In the Supreme Court

Sitting as a Court of Administrative Appeals

AAA 3908/11

Before: Her Honor, Justice (ret.) E. Arbel
His Honor, Justice Y. Danziger
His Honor, Justice N. Hendel
His Honor, Justice E. Rubinstein
His Honor, Justice S. Joubran
Her Honor, Justice E. Hayut
His Honor, Justice U. Vogelman

The Appellants:
1. **State of Israel, Courts Administration**
2. **Supervisor under Freedom of Information Law in the Courts Administration**

v.

The Respondents:
1. **TheMarker – HaAretz Newspaper Ltd.**
2. **Hila Raz, Journalist, "TheMarker"**

Appeal against the judgment of the Administrative Affairs Court in Jerusalem on April 14, 2011, in AP 43366-03-10 by Her Honor President M. Arad

Date of Session: Tevet 5, 5773 (December 18, 2012)

On behalf of the Appellants: Adv. **S. Rotshenkar**

On behalf of the Respondents: Adv. **P. Moser**

Abstract:

This is an appeal on an administrative judgment, in the framework of which appellant no. 1, the Courts Administration, was ordered to deliver information for the scrutiny of the respondents—a newspaper and a journalist employed by that newspaper—under the Freedom of Information Law, concerning the number of open cases that are being deliberated in the Supreme Court and in the district courts, indicating the amount of time that has elapsed since each case was opened, and the

names of the judges hearing the cases. The State agreed to publish most of the information that was requested, segmented according to judge, but without mentioning the name of the judge. The principle argument of the State is that publication of the requested data will interfere with the orderly functioning of the courts system, and therefore it is not required to make the information available under the Freedom of Information Law.

The Supreme Court, with an expanded bench of 7 justices, denied the appeal by majority opinion (Justice (ret.) E. Arbel and Justices S. Joubran, E. Hayut, Y. Danziger and U. Vogelman, as against the dissenting opinions of Justices E. Rubinstein and N. Hendel), on the following grounds:

In her judgment, Justice Arbel, who wrote the leading opinion, surveyed the purposes of the Freedom of Information Law, first of which is the right of the individual to information concerning the public authorities as part of the freedom of expression and as a condition for the realization of that freedom. She also discussed the nature of the judicial task and the extremely high professional, personal, ethical, and moral standard that the judge must meet, both inside and outside the courtroom. Justice Arbel also discussed the nature and substance of the judicial independence that judges are accorded as underlying the democratic system and constituting a guarantee of the realization of the right to due process and a condition for public confidence in the courts. At the same time, it was made clear that judges are subject to oversight and criticism at the various levels on which they conduct themselves, and the various mechanisms of oversight to which they are subject were surveyed.

It was decided, *inter alia*, that the Freedom of Information Law establishes a broad principle of entitlement of the public to view information that is in the hands of the public authority. In other words, the rule is that of making the information available, and if the authority wishes to refrain from disclosing the information, it may do so in the event that one of the reservations specified in the Law applies. The public interest in disclosure of the information must be considered, and the court must consider whether the balance achieved by the public authority between all the different relevant considerations was appropriate. *Inter alia*, the considerations that will be weighed are the public interest in the information as opposed to the anticipated harm to the interest of the authority as a result of disclosure of the information, the possibility of limiting the damage to this interest while still realizing the right to information by publishing part of the information or by omitting certain details which, so it is estimated, will cause most of the harm to the authority's interest. All the considerations that the authority ought to have taken into account for the purpose of its decision whether to refrain from disclosing the information must be examined, as well as the balance between them and its reasonableness.

As far as our case is concerned, at the first stage, Justice Arbel found that the information that was requested by the respondents is information to which the Freedom of Information Law applies. With respect to the reservation to the delivery of information as claimed by the State—the reservation prescribed in sec. 9(b)(1) of the Freedom of Information Law, according to which the public authority is not under obligation to deliver information whose disclosure "is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties" "—Justice Arbel ruled that in the framework of the balance between the right of the public to

information, which is derived from the freedom of expression, and the public interest in the proper functioning of the judiciary, which also includes the interest of protecting the rule of law and preserving public confidence in the courts, the authority will be justified in refraining from disclosure of the information only if there is near certainty of the occurrence of the claimed disruption to the orderly activity of the courts as a result of the disclosure.

Justice Arbel examined individually each of the State's arguments concerning interference with the functioning of the judiciary that would be caused by disclosing the requested information, and determined that although there is substance to the argument of the State that the requested information cannot create a reliable picture of the overload in the courts system or of the particular judge, and that it does not give expression to a long list of factors that can cause the handling of a case to be drawn out, the respondents have a right to receive the requested information. Justice Arbel pointed out that she was not convinced that there was a near certainty of occurrence of the claimed interference in the functioning of the courts system as a result of delivery of the information. Her reasoning was based on the purposes of the Freedom of Information Law, the characteristics of the courts system, the transparency of its activity and its public nature, the need to maintain public confidence in the system, the nature of the judicial task, and the status of the judge and the courts.

It was also explained that for the purpose of the decision, the identity of the parties is important: the judiciary is one of the authorities that has the greatest influence on the individual and on the state, and there is therefore a clear public interest in knowledge of its activities. On the other hand, those requesting the information desire it for the purpose of fulfilling their journalistic task, as part of the activity of the media, which constitutes a guarantee for the existence of a free, civilized society. It was therefore found that there exists a public interest in disclosure of the information.

Given that we are dealing with the limitation of the right to information, i.e., with the exception and not the rule, Justice Arbel found that appellants' arguments do not assign appropriate weight to the high personal, professional, and ethical standard that a judge must meet, nor to the highest level of responsibility expected of him. This high level of responsibility also involves exposure to criticism as part of the judicial task. The internal strength of judges, and the strength of the system as a whole, will allow them to deal also with negative publications, should there be any.

At the same time, it was decided to "go easy" on the appellants by deferring the period to which the material that will be disclosed relates, until the end of the 2015 legal year, in order to allow the State to examine the appropriate preparation for implementing the judgment. On this matter, the dissenting view of Justice Y. Danziger was that an order should be given for disclosure of the most recent information held by the appellants, that is, information relating to the 5774 (2013-2014) legal year.

Justice Hendel's opinion was that the appeal should be allowed in its entirety. According to him, it is difficult to see the marginal benefit in publishing the information together with the names of the judges. At the same time, such a publication will cause great damage: it will direct a powerful spotlight at the administrative aspect of the work of the individual judge. As a result, there is near certainty of harm being caused

to the efficiency of the work of many judges and of the judicial system as a whole.

Justice E. Rubinstein was of the opinion that the appeal should be granted in part, insofar as the district courts are concerned (whereas the material relating to the Supreme Court should be made available as decided in the majority opinion). According to Justice Rubinstein, both the position of Justice Arbel and that of Justice Hendel contain substantive reasons for granting or denying the appeal. According to him, in view of the entire array of considerations, with due regard to concerns about causing shame to the judges, and because there are judges in relation to whom the harm from publication of the data is a possibility that can be dealt with and will not disrupt their work, whereas there will be others for whom the harm is a near certainty, the following intermediate solution should be adopted: with respect to the Supreme Court, in view of its seniority in the system and in order not to create even the slightest appearance of trying to prevent the presentation of data, including personal data, regarding transpires therein, Justice Rubinstein proposes that the suggestion of Justice Arbel be adopted. With respect to the district courts, Justice Rubinstein's opinion is that one must proceed with baby steps and wait an additional period, during which time the effect of the publication of names in this Court will be reviewed, and the lessons of this move studied. In view of these lessons, the appellants will make a decision on the matter by the end of the 5776 (2015-16) legal year, and this decision will of course be subject to judicial review.

Judgment

Justice (Ret.) E. Arbel

The Administrative Affairs Court in Jerusalem (Hon. President M. Arad) ordered appellant no. 1, the Courts Administration, to hand over to the respondents, TheMarker newspaper and the journalist Hila Raz, for their scrutiny, information concerning the number of open cases being heard in the Supreme Court and in the district courts before every judge; and also the length of time that has elapsed since each case was opened. In every case, the name of the judge was to be mentioned. Before us is an appeal on this judgment.

Does the public's right to information by virtue of the Freedom of Information Law, 5758-1998 (hereinafter: the "Law" or the "Freedom of Information Law")—by means of the newspaper TheMarker — also apply to the requested information that concerns open cases in the district courts and the Supreme Court, with the names of the judges hearing the cases being identified? This is the question upon which we must decide in this appeal.

Background

1. On August 18th 2009, respondent no. 2, journalist Hila Raz, submitted a request to appellant no. 2, the supervisor for the implementation of the Freedom of Information Law in the Courts Administration, to obtain information under that Law, as specified in a list that was submitted together with the request. The information was sought

"in light of the supreme public importance with respect to the burden imposed upon the courts system." A response to the request was sent by appellant no. 2 on December 14, 2009, noting that he had the information that was sought with respect to two of the items: "quantitative information about the number of open cases being heard by each district court judge in the country and the justices of the Supreme Court" as well as "information about the length of time that has elapsed since the opening of each of the principal open cases." Despite this, on February 3, 2010 respondent no. 2 received a letter from Adv. Barak Lazar, professional advisor to appellant no. 1, which stated as follows:

> The number of cases assigned to a judge does not constitute a measure of the case load. Court cases are differentiated from each other according to the type of matter (civil, criminal, administrative), the bench before which the proceedings are conducted (a bench of three or a single judge) and the complexity of the legal dispute. Therefore, presentation of the details of the number of cases assigned to each judge would provide a misleading representation, attesting to nothing, save the numerical assignment of anonymous cases to a judicial functionary.
>
> The presentation of data that reflects a true index of burden requires the development of a tool for classification of cases which takes into account the time and the resources allocated to each and every case; the purpose of this is to create a basis for comparison.
>
> In the past, an attempt involving extensive research was made to develop such a tool. Several flaws were discovered in this research, which prevent effective use of the tool that was developed. At the present time, we are making plans to conduct complementary research and to develop the said tool for assessing case-load, especially in view of the relevancy of that information for improving efficiency in the courts. Clearly such complementary research cannot be carried out in the time allocated to us for the purpose of responding to the request that has been submitted pursuant to the Freedom of Information Law.
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> This is also the case with respect to data concerning the length of a case's lifetime. Production of such data requires an analysis of the database in the system, which is conducted by external factors and involves substantial costs.

Respondent no. 2 also referred to the half-yearly report and the Freedom of Information Report published by appellant no. 1; these are public reports that include quantitative information about pending cases, cases that have been closed and cases that were opened in Israeli courts, as well as data concerning the average lifetime of a case in the courts system. There is no dispute between the parties about the fact that the information included in these reports does not fully correspond to the information requested by respondent no. 2. After a further attempt of the respondents to obtain information from the appellants was not successful, an administrative petition was filed.

