the reasonableness of the decision under those rules (see *Canada Inc. v. Canada (Minister of Industry)* [32], at paras. 99-102).

19. Article 255 of the Treaty Establishing the European Community establishes the general right to receive information from the institutions of the European Union as follows:

> '1. Any citizen of the Union… shall have a right of access to European Parliament, Council and Commission documents,

> subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
>
> 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
>
> 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.'

Under this article, the European Parliament and the Council of the European Union adopted in 2001 regulation no. 1049/2001 (Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents). The regulation is intended to realize the public's right of access to documents and to establish rules that will ensure that it is realized without difficulty and that there is a proper administrative practice in this regard (see para. 1 of the regulation). The exceptions to the general right provided in art. 2 of the regulation are set out in art. 4 thereof, and the exception that concerns our case is the exemption set out in art. 4(3), which states:

> 'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
>
> Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

The test adopted in the European Union, as can be seen from art. 4(3) that is cited above, is the 'seriously undermine' test; only when this is satisfied will it be possible to exempt the information, unless there is an overriding public interest in the disclosure.

Interim Summary

20. We have seen from comparative law that the rationale underlying the exemptions such as the one in s. 9(b)(4) of the Freedom of Information Law is based on a recognition, both in Israel and in other countries around the world, that the disclosure of information concerning internal discussions and memoranda of internal consultations and opinions that are given for the purpose of making decisions may harm the decision-making process of the authority and reduce its quality. But the need to protect the decision-making process and its quality is not the whole picture. The Administrative Appeals Tribunal in Australia discussed the danger of placing too much weight on the pressures that always accompany the implementation of the duties arising from the principle of the freedom of information in *Re James and Others and Australian National University* [28], at para. 96, where the tribunal said:

> 'The pressures flowing from greater accountability are, in my view, an inescapable concomitant of more open government. To react too timorously to every anticipated situation of pressure could well negate the principles underlying the Freedom of Information Act.'

It follows that, because of the general public interest that we discussed above, the authority may admittedly refuse to provide information concerning internal discussions, but before it does so it should take into account all the considerations that are relevant to the case, and it needs to find in the specific circumstances of each case the correct balance between the public interest in exempting the information and the public and private interest, in so far as there is one, in disclosing the information. As we said above, the need to strike a balance that takes into account the specific facts of each case and the fact that the general interest alone should not serve as a ground for refusing to disclose information was discussed by the Administrative Appeals Tribunal of Australia in *Re Sunderland and Department of Defence* [30]. It said:

> 'A claim for immunity made for the document before us will not succeed if all that can be said on the public interest issue is that either its release will inhibit the candour and frankness of members of the Committee in future or that it is one of a class of documents of such a generic nature that none of the elements of that class, for that reason, should be made public. We therefore come to look at the particular document in question and ask ourselves whether its disclosure would be contrary to the public interest' (see also Fleming, *Australian Administrative Law*, *supra*, at pp. 439-440).

In other words, the authority cannot refuse to provide the information that is requested by relying solely on the general public interest in maintaining the frankness and effectiveness of the discussions. Such a refusal *de facto* makes the exemptions such as the one in s. 9(b)(4) of the Freedom of Information Law into absolute exemptions that do not allow the exercising of discretion in any specific case, and this is inconsistent with the language of the statutory arrangements that we have reviewed. More important still, this is not consistent with the general purpose underlying these arrangements, which seek to realize the principle of the freedom of information in so far as public authorities are concerned.

The exemption in s. 9(b)(4) of the Freedom of Information Law and the discretion of the authority

21. The conclusion that arises from the interim summary is pertinent and correct with regard to the manner in which the exemption set out in s. 9(b)(4) of the Israeli Freedom of Information Law. This is because of the language of the section, which invites the exercising of discretion, in view of the legislative environment surrounding this section and in view of the general purpose of the Freedom of Information Law, as defined in s. 1 of the law (see A. Barak, *Legal Interpretation* (vol. 2, *Statutory Interpretation*, 1993), at pp. 306-308). The immediate legislative environment that is relevant to this issue is the provisions of ss. 10 and 11 of the Freedom of Information Law. Section 10 of the law provides the fundamental assumption that the authority exercises discretion in such a case and it sets out guidelines with regard to the criteria that the authority should take into account. The section provides:

> ‘Considerations of the public authority
>
> 10. When it is considering a refusal to provide information under this law, under the provisions of sections 8 and 9, the public authority should take account, *inter alia*, of the applicant’s interest in the information, if he stated this in his application, and also of the public interest in the disclosure of the information for reasons of maintaining public health or security, or protecting the environment.’