The Judgment of the Administrative Court

2. The District Court granted the petition. First, the appellants' argument that delivering the information would necessitate an unreasonable allocation of funds was rejected. The Court determined that the appellants possess the requested information, and that its delivery involves the production of a computer report and does not require the allocation of substantial resources. The Court noted that the respondents did not request anything beyond the specified information, and that they did not ask that it be processed for them. The Court therefore rejected the appellants' argument that because the number of open cases does not reflect the judge's case-load, complex research, requiring an unreasonable allocation of funds, would be necessary, in order to produce data that could serve as an index of overload.

The appellants' argument that making the information available to the respondents was liable to disrupt the functioning of the Authority was also rejected. It was mentioned that this reservation to the obligation of disclosure applied, in accordance with the case law, only where there was near certainty of serious interference with the functioning of the Authority, and that the anticipated interference had to be "grave and serious" (AAA 398/07 *Movement for Freedom of Information v. State of Israel – Tax Authority* [2008] IsrSC 63(1) 284 (hereinafter: *Tax Authority*), at p. 346). However, the Court found that the argument that publication of the information would lead, with a high degree of certainty, to real interference with the functioning of the court system was not substantiated. The argument that the court system would have to provide complementary explanations with respect to an enormous number of cases for the information to serve as an index of the overload was also dismissed. It was made clear that public criticism that is liable to arise against the Authority as a result of publication of the information does not constitute the sort of "disruption" in the functioning of the Authority that would justify refusal to disclose the information. The Court was aware of the fact that the requested information could not serve as an index of the burden borne by the court or by judges, and of the fact that negligent reporting making use of this information would be baseless and misleading. However, it was decided that concealing information was not the way to deal with biased or unsubstantiated publications, and that judges could be presumed to perform their work faithfully even if a misleading article were to be published. It was also noted that it should not be assumed that the respondents, or any other body, would misuse the information, or that any publication would be issued without first receiving the reaction of the courts administration.

The argument that making information available was liable to harm public confidence in the judges and in the legal system was dismissed, and it was noted that precisely the opposite is true. The concern expressed by the appellants about harm to the efforts of the courts system to improve and become more efficient was dismissed as being too speculative. The concern about increased complaints and requests to recuse judges, or about attempts at "forum shopping" after publication of the information, was also found to be baseless. It was therefore found that handing over the information would not disrupt the functioning of the Authority, and that, in any event,there is no near certainty of serious interference with its functioning which would justify non-disclosure of the information.

3. The Court did not accept the appellants' argument that the information about the stock of cases, segmented according to judge, falls within the category of "information about the content of a judicial proceeding" (sec. 2 of the Law), which was excluded from the application of the Law. It was decided that information about the number of cases being handled by a judge and the date on which they were opened is administrative information, and the provisions of the Interpretation Law (1981) should not be used in a manner that broadens the scope of information that is not to be available to the public.

4. The attempt of the appellants to base themselves on the legal situation pertaining in other countries, too, was unsuccessful, after the Court determined that it is unnecessary to resort to foreign law where the Israeli law was explicitly applied to the courts system; furthermore, it was held that the comparative law that was cited did not clearly support the appellants' position.

5. The Court clarified that its conclusion was applicable, both in relation to the Supreme Court and to the district courts. It ruled that in the framework of the information handed over, it was possible to mark the year that the case was opened, but there was no requirement to provide such information for cases that had not yet been assigned to a judge, since the information that had been requested was "per judge". As for the Supreme Court, in which cases are not immediately assigned to a justice upon being opened, it was pointed out that it is possible to publish the requested information with respect to cases that had been assigned to a judge or a panel, together with details of the date on which the case was so assigned, in order to ensure delivery of information that was as complete as possible.

The State is appealing the judgment of the Administrative Affairs Court.

6. Before we review and discuss the pleadings of the parties, it should be mentioned that on July 12, 2011, this Court (Justice H. Melcer) order a stay of execution of the judgment of the Administrative Affairs Court. On December 19, 2011, this Court ([then] Justices A. Grunis and M. Naor, and Justice U. Vogelman) ordered a continuation of the hearing on the appeal before an expanded bench, by virtue of its authority under sec. 26(2) of the Courts Law [Consolidated Version] 5744-1984. On 18 December 2012 the pleadings of the parties were heard before the expanded panel.

Pleadings of the Appellants

7. The appellants opened their pleadings with a clarification that in a letter of appellant no. 2 dated December 14, 2009, he agreed to deliver the quantitative information that had been requested, but he expressed no intention of delivering the information together with exposure of the identities of the judges. Appellants contend that Adv. Laizer's letter was sent only when it became clear that respondent no. 2 would not be satisfied with information that did not include the names of the judges.

8. On the merits, the appellants' opinion is that they are under no obligation to hand over the requested information, in accordance with sec. 9(b)(1) of the Freedom of Information Law, which deals with non-delivery of information whose disclosure is liable to disrupt the proper functioning

of the public authority or its ability to carry out its duties. They argue that delivering personal information about the performance of the judges is liable to harm the principles on which the orderly functioning of the courts system relies—public confidence and judicial independence. This, they say, would nearly certainly interfere with the functioning of the system. The appellants explained at length what constitutes interference with the proper functioning of the system, which they claim is liable to ensue if the requested information is handed over. They say that the requested data itself cannot create a complete and reliable picture that will attest to efficiency or overload, neither of the system as a whole, nor of the individual judge. Thus, for example, they explained that there are various features that impact significantly on the input and the time required to conduct proceedings, which are not reflected in the quantitative data that was requested.

9. The appellants contend that a distinction must be made, in the context of the Freedom of Information Law, between institutional and personal information. In their view, the purpose of the Law is to create transparency with respect to the activities of the public authority, which bears systemic responsibility for the nature of the service that is provided for the citizen and for the employment of its workers; therefore, concretization of the requested information and its connection to a particular worker is not necessarily justified. It was further argued that connecting the requested information to a particular worker is liable to harm the worker's reputation and to harm public confidence him, for it contains elements of imposing liability for the ills of the system on the worker. It was explained that the worker cannot protect his reputation in public. The appellants believe that it cannot be assumed that the worker's functioning will be unaffected if he is publicly tried on the basis of purely quantifiable parameters which do not accurately reflect the quality of his work and its nature. It was also argued that impugning an individual in public on the basis of incomplete and misleading information will affect the ability of the public system to recruit the finest candidates into its ranks. In conclusion it was pointed out that delivery of personal information, particularly when it does not present a complete picture, involves greater potential for misuse of the information than a situation in which "systemic" information is handed over.

10. The appellants believe that the above arguments hold even more so in relation to the judiciary, and for the purpose of maintaining public confidence in it and for its independent functioning. They claim that publication of personal statistical information that is misleading will lead to contempt for the judges, which may affect public confidence in them, as well as to the conduct of "kangaroo courts" which will harm the regular functioning of the judges. It was stressed that in order to fulfill the goals of the judicial system, there must be assurance that, despite the complexity of the arena in which the judge operates, his considerations will always be relevant and that his decisions will be of a high quality.

11. In the appellants' opinion, the balance between the principle of independence and public confidence. on the one hand, and the public interest in oversight of an authority that acts as a public trustee on the other, should be achieved in a manner that allows for effective oversight of the judicial system without causing the aforementioned potential harm. In their pleadings, the appellants enumerated the various frameworks in

which oversight of the legal system is possible. They also pointed to the presently existing mechanisms for maintaining the personal and professional independence of judges and their public standing. The appellants also refer to the position adopted by Professor Segal, according to which the appropriate solution is to publish the information without attaching the names of the judges (Ze'ev Segal, *The Right to Know in Light of the Freedom of Information Law* (2000), 143-144 [hereinafter: Segal]). It was further claimed that the issue of the appropriate balance between the interest of preserving judicial independence and the judges' duty to report was discussed and decided by the legislator in the framework of the Ombudsman for Complaints against Judges Law, 2002 (hereinafter: Ombudsman's Law). According to the Ombudsman's Law, the work of the Ombudsman's Office is protected by a statutory duty of confidentiality, and the reports that it publishes do not indicate the names of the judges against whom complaints have been lodged. The appellants argue that an analogy should be drawn from that arrangement to our matter.

According to the appellants, in the balance between the need to maintain the independence of the judiciary and public confidence therein and other important interests, to the extent that the matter is one of information that relates to the functioning of a worker in a personal manner, the stricter standard of near certainty should not be applied, and proving a "reasonable basis for concern" or "reasonable possibility of harm to justice", should suffice, due to the sensitivity of the concrete information. In this context, reference was made to case law that established the standard of "reasonable possibility" for the purpose of balancing between freedom of information and the interest of ensuring that justice be done by the judiciary. They referred specifically to CrimA 126/62 *Dissenchik & Hon v. Attorney General* [1963] IsrSC 17 169 (hereinafter: *Dissenchik*), and to CrimA 696/81 *Azulai v. State of Israel* [1983] IsrSc 37(2) 565 (hereinafter: *Azulai*).

12. The appellants explain that in order to amend the data with explanations, a very sizeable allocation of resources will be required of them. Moreover, they think that such information which is capable of explaining the statistical-technical data. "encroaches" on the area of judicial discretion in the conduct of cases—and such information was excluded from the application of the Freedom of Information Law.

13. The appellants maintain that, considering that the information was sought for the sake of the public interest in pointing out the burden imposed upon the courts system, these goals of examining the information can still be achieved if the information is handed over to the respondents with the information segmented according to judge, without mentioning individual names. According to them, this is a good legal solution, compatible with the provisions of sec. 11 of the Freedom of Information Law.

Pleadings of the Respondents

14. The respondents explained that publishing information about the activities of public authorities, including the judiciary, is part of their occupation in the area of communications and journalism; therefore, failure to hand over the information infringes upon their freedom of

occupation. They stressed the public's right to know about the judiciary, and explained that their goal was not to besmirch judges, and that prior to each publication, the response of appellant no. 1 would be sought.

15. The respondents complained that their request was rejected in the letter of Adv. Laizer, who is not the authorized party for matters of freedom of information on the part of appellant no. 1; and this only a few months after appellant no. 2 notified them that the information would be delivered. They also pointed out that in the statements of pleadings, appellants claimed that producing the requested information involves an unreasonable allocation of resources, which is likely to disrupt the orderly functioning of the authority. However, when the Court ordered the appellants to submit an affidavit concerning the estimated cost of carrying out this task, it emerged that the computer program used by the appellants enables the data to be produced without any unreasonable allocation of resources. Despite this, the appellants performed an about-face and raised new arguments in support of their refusal to deliver information.