The considerations mentioned in this section are not the only considerations that should guide the authority in exercising its power, but the fact that they are expressly mentioned in this section amounts to a statutory indication that is intended to direct the public authority that it should give

proper weight to these considerations before it decides to refuse to provide information (see Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at p. 221). Thus, for example, if the person applying for the information indicates his private interest in the requested information, this is a significant ground for tipping the scales towards providing the information, even though the right to receive information under the law is not contingent *ab initio* upon giving reasons for the application and the applicant is not obliged to give the reason for his application (s. 7(a) of the law). An important criterion with regard to the discretion that the authority should exercise in this regard is provided in s. 11 of the law. This section allows the authority to integrate principles of proportionality in exercising the discretion and in the balance that it strikes, by stating that it may provide partial information and also make the providing of the information dependent upon conditions (with regard to providing partial information as a proper balancing point in the circumstances of the case, see and cf. CA 7759/01 *HaAretz Newspaper Publishing Ltd v. Ministry of Justice, State of Israel* [10], at para. 10). With regard to the principle of proportionality, which is reflected in s. 11 of the Freedom of Information Law, see Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at p. 225, and with regard to the manner of exercising the discretion in so far as concerns providing information that is subject to the exemptions stated in ss. 8 and 9 of the law, see *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* [6], at para. 31). In the language of the section:

> ‘Providing partial information and providing information conditionally
>
> 11. If the requested information is information that the public authority is entitled or obliged not to provide as stated in section 9, and it is possible to disclose the information, without an unreasonable allocation of resources or a significant burden to the activities of the authority, by omitting details, by making changes or by imposing conditions on the manner of receiving and using the information, the authority shall provide the information with omissions, changes or with the required conditions, as applicable; if omissions or changes are made as aforesaid, the authority shall state this, unless this fact should not be disclosed for the reasons set out in section

9(a)(1).'

It should be emphasized that when I say that the authority should take into account, when making a decision to refuse information, the circumstances and the facts of the specific case, I do not means that the authority has a burden to show that 'special harm' will or is likely to be caused as a result of disclosing the information. This approach was rejected by this court in AAA 1825/02 *State of Israel, Ministry of Health v. Retirement Homes Association* [11], in which Justice Naor said:

> 'The trial court went a step further and held, as cited, that if there is no "special harm" to the authority, the information should be provided, even in a case that falls within the scope of s. 9(b) of the law. My opinion is that the "special harm" formula should not be introduced into the required balance. Indeed, "formulae" are relatively simple to apply, but their weakness lies in their rigidity, and the case before us, in my opinion, proves this… Ultimately, the result of this formula is that if the person applying for the information shows that he has a personal interest in the information, and the authority does not show "special harm," the information should, in the opinion of the trial court, be disclosed. The "special harm" formula is not, in my opinion, a balancing formula. The "special harm" formula does not appear in the law, it is not required by the law, and in my opinion it has too restrictive an effect on the considerations of anyone who needs to strike a balance between all the interests — the authority within the framework of s. 10 and the court within the framework of s. 17(d)' (*ibid.* [11]), at para. 20. Cf. Macdonald and Jones, *The Law of Freedom of Information*, *supra*, at p. 182; art. 4(3) of Regulation no. 1049/2001 of the European Parliament and Council, *supra*).

Thus we see that we are dealing with a flexible balancing formula that should be constructed and implemented while taking into account the facts and circumstances of the individual case.

22. The District Court, as well as the parties in their arguments before us, addressed in this context the question of the burden of proof. The respondents asked us to adopt the ruling of the District Court that the authority has the burden of showing a special reason for a refusal, whereas the Council argued that when the exemption provided in the law is satisfied, the applicant should show a special reason why, despite the exemption, the authority should

provide the information. In my opinion, the use of the terminology of burdens of proof, which is borrowed from the laws of evidence, is out of place in this context. A public authority that is requested to provide information concerning one of the matters that falls within the scope of any of the exemptions in ss. 8 or 9 of the Freedom of Information Law, should deal with this application in accordance with the rules of administrative law that govern it in all of its actions. One of the important rules in this regard provides that a public authority should exercise the discretion given to it in a reasonable manner. Reasonableness, as a normative concept, means —

> '… identifying the considerations that should be taken into account, giving weight to the various considerations and striking a proper balance between them at the point where they conflict (see HCJ 14/86 *Laor v. Film and Play Review Board* [12]). The relevant considerations are derived from the purpose of the legislation. They include the particular purposes that the legislation is intended to realize and the basic principles of the legal system, which serve as a "normative umbrella" and a general purpose for all legislation (see HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [13]; CA 165/82 *Hatzor Kibbutz v. Rehovot Assessment Officer* [14]). This purpose also determines the internal weight that should be given to the various considerations. A reasonable decision is a decision that strikes a balance between the various considerations in accordance with the weight that is derived from the purpose of the legislation. Indeed, for a decision to be reasonable it is insufficient that relevant considerations are taken into account. The decision is reasonable only if the internal weight given to the relevant considerations is proper' (HCJ 5688/92 *Wechselbaum v. Minister of Defence* [15], at p. 824. See also HCJ 935/89 *Ganor v. Attorney-General* [16], at pp. 513-514; Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at p. 202).

In our case, in order that a decision to refuse to provide information under ss. 8 and 9 of the law will satisfy the test of reasonableness, the authority should identify and examine all of the considerations that are relevant to the case and strike a balance between them, *inter alia*, by availing itself of the tools put at its disposal for this purpose in ss. 10 and 11 of the Freedom of Information Law.

23. An additional duty that is imposed on the authority under administrative law, in so far as dealing with an application to provide information under the Freedom of Information Law is concerned, is the duty to give reasons for the refusal to provide all or some of the requested information in accordance with the authority's decision. The duty to give reasons allays the concern that decisions may be made arbitrarily or erroneously and it contributes towards building confidence in the relationship between the authority and the citizen in a democracy (regarding the importance of the duty to give reasons and its being one of the basic duties imposed on an administrative authority, see I. Zamir, *Administrative Authority* (vol. 2, 1996), at pp. 897-898). Indeed, a public authority may not simply give a laconic refusal to an application to provide information. It is obliged to give details of its reasons for the refusal, in order to allow the person applying for the information to be aware of the reasons for the refusal and to consider his position. Details of the reasons for the refusal also allow the court to know the considerations that the authority took into account and the internal balance that it made between them, when it scrutinizes the decision.

In so far as judicial scrutiny of decisions of the authority under the Freedom of Information Law is concerned, the duty to give reasons has special importance because the judicial involvement in these decisions is carried out on two levels: first, the court examines whether a decision of the authority to refuse to provide information under ss. 8 or 9 of the law satisfies the criteria required by administrative law, i.e., whether the process in which it was made was proper and fair, and whether the decision is reasonable and proportionate in the circumstances of the case. But even if the refusal decision satisfies this first test, the court still has a special jurisdiction under s. 17(d) of the Freedom of Information Law, which goes beyond the usual scope of judicial scrutiny of administrative acts (for the limited scope of this scrutiny in general, see HCJ 2324/91 *Association for Civil Rights in Israel v. National Planning and Building Council* [17], at p. 688). Section 17(d) of the Freedom of Information Law provides the following:

'Petition to the court

17. …

(d) Notwithstanding the provisions of section 9, the court may order requested information to be provided, in whole or in part and on conditions that it shall determine, if in its opinion the public

> interest in the disclosure of the information takes precedence over and overrides the reason for rejecting the application, provided that the disclosure of the information is not prohibited under any law.'