16. The respondents contend that the information they are requesting is not information about the "content[s] of a judicial proceeding", but rather, information about the administrative side of the legal system, which falls within the rule of disclosure under the Law. According to them, in order to fall within the exception to the delivery of information under sec. 9(b)(1) of the Law, the appellants would have had to prove that disclosure of the information would cause disruption in the functioning of the Authority, with a high degree of certainty, of real, severe harm. Such proof was not forthcoming. They object to the appellants' argument that in matters concerning the judiciary, a lenient criterion of "reasonable possibility of harm" should be applied, and they stress that this was raised only in the appellants' summations. Moreover, they are of the opinion that the case law on which the appellants sought to rely is based on the assumption that disclosure of the requested information involves harm to the pursuit of justice or the purity of the legal process, which was not the case here. They say that there is no place for the concern that the judge will not be able to withstand criticism relating to his performance, for exposure to such criticism is an intrinsic part of his judicial role. It was claimed that the judiciary acquires the confidence of the public, in part due to its transparency, and that, regardless, this confidence is liable to be harmed by the revelation of information about case overload. According to the respondents, the fact that the requested information cannot serve as an index of the burden borne by the court, or by a particular judge, cannot justify its being withheld.

The respondents are also of the opinion that the Ombudsman's Law has no relevance for the matter at hand, and that the distinction the appellants wished to draw between systemic information and personal information has no statutory basis.

Deliberations

17. The appeal before us is unlike other appeals under the Freedom of Information Law. If, until now, appeals under this Law dealt with the implementation of the Law on the part of other authorities, the present appeal is concerned with the implementation of the Law by the courts system, and we, who are an integral part of that system, are being asked to

decide the matter, In doing so we are bound, as in every appeal under the Freedom of Information Law, by the provisions of the Law, which must provide the guidance for the path we take, joined by professional discretion, conscience, and the sense of justice. In making such a determination we are obliged, naturally, to be doubly and triply cautious, and it has often been said in the past by President Barak that "when we sit in judgment, we are being judged" (Aharon Barak, "Law and Judgment", *Selected Writings* 1 (5760-2000); Aharon Barak, "Speech in the Supreme Court on his Retirement from the Bench", *Mishpatim* 38 (1) 3, at pp. 10-11 (5768-2008) (hereinafter: Barak, "Retirement").

18. Let me state from the outset, in brief, that my conclusion, after having examined the pleadings of the parties and all the material relevant to the subject, is that respondents have a right to obtain the requested information, and that the appellants have not succeeded in showing that the interference with the activities of the courts as a result of the publication, as they claim, is a near certainty. I found that the information that was requested is in essence administrative information, to which the Freedom of Information Law applies; in other words, this is information to which the public has a right of access. In my view, the public interest in the information also emerges from the identity of the parties: on one end, the courts system, a public authority, whose influence on the lives of the individual and whose effect in shaping these lives is substantial, and knowledge of whose activity there is a clear public interest, whereas on the other end the fact that the information was sought by people from the media who are interested in the information for the purpose of fulfilling their journalistic function, and whose activity is extremely important in the realization of freedom of expression of the public and the fashioning of a civilized society. As stated, I did not find that the appellants could invoke the exception to the publication of information under sec. 9(b)(1) of the Freedom of Information Law, which deals with interference with the functioning of the authority. The activity of the courts is characterized by transparency that is not only systemic: it also involves personal transparency in relation to the judges trying the cases, which exposes them, even today, to harsh public criticism. This being the case, it is difficult to accept the argument that publication of the requested data will detract from the judicial independence of judges, to their functioning and to public confidence in them. As I will show, even if it is not possible to rule out the possibility of the consequences against which the appellants warn, such as harm to the esteem which judges have been accorded or misuse of the information, many of the arguments raised in this context are conjectural, focusing on cases of callous, litigious reporting, which is the exception rather than the rule. These arguments do not attribute the appropriate weight to the right of the public to know about the judiciary and the possibility that most of the reporting will be neutral, or at least fair. I found that appropriate weight must be attributed to the high standard of conduct that is expected of a judge, as well as to the fortitude required from a person selected to fulfill a judicial function and who is expected to rule according to the law, even when faced with enormous pressure. When one takes into account the transparency characterizing the activity of the courts, including in weighty cases that involve substantive matters, it is difficult to justify not according the same treatment to quantitative data concerning the activity of the system. I believe that transparency on this matter, too, will only strengthen confidence in the system. The position

taken by the appellants seeks to create a different attitude to courts vis-à-vis other governmental authorities that were made subject to the Freedom of Information Law. I did not find—even given the distinctive nature of the judicial function—that any reasons were given that would warrant such a differentiation.

19. The subject under discussion includes within its purview various rights and interests, some in concert, some in conflict. All of them are worthy of representation, while above them hovers the spirit of the Freedom of Information Law, the purpose of which is to "help promote social values, including equality, the rule of law, respect for human rights, and also to allow more efficient oversight of the public of the acts of the government" (Freedom of Information Bill, 5757-1997). In our matter, on the one hand stand the rights of the public to know and to obtain information about the modes of action of the public authority—and in this case, the courts—as well as the right of the public to oversee the governmental authorities; and on the other hand, the status, mode and orderly functioning of the courts and the judges. This interest is seemingly independent, but it incorporates weighty rights in our system such as the right to due process. The place of the value of human dignity, of the dignity of the judge and the right not to be put to shame and not to be denigrated should not be ignored, but neither should the dignity of the system, which is essential for ensuring its proper functioning. These are the topics that I shall discuss.

I will begin with the normative framework within which the discussion will be conducted – the Freedom of Information Law.

The Normative Framework – the Freedom of Information Law

20. The Freedom of Information Law developed from the right to examine documents held by a public authority. In the evolution of the right to examine, Israeli law first recognized a private right of examination—the right of the individual to view the documents held by an administrative authority and which were used in the making of a decision which concerned him (HCJ 142/70 *Shapira v. Jerusalem District Committee of the Israel Bar Association* [1971] IsrSC 28(1) 325 (hereinafter: *Shapira*); HCJ 337/66 *Estate of Kalman Fital v. Assessment Committee, Holon Municipality* [1967] IsrSC 21(1) 69 (hereinafter: *Fital*), at p. 71; CA 6926/93 *Israel Shipyards v. Israel Electric Corporation* [1994] IsrSC 48(3) 749, at p. 796; AAA 8282/02; *HaAretz Newspaper Ltd. v. State of Israel, Office of the State Comptroller* [2003] IsrSC 58(1) 465 (hereinafter: *HaAretz*), at p. 469). This right, which is one of the foundations of the democratic regime, is derived from the right to be heard and from the duty of the public administration to act in a transparent fashion (LCA 291/99 *D.N.D. Jerusalem Stone Supply v. V.A.T. Director* [2004] IsrSC 58(4) 221 (hereinafter: *Jerusalem Stone*), at p. 232). Its source is in the case law, in that it is one of the principles of natural justice (*Fital*, at p. 72).

A significant development occurred in 1998, with the enactment of the Freedom of Information Law and recognition of the right of the individual to view documents held by the authority, even where there is no personal interest in the information, and subject to the exceptions prescribed by the Law (Segal, p. 11; *Tax Authority*; *HaAretz*, at p. 472; Explanatory Notes to the Bill). Our interest, therefore, is in the public right of inspection.

21. The right of the individual to obtain information about the activities of the governmental authorities "is one of the cornerstones of a free society" (AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper* [2006] IsrSC60(4) 217 (hereinafter: *Council for Higher Education*), at p. 233. See also *Jerusalem Stone*, at pp. 232-33); "The foundations of democratic culture" (sec. 15 of my opinion in AAA 9341/05 *Movement for Freedom of Information v. Government Corporations Authority* [*Nevo* – May 19, 2009] (hereinafter: *Government Corporations*). It is "a preliminary condition for the realization of other rights, and a basis upon which, in a democratic society, it is possible to build a culture of rights" (Aharon Barak, "Freedom of Information and the Court", *Kiryat Hamishpat* 3 (5763-2003) 95, 97 (hereinafter: Barak, "Freedom of Information"). The right to obtain information is based on the conception of a governmental authority as a public trustee. As a public trustee, the administrative authority is held to a standard of detailed accountability to the public it represents, which will allow the public to understand how it has exercised its authority and the power that was placed in its hands, the range of its activities etc.

22. The principle of freedom of information has several purposes, the realization of which must guide us when we address any petition or appeal dealing with freedom of information. *First*, the right to obtain information about public authorities is closely connected to freedom of expression and the public's right to know. As is known, under the broad span of freedom of expression are to be found other freedoms that are essentially connected to it, derived from it, and vital to its realization. The broad protection enjoyed by the freedom of expression covers these as well and impacts the extent of their reach (HCJ 5771/93 *Citrin v. Minister of Justice* [1993] IsrSC 48(1) 661, at p. 673). Realization of the right to know involves the right to information: "There is no freedom of expression without the right to know, and there is no right to know without freedom of information" (AAA 6013/04 *State of Israel – Ministry of Transport v. Israeli News Corporation Ltd.* [2006] IsrSC 60(4) 60 (hereinafter: *Ministry of Transport*), at p. 73). The purposes served by freedom of expression mandate recognition of a broad right to know, and therefore also of a broad right of access to information. The fact that freedom of expression underlies the right to information and is bound up with it led to its recognition as a constitutional right, even though it is not entrenched explicitly in Basic Law: Human Dignity and Liberty (AAA 11120/08 *Movement for Freedom of Information v. State of Israel – Antitrust Authority* [*Nevo* – November 17, 2010] (hereinafter: *Antitrust Authority*), para. 9 and the references there).

The *second* purpose of the principle of freedom of information is the exercise of effective civilian review and oversight of the activities of governmental authorities. "The public eye is not only an expression of the right to know, but it is a reflection of the right of oversight" (HCJ 1601/90 *Shalit v. Peres* [1990] IsrSC 44(3) 353, at p. 361; see also AAA 10845/06 *Keshet Broadcasting Co. v. Second Authority for Television and Radio* [*Nevo* – November 11, 2008] (hereinafter: *Keshet Broadcasting*), para. 65); Segal, at p. 102). The accessibility of information is a condition of the ability of the public to oversee the governmental authorities, to form an informed view of their activity, "to demonstrate involvement in governmental activity and to take part in the formation and fashioning of appropriate governmental culture . . ." (*Government Corporations*, at para.

15). It makes possible the realization of political and civil rights and is an important component in the fostering of active, involved citizenship. The flip side of the coin is that transparency of the activity of the authority ensures an important contribution to "public hygiene", as described by Justice Hayut in *Council for Higher Education*, at p. 231, for improving the quality of governmental decisions and its activities.

A *third* purpose of the right to information is ensuring public confidence in public authorities. The knowledge that the authority is subject to oversight, which can be exercised by any individual, contributes to the confidence in the governmental authorities (*Antitrust Authority*; Segal, at p. 101.) As I mentioned in the past, without public confidence in the system, democratic society cannot exist (HCJ 5853/07 *Emunah – National Religious Women's Organization v. Prime Minister* [2007] IsrSC 62(3) 445, at p. 493).