In practice, s. 17(d) allows the court to substitute its own discretion for the discretion of the authority 'notwithstanding the provisions of section 9,' and to order the disclosure of the information even is it finds no defect whatsoever in the discretion of the authority according to the tests of administrative law (cf. s. 44(a) of the Evidence Ordinance [New Version], 5731-1971, with regard to the disclosure of privileged evidence). This provision in s. 17(d) of the Freedom of Information Law highlights and emphasizes the importance of the principle of freedom of information that the law is intended to realize. In *State of Israel, Ministry of Health v. Retirement Homes Association* [11] the court left undecided the question of the character and nature of a hearing under s. 17(d) of the Freedom of Information Law. It did not decide the question whether the hearing is held *de novo*, so that the court does not attribute special importance to the decision of the public authority with regard to providing the information (see Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at p. 252). As we shall see below, in our case there is also no need to make a firm decision in this regard, since where the authority did not exercise reasonable discretion under s. 9 of the Freedom of Information Law, the court does not need to resort to exercising the special jurisdiction given to it in s. 17(d) of the law, and it can find a basis for setting aside the refusal decision and the obligation to provide the information, in whole or in part and on such conditions as it sees fit, on the general principles of administrative law.

From general principles to the specific case

24. The relevant authority in both of the appeals before us is the Council for Higher Education. This authority satisfies the definition of the term 'public authority' in s. 2 of the Freedom of Information Law, since it is a 'statutory corporation' (see subsection 8 of the aforesaid definition), and it is the national institution for matters of higher education in Israel that is the authority on all matters concerning institutes of higher education and the degrees given by them. The Council numbers twenty-five members, who are appointed by the president of the state. Fair representation is given on the Council to all the types of institutions that are recognized as institutes of

higher education in Israel, and two thirds of its members are 'persons with standing in the field of higher education, who were recommended by the Minister of Education and Culture, after consultation with the recognized institutes of higher education' (see ss. 2 and 4A of the Council of Higher Education Law). The Council has control of the regular budgets of the institutes of higher education in Israel and of their development budgets, through the Planning and Budgeting Committee, which was given, by virtue of a government decision, the sole power to distribute budgets to institutes of higher education. We can therefore summarize by saying that the Council, as the public authority that is responsible for dealing with all issues concerning the institutes of higher education in Israel, is without doubt one of the most important and influential authorities in Israel in this field, and therefore it arouses great public interest.

The nature and characteristics of the public authority that receives an application for disclosure of information concerning its internal discussions — which in this case is the Council for Higher Education — are in my opinion of significant weight among the considerations that should be taken into account when dealing with the application to provide the information. It may be assumed that there is a direct correlation between the importance and degree of influence of the public authority on public affairs and the strength of the public interest in the disclosure of the information concerning its actions and decisions. Moreover, as we have already said, the authority should consider the public importance of the specific matter that was addressed in the internal discussions that are the subject of the request for information, and here too it may be assumed that there is a direct correlation between the degree of public importance of the issue that was discussed and the strength of the public interest in the disclosure of the information in this regard. Against this set of considerations that all operate in favour of providing the information, to which should also be added the personal interest that the party requesting the information has in receiving it, the authority should consider the strength of the general interest of exempting the information in order to protect the effectiveness of the decision-making process at the authority, and it should also consider additional interests that may also justify, in the specific case, a refusal to provide the information that was requested, in whole or in part. At all times the authority should be mindful of the general purpose for which the Freedom of Information Law was intended — realizing the right of every citizen and resident to receive information from public authorities, as stated in s. 1 of the law.

25. In the cases before us, the Council refused to give the Shachar organization minutes from the discussions that were held with regard to it in the plenum of the Council and in the extensions committee, as well as the licensing unit's report that was submitted to the extensions committee with regard to it. Likewise, the Council refused to give the HaAretz newspaper the minutes of its meetings and the meetings of the Planning and Budgeting Committee in the three years that preceded the request for the information. In both cases, the District Court was of the opinion that the refusal was unlawful and it ordered the information to be provided on the conditions that it outlined.

From the position that the Council presented in the District Court and in the appeals before us, it appears that in its opinion the fact that we are concerned with information regarding its internal discussions is sufficient for it to be able to refuse to provide it, by virtue of the exemption provided in s. 9(b)(4) of the Freedom of Information Law. In view of this fundamental position, the Council did not consider in either of the two cases all of the considerations that it ought to have considered before it refused to provide the information that was requested and it therefore did not determine the proper balancing point in each of them. Indeed, the Council for Higher Education sought to rely absolutely on the exemption in s. 9(b)(4) of the law, and therefore it did not take into account its pivotal national status with regard to all matters of higher education in Israel, the budgetary power that it controls, the public importance of its discussions and decisions on a general level and the specific degree of importance of the discussions concerning which the information was requested. In addition, the Council did not consider the harm that would be caused to the personal interest of the Shachar organization if the information requested by it was not disclosed, and the harm that would be caused to the public interest as a result of the non-disclosure of the information that was requested by the respondents in the HaAretz appeal, in view of the fact that they are representatives of the media who serve as an important and effective conduit through which the public exercises its right to know (on journalists as the antenna of the individual and the public… who march in the vanguard of the people,' see *HaAretz Newspaper Publishing Ltd v. State of Israel, State Comptroller's Office* [5], at p. 479; see also Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at pp. 222-223). Moreover, all of these considerations that the Council ought to have taken into account should have been reflected in reasoned refusal decisions, as required by law.