The *fourth* purpose of the right to information is proprietary. In its capacity as a body serving as a trustee for the public, the public authority holds information in trust for the public. The public is the owner of the information, and the authority cannot act in respect of this information as if it were the owner of property belonging to it. The importance of this goal is highlighted in the commentary to the Bill, whereby "… in fact, it would appear that it is difficult to uproot the proclivity of the authorities for regarding information as their property and not property that is held in trust by them for the public and on its behalf" (See Freedom of Information Bill). Accordingly, every one of the individuals constituting the public has the right to obtain information from the authority, even if he has no direct, personal interest in that information, when there are no good reasons for withholding it (HCJ 2283/07 *Legal Forum for Israel v. Judicial Selection Committee under Section 4 of Basic Law: The Judiciary* [*Nevo* – May 5, 2008], per Justice Hayut, para. 5; *HaAretz*, at p. 471; AAA 7744/10 *National Insurance Institute v. Adv. Yafit Mangel* [*Nevo* – November 15, 2012] (hereinafter: *National Insurance Institute*), per Justice Hendel, para. 5).

23. I would point out that the hierarchy amongst the various purposes of the right to information is in dispute. There are those who viewed the protection of freedom of expression as the main purpose that the Law is designed to realize (*Ministry of Transport*, at pp. 72-73); some saw it in the value of transparency and the ability to maintain oversight of governmental activity (*Government Corporations*, at para. 37; *Tax Authority*, per my opinion, para. 56). As I pointed out in *Antitrust Authority*, I do not think that any one of these purposes should outrank any other. The different purposes are all foundational to the Law. To a great extent, they are bound up with and affect one another. In the circumstances of a particular case, one of these purposes will be the focus of the discussion, and at times, the discussion will touch upon several of them. One way or another, I believe that "…rather than examining the centrality of any particular purpose that lies at the basis of the Law and examining the request for information in its light, one must examine which of the purposes underlie the concrete request and examine their combined weight" (para. 9).

24. A person's entitlement to information held by a public authority arises if he succeeds in passing through the three filters on which the Law is based, as Justice Cheshin put it (*HaAretz*, at pp. 472-472).

The first filter is to be found in sec. 1 of the Law, which sets the parameters of the broad, principled range of the right to information:

> Every Israeli citizen or resident has the right to obtain information from a public authority in accordance with the provisions of this Law.

The second filter prescribes exceptions to the right to information (secs. 8 – 9 of the Law), which define the cases in which information will not be delivered by the public authority or in which it is not obliged to deliver information, due to the existence of other, potentially conflicting interests and rights. Like all rights, the right to information is not absolute, but rather is relative. At times, it yields to other rights that merit protection, such as the right to privacy and to reputation, or to weighty interests, such as state security or foreign relations. In sec. 8, the Law enumerates a list of cases in which the public authority has discretion as to whether to grant the request for information. One can generalize and say that these cases are concerned with "administrative efficiency and practical constraints" (HCJ 2398/08 *State of Israel – Ministry of Justice v. Segal* [*Nevo* – June 19, 2011] (hereinafter: *Segal*), per (then) Justice Naor, para. 26); Eliezer Shraga & Barak Shahar, *Administrative Law – Basic Principles* vol. 1 (2009), 357), in view of which the authority is authorized to dismiss the request for information. The Law also provides a list of exceptions to delivery of information (sec. 9), distinguishing between cases in which information is not to be delivered, such as a case of concern of harm to national security or foreign relations (sec. 9(a)(1)-(2) of the Law) or harm to a person's privacy (sec. 9(a)(3) of the Law), and cases in which the authority is granted discretion as to whether to hand over the information (sec. 9(b) of the Law). These exceptions express various points of balance between the right to information and other rights and interests, and place broad discretion in the hands of the public authority. The main consideration that the public authority must weigh in its decision is that of the public interest in disclosure of the information (Segal, at p. 199).

The third filter (sec. 17 of the Law) grants the court authority to order the disclosure of information contrary to the position of the public authority (and see also *HaAretz*, at pp. 472-473).

To these three filters are adjoined the provisions of the Law that limit the realization of the right to information: inter alia, sec. 10, which deals with the considerations of the public authority; sec. 11, dealing with the possibility of delivering partial information or with conditions attached; sec. 13 which deals with protection of third parties; and sec. 14 of the Law, which contains a list of bodies that are not subject to the Law.

25. This is the normative framework of the deliberation. Before we examine the arguments of the parties, I will discuss the issues that define the dispute before us. First, I will consider the nature of the judicial function and the principle of judicial independence which lies at its core. Juxtaposed to this I will present the mechanisms of supervision to which governing judges are subject, which are of importance in the present

matter due to the fact that the purpose of the present petition is to increase the transparency of the activity of the courts. I will then proceed to examine the arguments that were raised by the parties in order to ground their contention that handing over the requested information will cause disruption with the proper functioning of the courts system, and that they may therefore invoke the exception to the delivery of information specified in sec. 9(b)(1) of the Freedom of Information Law; I will then decide on these arguments.

On Judging and the Image of the Judge

26. Judging is a calling. It is not like other occupations. It is not a trade. To choose a judicial career is to choose a destiny, a way of life. The task that befalls a judge—to decide disputes and to adapt the law to the changing exigencies of life, to preserve and protect the rule of law, human rights and all other values of Israel as a Jewish and democratic state (Aharon Barak, "On My Role as a Judge" *Mishpat Umimshal* 7 (5764-2004) 33; Tova Strasberg-Cohen and Moran Svorai, "Justice Bach – The Image of a Judge" *Gabriel Bach Volume* (2011) 731, 740 (hereinafter: Strasberg-Cohen & Svorai, *Bach Volume*)) — is a weighty one. The authority and the power vested in the judge's hands have the capacity to affect—sometimes very profoundly—the life of the individual and his rights; they can have a significant impact on shaping the face of society. Vice-President M. Cheshin and (then) Justice E. Rivlin described the distinctive nature of the vocation of the judge as follows:

> The judicial profession is no ordinary profession: it is a profession that is one of a kind; a profession of destiny that imposes upon the judge, almost of itself, special tasks and norms of behavior. The judge has a heavy—extremely heavy—burden placed on his shoulders: to judge and to decide the law. A person's fate is entrusted to his hands—not only metaphorically — his liberty, his money, and his rights. This requires the judge to act with integrity, discretion, moderation, caution, and precision, and to continually ensure that he does not deprive the litigants before him of their rights (DC 2461/05 *Minister of Justice v. Judge Cohen* [2005] IsrSC 60(1) 457 (hereinafter: *Judge Cohen*), at p. 461).

The special nature of judging characterizes those who have chosen this profession and were chosen for it. A person who merited donning the judicial robes is obligated to justify, in all aspects of his life, in his conduct both in the court and outside of it, the trust that has been placed in him. The highest personal, professional, moral, and ethical standard is demanded of him (Tova Strasberg-Cohen, "The Image of the Judge" *Parliament*, 72, available at the website of the Israeli Democracy Institute, www.idi.org.il, hereinafter: Strasberg-Cohen, *Parliament*). He is required to encapsulate in his personality a blend of personal attributes, professional sills, responsibility, wisdom and discretion that will guide him, as a kind of inner compass:

> From the special nature of the judicial system—with which the judge is occupied in making fateful decisions, in the criminal law and in preserving the rule of law, human rights and democratic values—is derived the requirement that he requires a special personality, special characteristics, and a special nature to qualify

> him for his position. Principal amongst the required qualities are: personal honesty, integrity, moral rectitude, clean hands, professionalism, independence of thought, objectivity, and neutrality. In addition to these qualities, the judge must—when sitting in judgment—be attentive, sensitive, tolerant, and patient. He must hold the reins of the judicial process and conduct the trial fairly and efficiently. He must display a judicial temperament even though the process—by its very nature—is fraught with tension and pressure. (*Ibid*)

And as the prophet said:

> He has shown you, O mortal, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God (Micah 6:8).

The judge is a symbol of values, conscience, and morality. In his conduct, and in all that he does, he must constitute a shining example for the public in his respect for the law, in his meticulous adherence to it, and in his exemplary, respectful, and respecting personal conduct.

A preliminary, essential condition of the judge's ability to serve in that capacity is the confidence of the public, which recognizes his authority to judge and will accept his decisions as binding. Not only is the matter of the individual judge at issue before us, but also public confidence in the system as a whole (and see *Judge Cohen*, at p. 461).

Judicial Independence

27. The judiciary is one of the three branches of government on which the democratic regime is founded. The alignment of the relations between the judiciary, the legislature and the executive is based on a balance between the authority of these branches in a way that allows for autonomy on the one hand, and mutual oversight on the other—the existence of separate governmental authorities that amongst themselves maintain mutual relations of "checks and balances":

> One principal is that of the separation of powers: the legislature will legislate, the executive branch (the government) will execute and the judiciary will sit in judgment. The combination of words "separation of powers" does not indicate the full content of the expression. The essence of this principle does not lie in the "separation of powers", i.e. the separation between the branches for the sake of separation, but in the decentralization of power and authority between different and separate branches. The essence lies in the legislature engaging solely in legislative acts and not in executive ones, the executive solely in executive acts and not in legislative and judicial ones and the judiciary engaging solely in judicial acts and not in legislative and executive ones." ((then) Justice M. Cheshin, HCJ 6971/98 *Paritzky v. Government of Israel* [1999] IsrSC 53(1) 763, at p. 790).

The principle of checks and balances between the governmental branches requires, therefore, that there be an independent judiciary, which

is not susceptible to any inappropriate influence, either on the part of the other governmental braches or on the part of any interested party.

28. Judicial independence is one of the basic values of the democratic system, and its existence is essential for the realization of all the other values of the system. It is one of the judge's most important assets in fulfilling the weighty tasks laid upon his shoulders. It is the crux of judging, "the heart and soul of the judicial enterprise" (Tova Strasberg-Cohen, "Judicial Independence and the Supervision of Judges' Conduct: Reflections on the Purposes of the Ombudsman for Complaints against Judges Law, 2002", *Mishpat Ve'Asakim* 3 (5765-2005), hereinafter: Strasberg-Cohen, *Mishpat Ve'Asakim*), and it constitutes the basis and the condition for realization of the right to due process. At the core of judicial independence are to be found objectivity and neutrality, which are the first principles of judging (Strasberg-Cohen & Svorai, *Bach Volume*, at p. 737; Meir Shamgar, "Independence of the Judicial System as a Fundamental Element of Democratic Order" *Hapraklit* 42 (5755-1995), 245, 249 – hereinafter: Shamgar). The meaning of this is that the judge decides the case according to the law, with freedom of thought and conscience, without fear and without bias, acting in accordance with the law and with professional discretion and a sense of justice and conscience, with no pressure nor incentive applied to him (Strasberg-Cohen, *Mishpat Ve'asakim*, at p. 335; Aharon Barak, *The Judge in a Democratic Society* (2004), 124 – hereinafter: Barak, *The Judge in a Democratic Society*; Tova Strasberg-Cohen, "The Tension between Judicial Independence and Accountability", *Berenzon Volume* (5767-2007) 127, 129 – hereinafter: Strasberg-Cohen, *Berenzon Volume*).

29. Judicial independence ensures the pertinence and the quality of the judicial decision. It is mandated by, and warranted in view of, the powers that are placed in the hands of the judge—powers which may decide fates and change the courses of lives. Its importance, however, is not exhausted at the level of the individual litigant; significantly, for the public at large, this independence ensures equality before the law to all who cross the threshold of the court, as well as enabling the judge to fulfill his role in protecting human rights and the rule of law (see also: Strasberg-Cohen, *Berenzon Volume*, at p. 130; Eli Salzberger, "Temporary Appointments and Judicial Independence: Theoretical Thoughts and Empirical Findings from the Supreme Court of Israel", *Mehkherei Mishpat* 19 (5763-2003) 541, 543; Michal Agmon-Gonen, "Judicial Autonomy? The Threat from Within", *HaMishpat* 10 (5765-2005) 213, 216 (hereinafter: Agmon-Gonen)). In other words, more than protecting the judge, judicial independence protects the public whom he judges.

30. There are two facets to judicial independence. The *first* facet is the personal independence of the judge who hears the case. Personal judicial independence is secured within two concentric circles. In the inner circle is to be found the personal substantive independence of the judge, i.e., the liberty granted to the judge to decide the law according to his best professional understanding and conscience, with no dependence on any external factor, in order to ensure neutrality and objectivity in the conduct of the case and the decisions made therein. Personal independence of the judge is prescribed in sec. 2 of Basic Law: The Judiciary, the heading of which is "Independence": "A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law" (and

see sec. 5 of the Code of Ethics for Judges, 5767-2007, and in particular, sec. 5(c) of the Code, which states that "The judge shall fear no one, and shall not be influenced, in the fulfilling his role, by public opinion, concern about criticism or desire to please"). Of course, the decisions of a judge are subject to appellate review, but this is an integral, fundamental part of the judicial enterprise, which does not negate or erode the fact that at the time when the judge makes his decision in a case, he does so according to his conscience and his best judgment; hence the activity of the appeals court cannot constitute harm to his judicial independence (Shlomo Levin, "Judicial Autonomy – An Inside Look", *Iyunei Mishpat* 29 (2005) 5, 11 (hereinafter: Levin)).

The autonomy of the judge is not intended to be confined to relations with the legislature and the executive; rather, it extends to fulfillment of the judicial role with administrative independence vis-à-vis every internal factor in the judicial system (Shamgar, at p. 254; Levin; Barak, *The Judge in Democratic Society*, at p. 125).

31. In the outer circle of personal independence are the rules that seek to prevent inappropriate interventions in the function of the judge that affect his substantive independence. These are rules which seek to ensure for the judge a professional working environment free from pressures and concerns regarding potential personal consequences stemming from a particular ruling (Shamgar, at p. 248; Shimon Shetreet, "Culture of Judicial Independence in Israel: Institutional and Substantive Aspects of the Justice System in a Historical Perspectives", *Law and Business* 10 (5769-2009) 525, 529-533 (hereinafter: Shetreet)). We will mention in particular those rules that set out the modes of appointment and conditions of office of the judge (Basic Law: The Judiciary, secs. 4, 7 and 10); the rules concerning the personal immunity of the judge in torts for an act done in the capacity of his judicial role (sec. 8 of the Civil Wrongs Ordinance [New Version], 5728-1968; LCA 6830/00 *Bernowitz v. Te'umim* [2003] IsrSC 57(5) 691, at p. 702; and rules about taking testimony from judges (LCA 3202/03 *State of Israel v. Yosef* [2004] IsrSC 58(3) 541).

32. For the sake of completeness I will mention that the *second* aspect of judicial independence is institutional independence, i.e., the administrative and organizational independence of the judiciary. Institutional independence is closely connected to personal judicial independence. The latter draws sustenance from the former, without which it would not be possible to ensure, fully, the personal independence of judges. The issue of institutional independence is not the focus of our discussion, and I will therefore say no more on the subject (for elaboration of the subject see: Aharon Barak, "Judicial Independence – How?" *Mivhar Ketavim* 1 (5760-2000); Barak, *Judge in a Democratic Society*, at pp. 125-127).

33. To sum up this point: in matters of judging, the judge is not subject to the authority of any other person, or any governmental authority, or any office, or to the power of money. He is subject only to the authority of the law. Judicial independence is a precondition—and there is none more vital —for allowing the judiciary to fulfill its role in protecting the rule of law and ensuring the orderly functioning of the other branches, as

well as its role in protecting human rights and the basic values of society, and most of all, in doing justice. It comes to ensure that the judge can fulfill his function with professionalism and without bias, in that it constitutes a barrier against abuse of authority or deviation from the bounds of competence by other governmental authorities (Shamgar, at p. 254), or against attempts by those with an interest and power to influence the proceedings. Judicial independence is fundamental in ensuring due judicial process. It is the basis for securing the confidence of the public in the legal system, that "judging is executed fairly, neutrally, with equal treatment of litigants and without even a smidgeon of personal interest in the outcome" (HCJ 732/84 *MK Yair Tzaban v. Minister for Religious Affairs* [1986] IsrSC 40(4) 141 (hereinafter: *Tzaban*), at p. 148). As such, it is one of the basic values of democracy: there is no properly-functioning regime where the public has no confidence in the fact that the judiciary resolves disputes that come before it on the merits, objectively, and independently. Without public confidence in the characterization of the judicial system as described, society has no effective mechanism for deciding disputes and for the conduct of life in a cooperative, organized, and orderly framework. Public confidence and the independence of the judiciary operate reciprocally: judicial independence provides the basis for public confidence in the judiciary, whereas public confidence strengthens judicial independence and is the source of its power (Strasberg-Cohen, *Berinson Volume*, p. 131).

Oversight and Supervision of Judges – the Principle of Accountability

34. "Our system relies on unreserved trust in judges, in their integrity, their morality, their humanity, and their values" (HCJ 188/96 *Tzirinsky v. Vice President of Hadera Magistrates Court* [1998] IsrSC52(3) 721 (hereinafter: *Tzirinsky*) , at p. 743; and see Barak, *The Judge in a Democratic Society*, at p. 50). At the same time, even given the judicial independence enjoyed by the judges and the courts system, they are not immune from supervision, nor are they exempt from it.

35. Judges are not like the other functionaries in the public service. The nature of their task, its particular characteristics, as mentioned above, and inherent duties, as well as responsibility for the high standard of conduct to which the judge is held, both inside and outside the courtroom, are different from those pertaining to other public servants. The role of the judge is characterized by norms that he sets forth in his decisions, within the framework provided by the law, to which the influence and application are not limited to the litigants in the particular case before him, but rather, reach the entire public. All these create a substantive, significant difference between judges and other public servants (in this context, *cf*: Daphna Avnieli, "Who Will Judge the Judges and How?" *Hapraklit* 47 (5764-2004) 77, 95; Strasberg-Cohen, *Mishpat Ve'asakim*, at 337; Agmon-Gonen, at p. 230). However, precisely because of these characteristics of the judicial function, judges are subject to the duties that apply to other public functionaries as public trustees (see also the Preface to Code of Ethics for Judges; Tova Strasberg-Cohen and Moran Svorai, "Mechanisms for Supervision of the Judiciary" *HaMishpat* 24 (2007), 47 (hereinafter: Strasberg-Cohen and Svorai, *HaMishpat*)). The concept of trusteeship leads to a requirement of transparency that applies to all public authorities. Transparency, which I shall discuss presently, also involves supervision:

> The indispensability of supervision is derived from the requirement of transparency that stems from a conception of the public authority and its workers as trustees on behalf of the public. About this is has been said: "The public authorities are trustees of the public. They have nothing on their own, and everything that they do have, they have for the public (HCJ 1635/90 *Zarzewski v. Prime Minister* [1991] IsrSC 45(1) 749, at p. 839). Even despite the fact that due to these special characteristics of the judicial task, judges should not be regarded as public servants in the narrow sense, the duties that apply to public servants as public trustees should be applied to them, *mutatis mutandis* (Strasberg-Cohen, *Berinson Volume*, at p. 132).

The Judge's being subject to supervision stems, therefore, from the transparency that is necessitated by the activity of the courts as a public body, but it also expresses acknowledgment of the fact that the judge is a human being, and like every human being, "there may be failings and defects in his behavior and his conduct" (Strasberg-Cohen, *Berinson Volume*, ibid.). The fact that the judge is subject to supervision and oversight of his conduct and behavior in the framework of fulfillment of his judicial role—this is the "Principle of Accountability".

Thus, "… supervision is desirable. Like every governmental authority, we too must be subject to supervision; just as there is no authority that is higher than the law, so too is there no authority which is beyond supervision" (Aharon Barak "Supervision of the Judiciary", *Mivhar Ketavim* (2000) 961). The fact that judges are subject to supervision contributes to the public confidence in the courts, to the propriety of legal process, to the quality of the decisions that are made, and to the quality of the functioning of the legal system as a whole.

36. What is the nature and the extent of the supervision of judges? How does it comport with judicial independence and the principle of accountability?

Normally, three fundamental approaches are cited for balancing the natural tension existing between the principle of judicial independence and the principle of accountability (Strasberg-Cohen, *Berinson Volume*, p. 134-135). The *first* approach holds that judicial independence must be absolute, with absolutely no interference from an outside body. The proponents of this approach believe that the legal system itself must handle claims about the conduct and the behavior of judges, including with regard to matters of the administration of justice, and that action by external review mechanisms should not be permitted. There are also those who claim that judes' accountability to the public for their actions is only indirect and passive, and is exhausted by the publication of judicial decisions and the written reasons judges provide for these decisions (Haim H. Cohn, "Heretical Thoughts on Public Confidence", *Shamgar Volume* 2 (5763-2003) 365, 381 (hereinafter: Cohn)). This approach is inconsistent with the predominant approach today whereby no public authority is above external supervision.

The *second* approach is that the judge, like every public servant, must be subject to supervision. This approach assigns no real weight to the substance and the goals of the principle of judicial independence or to the

special nature of the role of the judge vis-à-vis public servants. This approach, too, expresses an extreme position and does not attribute proper weight to the interests that are relevant to the matter.

The *third* approach, accepted today both in Israel and the world over, is a combined approach, which grants weight to both principles and strikes a balance between them (Strasberg-Cohen and Svorai, *HaMishpat*, at pp. 47-48). This approach contends, *inter alia*, that the principle of judicial independence is a means for protecting democracy, the rule of law, and human rights, and insofar as it does not serve these purposes, it should be limited (Strasberg-Cohen, *Mishpat Ve'Asakim*, at pp. 339-340).