The decisions of the Council do not satisfy these requirements and the approach that it adopted with regard to the refusal decisions in both cases before us undermines the reasonableness of its decisions and justifies their being set aside. Admittedly the general concern underlying the exemption provided in s. 9(b)(4) of the Freedom of Information Law that the frankness and effectiveness of the internal discussions taking place in public authorities will be impaired also applies to the Council. At the same time, this general concern on its own cannot be decisive for every application to disclose information concerning internal discussions. As we have already said, the fact that holders of public office, including the members of the Council, are required to contend with the tension inherent in the duty to act transparently and to disclose to the public the information concerning their activity is unavoidable and required by the public character of the Council's activity. Thus we see that someone who accepts public office, because he serves the public and owes a duty of trust to the public, should take into account *ab initio* that his actions within the framework of this office will be to a large extent 'in the public eye' (see and cf. CA 6926/93 *Israel Dockyards Ltd v. Israel Electric Co. Ltd* [18], at p. 799). He should take into account that disclosure of the information is the rule, which derives from the principle of transparency and the right of the public to know, whereas non-disclosure of the information is the exception, which will be possible only when one of the exemptions provided in the law in this regard is satisfied and only after the authority has exercised discretion and adopted a reasonable decision not to disclose the information.

26. In the HaAretz appeal the Council also raised an alternative argument concerning the conditions stipulated by the court with regard to the information that it ordered the Council to provide. In this context, the Council argued, *inter alia*, that these conditions, in so far as they concerned a third party that was likely to be harmed by the disclosure of the information, imposed upon it a heavy and unreasonable burden of making enquiries with dozens of third parties under the mechanism provided in this regard in s. 13 of the Freedom of Information Law. This argument was raised by the Council without a proper basis and it is unfounded, and this is sufficient reason to reject it (on the duty of giving details that is required of an authority that argues that providing the information involves an unreasonable investment of resources, see H. Sommer, 'The Freedom of Information Law: Law and Reality,' 8 *HaMishpat* 435 (2003), at pp. 450-452; see also Segal, *The Right to Know in Light of the Freedom of Information Law*, *supra*, at pp. 165-166).

Moreover, the respondents undertook to pay all the expenses incurred by the Council (see para. 52 of their petition).

27. In closing, we should draw attention to an additional argument that was raised by the Council, according to which requiring the authorities to provide minutes of their discussions is likely to lead to them refraining from keeping full minutes; instead, they will prefer to record the main points and decisions only. It is to be hoped that this fear will not be realized, and to the extent that it is realized it will be necessary to examine each case on its merits, in view of the duty imposed on a public authority in general to keep minutes that faithfully reflect its discussions (see *Ilan v. Tel-Aviv-Jaffa Municipality* [3], at para. 18, and cf. HCJ 954/97 *Cohen v. President of Israel Bar Association* [19], at pp. 519-528). A similar argument was made by the authority in *State of Israel, Ministry of Transport v. Israeli News Co. Ltd* [6], and the remarks uttered by Justice Rivlin in that case, with regard to the cooperation of civil servants with the internal auditor, are also pertinent and apt, *mutatis mutandis*, in our case:

> 'It is the duty of civil servants to cooperate with the internal auditor so that he can carry out his duties. These duties are not subject to the good will and sympathetic disposition of the persons involved… all of the parties concerned are presumed to carry out their duties, and it should not be assumed *ab initio* that they will be derelict in discharging their duties merely because of the likelihood that reports of public importance will be brought to the attention of the public' (*ibid*. [6], at para. 24).