Existing Mechanisms for Supervision of Judges and Courts

37. Supervision of judges in Israel occurs within formal, institutionalized frameworks, into which the preservation of judicial independence and the balance between that independence and the need for supervision are built. However, this supervision also occurs informally, sometimes raising questions as to the appropriate manner to enable supervision while still preserving the judicial system and its independence. As will be explained, the existing mechanisms of supervision extend to all areas of activity of the courts.

a. Supervision Mechanisms Built into the Judicial Process

38. Review is the backbone of the judicial process. This process, and the rules by which it is conducted, are based on the conception that the conduct of a process and the rendering of a decision in that process are subject to review. The principal mechanism of review of a judge's decision is the appeals process. The review that is embodied in the appeals process may also relate to: the conduct of the judge in the process; to his attitude to the litigants, their attorneys and the witnesses; to the manner in which he conducted the hearings; to the manner in which he expressed himself; to delays in issuing the judgment and more (Daphna Avnieli, "Who Will Control the Judges - and How?" *Mishpat Umimshal* 9 (5766-2006) 387, 391 (hereinafter: Avnieli, "Control of Judges").

39. Another means of review is the principle of transparency, which constitutes an integral part of the judicial process and of the activity of the court; its main manifestation is in the *principle of publicity of proceedings.* This principle is one of the foundations of the democratic regime, and has acquired constitutional status in our legal system (HCJ 5917/97 *Association for Civil Rights in Israel v. Minister of Justice* [*Nevo* –October 8, 2009] (hereinafter: *Association for Civil Rights*), para. 17). Its meaning is that as a rule, a trial will be held publicly, will be transparent, and will be open to the public (sec. 3 of Basic Law: The Judiciary. See also sec. 68(a) of the Courts Law [Consolidated Version] 5744-1984 (hereinafter: the Courts Law)). The limitations clause listing matters in which the legislator permitted the courts not to hear a case in open court was interpreted in the case law as exclusive and narrow, in order to ensure that the principle of publicity is strictly maintained (CA 5185/93 *Attorney-General v. Marom* [1995] IsrSC 49(1) 318, at p. 341).

The publicity of court proceedings is intended to ensure that the activity of the courts will be transparent and open to the public, and that

the public will be able to observe how the system works, and also to criticize the system (HCJ 258/07 *MK Zahava Galon v. Government Commission of Investigation for Examining the Events of the 2006 War in Lebanon* [2007] IsrSC 62(1) 648, at pp. 664-665, 676-677). Indeed, "proper government acts in daylight, in the open, and thus exposes itself to perpetual criticism …" ((then) Justice M. Cheshin, LCrimA 112/93 *State of Israel v. Klein* [1994] IsrSC 48(3) 485, at p. 516). The public nature of hearings is an essential condition for the proper functioning of the courts. It is "… one of the main guarantees of the regularity of the legal process, both in terms of doing justice and uncovering the truth, in practice, and in terms of the appearance of justice …" (CrimA 353/88 *Vilner v. State of Israel* [1991] IsrSC 45(2) 444, at p. 450).

40. There are three main rationales for the principle of the publicity of proceedings (CrA 11793/05 *The Israeli News Company v. State of Israel* [*Nevo* – April 5, 2006] (hereinafter: *Israeli News Company*), para. 13-15; LCA 3614/97 *Avi-Isaac v. Israel News Corporation* [1998] IsrSC 53(1) 26 (hereinafter: *Avi-Isaac*), at pp. 45-46).

The *first rationale* is that the public's right to know about the activity of governmental authorities is part of freedom of expression and freedom of the press (LCA 3007/02 *Yitzhak v. Moses* [2002] IsrSC 56(6) 592, at p. 598). The guarantee that the publicity of the proceedings provides for the transparency of court proceedings, as well as to the supervision and oversight of the courts and their activities was discussed by (then) Justice M. Cheshin stating:

> The overarching principle, whose wings span the whole issue of publicity, is the principle of publicity of the proceedings in court. In the days of old, the elders sat in judgment in the gates of the city. Similar to the ancient gates, are the courts in our times, whose doors are wide open to those who wish to enter therein. The conduct of a trial, of any trial—other than the exceptions—occurs in public, and the publication of what has been done and what has been heard in the courtroom is simply a by-product of that publicity. Subject to considerations of physical room capacity, everyone is entitled to be present at courtroom hearings, and publication of what occurred in the courtroom extends the courtroom, as it were, to those not physically present. The public nature of the legal proceeding—which itself provides publicity—fulfills an exalted need in the system of open government and law. Publicity means—in practice—the transparency of proceedings in the court, and transparency ensures ongoing review of what occurs in the courtrooms. Transparency and supervision—those are the essential terms (CrM 5759/04 *Turjeman v. State of Israel* [2004] IsrSC 58(6) 658, at p. 662).

A *second rationale* for the principle of the publicity of legal proceedings is its contribution to improving the quality of the judicial decision (*Avi-Isaac*, at p. 46). "The exposure of legal proceedings to the public eye serves as a guarantee for the existence of public oversight of the courts, and to ensure the conduct of a fair trial and absence of bias" (Report of the Committee for Examining the Opening of Courts in Israel to Electronic Media, p. 14 (2004)).

The *third rationale* relates to public confidence in the public authorities in general, and in the courts in particular. The public nature of proceedings prevents the impression that law is conducted secretly, and that extraneous considerations are exercised (CA 152/51 *Trifous v. Attorney General* [1952] IsrSC 6(1) 17, at p. 23): justice must not only be done but must also be seen.

If so, the fact that as a rule, legal proceedings are conducted publicly ensures that the provisions of the law are followed scrupulously with respect to the conduct of trials, contributing to their fairness and to their proper conduct. It makes the process of doing justice transparent and accessible to the public as a whole, fortifying public trust in the judicial system (and see: LCrimA 5877/99 *Yanos v. State of Israel* [2004] IsrSC 59(2) 97 (hereinafter: *Yanos*), at p. 111)). These functions, which are served by the public nature of proceedings, render it an instrument of oversight of the judges and of their conduct.

41. Alongside the public nature of the proceedings, other characteristics of the legal process are directed at ensuring transparency, and in this they contribute to the oversight of judges. In this context I will mention that judicial proceedings are documented in the protocol, which is intended to express and reflect what happens in the courtroom (and see: Dafna Barak-Erez, *Administrative Law* (5770-2010), at p. 613), and that there is a duty to provide written reasons for judicial decisions. The protocols and the duty to provide reasons are significant, necessary components in enabling the parties to challenge the decision before an appeals court, and in order to allow that court to review the judicial decision and the discretion that was exercised in the conduct of the process (on the importance of the protocol for review on appeal, see: CA 579/90 *Rosin v. Ben-Nun* [1992] IsrSC 46(3) 738, at p. 747. On the importance, for that purpose, of providing reasons see: CrA 446/01 *Rudman v. State of Israel* [2002] IsrSC 56(5) 25, at p. 30; CA 84/80 *Qassem v. Qassem* [1983] IsrSC 37(3) 60, at p. 70; CrM 3196/00 *Abergel v. State of Israel* [2000] IsrSC 54(2) 236, at p. 239). In addition, as an element of the transparency of the courts system, there is a right to view court files, even for non-litigants, as regulated in the Courts and National Labor Courts (Examination of Files) Regulations, 5763-2003 (on this matter, see *Association for Civil Rights*).

42. Mention has been made, both in legislation and in the legal literature, of other means that can serve the function of supervision of the judges, such as the process for judicial disqualification, due to concern about bias (see Yigal Mersel, *Judicial Disqualification Law* (2006) 37); filing a civil suit for a judicial tort; the possibility of suing the state instead of bringing a personal suit against a judge; a suit against the state as being responsible for the propriety of the judicial system; and embarking on legal proceedings against a judge in cases which are not protected by the immunity from criminal proceedings that is afforded to a judge by virtue of sec. 34T of the Penal Law, 5737-1977 (Avnieli, *Control of Judges*, at pp. 392-399).

b. Supervision Mechanisms in the Disciplinary and Ethical Realm

43. The main mechanism of oversight of judicial conduct is the institution of the Ombudsman for Complaints Against Judges, who

operates by virtue of the Ombudsman's Law. The Ombudsman's Office is a separate, neutral, and independent body, whose job is to investigate "complaints about the conduct of judges in carrying out their functions, including the manner in which they conduct a trial (end of sec. 2 of the Ombudsman's Law), for the purpose of improving the service given to the public by judges, while preserving judicial independence (Strasberg-Cohen and Svorai, *HaMishpat* at p. 54). The oversight exercised by the Ombudsman's Office does not deal with the substantive aspect of the judicial function, which clearly falls within the principle of judicial independence, and which is subject to review by the appeals process. The Ombudsman's activity focuses on the conduct of the judges on the ethical-disciplinary plane (*ibid.*), which, as befitting the nature of the judicial position, is held to a high normative standard:

> Indeed, even that which is permitted to all other people, and even to other public servants, may well be prohibited to a judge *qua* judge. This is so with respect to his manner of speaking and his conduct, and with respect to the need to be meticulous in guarding against harm to the appearance of justice, and this is so with respect to the care he takes in conducting a well-run trial and more. This extra vigilance stems from the special nature of the judicial endeavor, in which the judge deals with fateful decisions in criminal and civil law, in preserving the rule of law, human rights and the values of society, while doing justice through the law. This vigilance also stems from the need to preserve public confidence in the judicial system— meaning the public's sense that the judicial act is executed with fairness, neutrality, objectivity, without bias or prejudice, while maintaining the high moral level of the judges (Tova Strasberg-Cohen and Moran Svorai, "Oversight of Judges on the Ethical-Disciplinary Plane" *Mishpat Umimshal* 9 (2006) 371, 378).

The purpose of these norms, the observance of which is within the purview of the Ombudsman for Complaints Against Judges, is to preserve a high professional and moral standard in the judicial system, and to maintain and strengthen public confidence in that system.

Alongside oversight of the conduct of the judge in the courtroom and his maintenance of a judicial temperament that is in keeping with his judicial position, the Ombudsman also deals with aspects of the efficiency of the operation of the courts system, including the speed with which cases are handled.

44. The oversight conducted by the Ombudsman is publicized in an annual report, which includes details of the complaints lodged each year against judges, without designating the names of the judges against whom the complaints are lodged. In addition, reasoned decisions regarding complaints that have been found to have merit are inserted into the personal files of the judge in question. The Ombudsman's office is also authorized to recommend that disciplinary action be taken against a judge, or that his judicial appointment be terminated by the Committee for the Appointment of Judges (sec. 22 of the Ombudsman's Law). At the same time, the Ombudsman's office also looks to the system as a whole, by recommending steps to correct defects that emerge as general or broad

phenomena and following through on their execution (Strasberg-Cohen, *Berinson Volume*, at p. 143).

The principles that have been laid down in the Ombudsman's Law for the supervisory activity express a striving for effective oversight, together with caution, responsibility, and sensitivity to ensure that there is no violation of judicial independence (Strasberg-Cohen, *Mishpat Ve'Asakim*, at p. 342). The actions of the Ombudsman's office express, therefore, a model of oversight of the activity of judges that involves public expression and reporting, which may have significant implications from the point of view of those over whom the oversight is exercised, but without exposure of the details of the judge in question.

45. In addition to the activity of the Ombudsman's office, aspects of supervision and oversight over the conduct of judges can be discerned in other frameworks as well: for example, the activity of the disciplinary court for judges (sec. 13 of Basic Law: The Judiciary and secs. 17 – 21 of the Courts Law); or the activity of the Ethics Committee under sec. 16B of the Courts Law (see also Strasberg-Cohen and Svorai, *HaMishpat*, at pp. 54-55). These are joined by the fact that the courts are amongst the bodies subject to audit by the State Comptroller (State Comptroller Law 5718-1958, secs. 9 and 10(a)(2)). In addition, there is informal oversight of the courts system by the director of the courts and the presidents of the courts, which mainly consists of administrative oversight by means of tracking the number of cases and the pace of proceedings in each court (and see: Strasberg-Cohen and Svorai, *Mishpat Umimshal*, at p. 380).

Public Oversight

46. To the mechanisms of oversight must be added the public criticism to which the courts and the judges are subject. Public oversight includes criticism of courts and of judges by jurists, academics, public representatives, the media, and of course—the general public. The possibility of criticizing judges as public functionaries is a component of freedom of expression. As stated, public confidence in the courts significantly depends on the ability of the public to publicly criticize them. Indeed, "justice is not a cloistered virtue, She must be allowed to suffer the scrutinty and respectful, even if outspoken, comments of ordinary men" (as cited (and translated) by Justice Etzioni, CrA 364/73 *Seidman v. State of Israel* [1974] IsrSC 28(2) 620, at p. 634). In this context, the fact that the deliberations of the courts are, as a rule, open to the public who may come, listen, see, and form a first-hand impression of the manner in which cases proceed is, obviously, of particular importance.

47. The possibility of formulating criticism depends, as mentioned, on access to information. A major instrument of oversight for the public is the Freedom of Information Law. Various reports that the appellant publishes by virtue of the Freedom of Information Law allow the public to see the number of cases that are handled in the courts and the pace at which they are handled. Thus, the annual report of appellant no. 1 includes data concerning the number of cases that were filed and closed each year, the total number of cases pending, the distribution according to courts and according to areas of activity, and the average lifetime in years of a case. The bi-annual report published by appellant no. 1 includes data about the volume of cases, the number of cases that were filed and that were closed,

segmented according to the courts, the types of proceedings and types of cases, and also data concerning the rate at which hearings take place, the distribution of the cases according to the number of years that they have been in the system, and the average lifetime of a case in the different courts. The judges' dockets and the online management of cases make it possible to learn about the functioning of the system. Of course, this data does not refer to the volume of cases handled by a particular judge, or to the duration of proceedings in the cases he hears, which is the issue before us at present.

48. I will add something that might be obvious: the importance of public scrutiny does not necessarily imply that the criticism requires or justifies internalization or correction. The criticism might reflect "passing whims, which are detrimental to fundamental principles," in the words of President Barak (Aharon Barak, "Law and Judgment", *Selected Writings* 1 (5760-2006) 961, 963), and it is clear that the judge should not wring his hands over them. The criticism is sometimes based on incomplete or wrong information. Sometimes it ignores relevant facts. In these cases, too, there is no justification for correction or change in the wake of the criticism (Barak, *Farewell Address*, at pp. 9-10).

Interim Summary

49. I have discussed at length judicial independence on the one hand, and the fact of the court being subject to oversight and audit by means of various mechanisms on the other hand. It is precisely because of the elevated status of the judicial function that the mechanisms that ensure the transparency of the courts and their oversight are so important. They are able to increase and bolster public confidence in the courts in general and in the judges in particular. I will note at this point that given the publicity, transparency, oversight, audit, and supervision, one cannot but be surprised at the objection of the appellants to the request, which is something of an addendum, and not central, to the large, broad set-up of transparency in the courts, which only increases confidence in the judges and in the whole courts system.

At this stage let us turn to the Freedom of Information Law, and determine whether the appellants succeed in passing through the filters that it establishes. First I will look at whether the requested information is governed by the Freedom of Information Law. Then I will examine the reasons for the appellants' refusal to hand over the information, and decide whether they can invoke an exception to disclosure by virtue of sec. 9(b)(1) of the Law, as they claim.

First Filter – Section 1 of the Freedom of Information Law

50. As we have said, sec. 1 of the Freedom of Information Law states that every citizen or resident in Israel has the right to obtain information from a public authority. Section 2 of the Law defines a "public authority" for the purposes of the Law. Item (5) of the definition of "public authority" includes within this definition "Courts, tribunals, execution offices and other bodies with powers of adjudication under any law, except in respect of the content of a judicial proceeding." The definition does not, it is true, specifically mention the courts administration as a public authority, but because it applies to "courts", there is no doubt in my mind that appellant

no. 1 comes within its purview. In addition, the requested information—data regarding the number of cases that are being heard by each judge and as to the date on which each case was opened—is information that is administrative in nature and does not involve the contents of a judicial proceeding, as required by the end part of the definition of a "public authority" (for the distinction between administrative information and information regarding the content of a judicial proceedings see Segal, at pp. 141-143).

I am aware of the appellants' argument that in order to present a complete picture of the situation, they would have to add various explanations to the requested data. According to them, the required explanations would create "slippage" towards the innards of the judicial proceeding and the discretion exercised in its framework, which is not covered by the Law. I will discuss this issue below; at this stage, however, I am of the opinion that our matter passes through the first filter established by the Law.

The Second Filter – Exceptions to Delivering Information (Section 9 of the Law)

51. The appellants contend that they may invoke the exception to the delivery of information prescribed in sec. 9(b)(1) of the Freedom of Information Law, whereby:

> (b) A public authority is not obliged to provide information in any of the following categories:
>
> (1) Information, disclosure of which is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties.

I will mention, very briefly, that appellants' main argument is that delivering the information with the names of the judges hearing the cases will bring harm to public confidence and to judicial independence, which are essential foundations of the functioning of the courts system; hence the concern about interfering with the orderly functioning of this system. As stated, the appellants are prepared to deliver the requested information, but without mentioning the names of the judges.

52. The exception upon which the appellants wish to rely is included in the cases in which the authority is not obligated to give out information, as specified in sec. 9(b)(2) of the Law, and in relation to which the public authority has discretion whether to disclose the information, in order to protect other important interests. The scope of the discretion granted to the authority within the bounds of sec. 9(b) of the Law is broad (*Council for Higher Education*, at p. 238). The fact that administrative discretion lies at the core of this section makes it an extremely important and central arena in which the right to information acquires content (Hillel Sommer, "The Freedom of Information Law: Law and Reality", *HaMishpat* 8 (5763-2003) 435; Segal, at p. 199). The main consideration that should guide the authority in its decision as to whether to refrain from providing information under sec. 9(b) of the Freedom of Information Law is public interest in the disclosure of the information (Segal, *ibid*.). At the same time, the authority will also take into account, *inter alia*, the public interest

in transparency of the authority's activities in order to enable informed discussion and to allow for effective, appropriate public oversight of the authority, the applicant's interest in the information (sec. 10 of the Freedom of Information Law), and the right of the public to know.

I will begin with a discussion of the probability test that the appellants must pass in order to invoke the exception in sec. 9(b)(1) of the Law. I will then proceed to examine the arguments on their merits.

Probability Test

53. The parties disagree on the question of whether, in the balancing that takes place pursuant to sec. 9(b)(1) of the Law, appellants must show that interference with the activity of the authority or with its ability to perform its tasks is a near certainty, as respondents claim, or whether it is sufficient for them to pass the more lenient standard of proving a reasonable possibility that the said result will occur, as appellants argue. According to the appellants, in achieving a balance between the principle of justice being done by the courts and other principles such as freedom of expression, the case law requires nothing beyond the criterion of reasonable possibility of interference with the administration of justice, and in this regard they refer to *Dissenchik* and *Azulai*, in which there was discussion of the balance between freedom of expression and preservation of the integrity of the judicial process; to CrimApp 1986/94 *State of Israel v. Amar* [1994] IsrSC 48(3) 133, in which there was discussion of the balance between the freedom of movement and the orderly function of the judicial process; and to LCrimA 4708/03 *Hen v. State of Israel – Ministry of Health* [2005] IsrSC 60(3) 274 (hereinafter: *Hen*), in which the balance between the principle of doing justice and the public interest in improving and advancing medicine was discussed.

Indeed, in these cases, the court employed the "reasonable possibility" standard, in examining whether competing rights or interests should be limited for the purpose of ensuring various aspects of the judicial proceeding. However, there is a significant difference between these matters and the one before us. To what am I referring?

54. In order to strike the appropriate balance between various values and interests, there is an accepted distinction between "horizontal balancing" which exists between two interests or values that are of equal legal status, and in the framework of which a certain concession is required on the part of each in order to allow for the core of both to be upheld, and "vertical balancing" which seeks the balancing point between a "high" right or normative value that clashes with a right or normative value of inferior status. In the framework of vertical balancing, preference will be accorded to the value whose status is more elevated, if the balancing formula that can determine the severity of the violation of that value and the probability of its occurrence is satisfied. In this context, the common criteria are the "near certainty" of the occurrence of the violation, or the "reasonable possibility" of its occurrence (see in short in: Barak, *The Judge in a Democratic Society*, at pp. 272-272; *Hen*, at p. 296; HCJ 10271/02 *Fried v. Israel Police—Jerusalem Region* [2006] IsrSC 62(1) 106, at pp. 152-153; Barak, *Freedom of Information*, at p. 101-102).

In the present matter, the public's right to information, which as stated is a right of a constitutional nature, in that it is derived from the right of freedom of expression, is in competition with the public interest in the efficient functioning of the judiciary, which also encapsulates the interests of protection of the rule of law and maintenance of public confidence in the courts. I would clarify that I do not believe that the opposing interest is the moral integrity of the judicial process, for even the pleadings of the appellants in no way intimate that they are concerned that publication will affect the exercise of judicial discretion. The balance in question is, therefore, one which is vertical in nature.