28. In summary, the decisions of the Council in which it refused the requests for information in the two cases before us do not satisfy the test of administrative reasonableness and therefore they cannot stand. Does it follow from this conclusion that the consideration of the requests should be returned to the Council so that it can reconsider them in accordance with the rules relevant to the issue? The Council did not raise this possibility in its arguments and it seems to me that in the circumstances that have been created there is no need for this, since in the course of the comprehensive hearings that took place in the trial court in each of these proceedings the whole question was laid before the court and the court examined the arguments of the parties and reached operative results that strike a proper balance between all the relevant considerations. In the HaAretz case the court even provided a proportionate and detailed mechanism that gives the authority a certain margin of discretion even at this stage with regard to the

conditions for disclosing the requested information. I am therefore of the opinion that we may content ourselves with adopting the operative conclusions reached by the trial court in the two judgments that are the subject of the appeals before us. This conclusion is made even more necessary in view of the time that has passed since the requests were originally made.

Conclusion

29. I shall therefore propose to my colleagues that we deny the appeals and find the Council liable to pay legal fees in a sum of NIS 20,000 to the respondent in the Shachar appeal, and an additional amount of NIS 20,000 to the respondents in the HaAretz appeal.

President A. Barak

I agree with the opinion of my colleague, Justice E. Hayut.

Justice D. Beinisch

I agree.

Justice E. Rivlin

I agree with the comprehensive and wide-ranging opinion of my colleague Justice E. Hayut.

Justice M. Naor

I agree with the opinion of my colleague, Justice E. Hayut.

Justice S. Joubran

I agree with the opinion of my colleague, Justice E. Hayut.

Vice-President M. Cheshin

I agree with the comprehensive and profound opinion of my colleague, Justice Hayut. I would, however, like to add two comments to her remarks.

2. Section 1 of the Freedom of Information Law, 5758-1998, tells us the following:

‘Freedom of information

1. Every Israeli citizen or resident has the right to receive information from a public authority pursuant to the provisions of this law.

A text cannot be interpreted contrary to its simple meaning, and what the law says is, in my opinion, simple and clear: every Israeli citizen or resident has a right to receive information from a public authority ‘pursuant to the provisions of this law.’ A citizen and a resident do not have a right to receive information from the public authority in every case; the right is ‘pursuant to the provisions of this law.’ Before we can know the essence and the scope of the right of the citizen and the resident to receive information from the public authority, we should first direct our steps along the paths of the law — both the visible paths and the hidden paths — since only in this way shall we know if in a specific case the citizen and the resident do indeed have a right to receive information from the public authority. I would therefore not classify s. 1 as a key provision, and certainly not as the ‘cornerstone’ on which the law is built. The law does not depend on s. 1; on the contrary, s. 1 is dependent on the law. These remarks are not intended to detract from the value of s. 1 as a provision of statute that contains a normative declaration — for the first time in Israeli legislation — of the existence of a right to receive information from a public authority. But we cannot ignore the phrase at the end of s. 1, ‘pursuant to the provisions of this law.’ Section 1 says what it says, and no more; let us read into s. 1 what it says, and not read into it what it does not say.

3. The second comment is that this is the first time that the Supreme Court is interpreting the provisions of s. 9(b)(4) of the law in an authoritative and detailed manner, and the appellant has learned for the first time — from our judgment that is before us — that it erred in interpreting the law. In such circumstances, I at first thought that we ought to return the case to the trial court, and thereby make it possible for the appellant to raise arguments, and perhaps even to bring evidence, to justify its position in the spirit of our remarks in this judgment. This has always been the case law rule, and I thought we should follow it. See, for example, HCJ 131/65 *Savitzky v. Minister of Finance* [20], at p. 378; HCJ 557/75 *East Lod Buildings (1953) Ltd v. Lod Local Planning and Building Committee* [21], at p. 20; HCJ 162/78 *Federation Health Fund v. Appeals Board* [22], at p. 452. But I have been persuaded that all the arguments that could have been raised were brought before the trial court, and in these circumstances — including the period of time that the matter has been before the courts — I have changed

my mind and agreed that we should decide the appeals instead of returning them to the trial court. See and cf. HCJ 62/75 *9 Hibbat Zion Street Ramat Gan Co. Ltd v. Ramat Gan Local Planning and Building Committee* [23], at p. 600.

Appeal denied.

19 Tevet 5766.

19 January 2006.