55. In the past, this Court has considered the exception in sec. 9(b)(1) of the Law, and has determined that anyone seeking to invoke it must show that the disclosure of the information will lead, with a high degree of probability, to real harm to the public interest, which the authority seeks to protect in declining to disclose that information:

> Section 9(b)(1) is formulated in broad and inclusive terms. The provision permits the public authority not to deliver "information, disclosure of which is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties.
>
> ." *It has rightly been said of this provision that it "opens the door to a distortion of the very right to obtain information"* (Segal, at p. 199). *Interpretation of the section must, therefore, adapt itself to the criteria that guide the Law and to the general and constitutional principles that are accepted in our law. It is a well-known, established rule in our law that where there is a clash between a protected constitutional right and a public interest, the latter takes precedence over the former only where there is an appropriate standard of probability—normally, "near certainty"—of real harm to that public interest is met…* This rule is particularly applicable in the case of a clash between freedom of expression and other public interests (see *Kol Ha'am*; HCJ 4804/94 *Station Film Co. v. The Film Review Board* IsrSC 84 (5) 661). The formula that emerged from the abundant case law regarding freedom of expression and its constraints is applicable to our case as well.
>
> …
>
> Indeed, there is an important public interest in preserving the orderly functioning of a public authority, *but only where there is near certainty of harm to that interest will there be sufficient cause for limiting the freedom of information*. Let us be precise: where it is possible to reduce the harm to the orderly functioning of the authority without negating the freedom of information, it is right and proper to do so. The restriction of freedom of information is a last resort, and the public authority has a duty, before it decides not to hand over the information whose disclosure is being sought, to examine means that are less detrimental to the freedom of information (*Ministry of Transport*, at p. 84-85 (emphasis added, E.A.). See also AAA 1245/12 *Movement for Freedom of Information v. Ministry of Education* [*Nevo* – August 23,2012]

(hereinafter: *Ministry of Education*), para. 7 per Vice-President E. Rivlin).

A similar view regarding the fact that the relevant probability criterion within the bounds of sec. 9(b)(1) of the Law is that of near certainty was also expressed by Segal (p. 199), and by President Barak who noted that "… within the bounds of the external balance and against the background of the purpose of the Law, only severe, serious disruption whose occurrence is a near certainty allows for the non-disclosure of information" (Aharon Barak, "Freedom of Information and the Courts", *Kiryat Hamishpat* 3 (5763-2003) 95, 102-103). I too accept that for the purpose of restricting the citizen's access to information, the authority must meet a strict standard of near certainty of the occurrence of harm to a competing protected interest which is recognized by the law.

56. The appellants sought to argue that the more lenient standard, i.e., that of "reasonable probability", ought to be applied in our case, as was done in the cases cited above, in order to ensure protection of the legal process and its integrity. I beg to differ. First, in the cases of *Dissenchik* and *Azulai*, there was concern for damage to the integrity of a judicial proceeding that was actually taking place, against the background of the contents that had been published. In the present case, the appellants plead concern about the general effect of publicizing the performance of the judges. This concern is based, even if only partially, on assumptions and speculation, and assumes that the publication *per se* will affect the general conduct of the judges. In my view, and I will elaborate below, this argument is difficult to accept, and in all events it does not justify invoking a more lenient standard. Another significant difference emerges from the decision of (then) Justice A. Barak in *Azulai*, who explained that in the context of a violation of *sub judice* (sec. 41 [then] of the Courts Law, 5717-1957), the criterion of reasonable probability is not only directed at harm done to a judge:

> Till now I discussed the possible effect on the professional judge. Needless to say, sec. 41 of the Law does not deal exclusively with a judge. It is concerned with publication that has the potential to affect the course of the trial or its outcome. It may be a litigant who is affected; or the witnesses. It would seem that it, in fact, the judge is the strongest link in this chain, whereas the witnesses are the weakest link. Frequently, there is a reasonable probability of the witnesses having been influenced, whether by way of dissuading a witness from testifying or by influencing—consciously or otherwise—the contents of his testimony. This is the reasonable probability that sec. 41 is intended to prevent (*ibid*., at p. 577; *cf.* also the words of Justice Berinson in *Dissenchik*, at p. 185).

To this must be added that *sub judice* involves the restriction of the freedom of expression regarding a particular matter for a limited period—as long as the trial is proceeding. In our case, the restriction sought by appellants is much wider. Moreover, I will point out that even though, in the cases on which the appellants sought to rely, the reasonable probability standard was selected for balancing between protection of the judicial process and other rights and interests, there are other cases in which, when the freedom of expression comes up against the interest of protection of

the legal system, it was in fact the standard of near certainty that was selected (see, e.g., HCJ 506/89 *Be'eri v. Head of Claims Department, Investigations Division, Israel Police National Headquarters* [1990] IsrSC 44(1) 604 (hereinafter: *Be'eri*), a p. 607).

57. The cases to which the appellants referred dealt with the balance between the freedom of expression and preservation of the integrity of the judicial process and due process. Apart from the fact that, as stated, I do not think that our case relates to the integrity of the judicial process, these cases did not deal with a balance that involved the right to information. It is important to emphasize that in the context of disclosure of information that is held by public authorities, there is a special legislative arrangement, viz., the Freedom of Information Law, and the balances it requires must be made in light of the purposes of the Law, and in particular, the purpose of the transparency of public authorities in order to allow for oversight of their activity. Moreover, as Segal explains in his book, the Law was applied to the administrative aspect of the activity of the courts, and the committee to examine the implications of the Freedom of Information Law for the courts system, headed by Judge J. Tsur, found that out of respect for the purposes of the Freedom of Information Law, the judiciary should not be granted protection or immunity in relation to the administrative aspect of its task (Segal, at p. 143). In light of this, the argument that in relation to courts, the more lenient probability standard should be adopted as a starting point, in order to protect the judicial process is troublesome: it seeks to create a different standard for the courts precisely where the legislator saw fit to subject them to the Freedom of Information Law, albeit regarding the administrative plane of their activity, with which we are dealing. I therefore see no justification for abandoning the framework that was established by the Law and the case law for considering petitions under the Freedom of Information Law by making do with a lenient probability standard, and therefore, I reject this argument.

From here we will proceed on a path that will lead us to a decision. Only if it is found with near certainty that publication of the requested information will interfere with the activity of the judiciary or with its ability to perform its task, in that it will detract from the confidence of the public in the judges and affect judicial independence, will the appellants have cause to refrain from delivering the information under sec. 9(b)(1) of the Law.

Disruption of Proper Functioning of the Authority or its Ability to Carry Out Its Duties

58. The argument of the appellants that publication of the requested information will disrupt the proper function of the courts or their ability to carry out their duties, and that they may therefore avail themselves of the exception in sec. 9(b)(1) of the Law, is built on several levels. The first is their argument that the requested information does not create a reliable picture of the load on the system or on a particular judge in the system. At the second level it is argued that the distorted picture that will be painted by this information will harm the judges in various ways—it was explained that handing over the information while connecting it to the names of judges does not comport with the purpose of the Freedom of Information Law. It will cause the individual judges to be seen as being exclusively responsibile for these numbers, but to which, in fact, various

systemic problems contributed; it will harm their reputations and cause them to feel that they have been wronged; it will be detrimental to their functioning, because they will be judged by the public exclusively on the basis of quantifiable parameters, which do not reflect the quality of their work and its nature; it will be burdensome to them, due to the need to deal with distorting criticism. It was also mentioned that releasing the data would make it difficult for the system to recruit suitable judicial candidates in the future, and that there was a concern about misuse of the information. All these, according to the appellants, will lead to a third layer—to the serious outcome of harm to public confidence in judges as a result of incomplete, distorted information, leading to disrespect for the judges and to harm to judicial independence, due to distorted personal information, which has the potential for embarrassment and intimidation and for upsetting the equanimity which is essential to the functioning of a judge. I will stress that from the appellants' arguments it emerges that they are not arguing that the publication will affect the discretion that the judges exercise, but that it will affect the conditions necessary for them to perform optimally.

The Requested Information – An Incomplete Picture

59. There is merit in the appellants' argument that presentation of the requested information does not create a reliable picture—neither of the burden on the courts system, nor of the caseload of any particular judge. The reasons for this are many and varied, most of which were elaborated upon by the appellants in their appeal.

The requested information concerns only the district courts and the Supreme Court, and it does not, therefore, reflect the overload in the courts system in its entirety. Moreover, I accept that data as to the number of open cases and the date on which each case was opened, even when added to other data published by the courts system, present a limited, incomplete picture which does not shed light on the reasons for the duration of the handling of a case—short or long—nor on the reasons for the caseload of a particular judge. A long list of variables which will not find expression in the requested information can affect the data: thus, for example, the type of process can affect the duration of the judicial proceeding. A fast track process is not the same as a civil suit in the framework of which testimony is heard. An arraignment hearing is not the same as a criminal trial in which witnesses testify. In addition, different events in the lifetime of a case can significantly affect the length of time over which it is handled: an accused person who flees; a witness who dies and the party who summoned him to testify wishes to find another witness in his place; mediation proceedings, compromise agreements, or plea bargains that were achieved at early stages of a process; motions for stay of proceedings; the concurrent conduct of another process on a related matter; the case being returned to the trial court by the appeals court—these are only a few examples of what can influence the duration of a case. In the Supreme Court, and particularly in relation to petitions to the High Court of Justice and in appeals on administrative petitions, the duration of the lifetime of a case is often affected by the need to wait for the completion of legislative or other processes that might obviate the need to decide on the petition and prevent judicial intervention. Preliminary processes, such as questionnaires and discovery of documents in a civil process, or an appeal for discovery of confidential evidence and

procedures relating to examination of the material from interrogations in a criminal process, can also affect the amount of time taken for a case. Of course, there are also urgent cases which require immediate attention and cause a delay in the handling of older cases. Above all, the requested data cannot reflect the degree of complexity of the case, from either a factual or a legal point of view. The more complicated and complex the case, the more time may reasonably be required to decide on it. The said data in no way expresses the number of parties in a case, the number of sessions that are required to resolve it, or the number of witnesses summoned to testify.

I will further mention that the requested information cannot shed light on additional aspects of the conduct of the parties that affect the duration of the proceedings in the case, whether these be agreements about submitting affidavits in a civil process or submitting agreed notifications in a criminal process which contribute to the efficiency of the proceedings, or whether this be conduct that contributes to the drawing out of the process, such as repeated requests to defer hearings, summoning witnesses whose testimony is of disputable value, the manner in which the questioning is conducted and more. The requested information also does not reflect situations in which a single judge began hearing the case and it was subsequently transferred to a bench of three judges, as happens, for example, with petitions to the High Court of Justice, or instances in which cases are passed over to a judge as an "inheritance" from a judge who retired, and they are therefore "more ancient" within the system.

I therefore accept the argument that the requested information will create an incomplete picture that cannot attest to what is actually sought—a picture of the burden on the courts system and its judges. I will elaborate on the ramifications of this matter presently.

Distinction between Institutional Information and Personal Information

60. A central argument raised by the appellants is that the purpose of the Freedom of Information Law is to ensure transparency of the public authority so that oversight will be possible, and not personal transparency of those working in the authority. According to the appellants, in order to achieve this purpose, no connection is required between the information and the identity of a particular functionary—something which could interfere with the functioning of the public authority.

On the level of principle, I accept the distinction between institutional information and personal information. Examination of the Freedom of Information Law and of the literature on the subject leads to the conclusion that the Law is concerned with the public authority as a governmental factor, as a system, and not in attempting to zoom in in on individuals who are active in its ranks. This conclusion stems primarily from the provisions of the Law, which refer to "information from a public authority." Some may argue that such information includes information about the functioning of the individual employee of the authority, but other provisions in the Law seem to indicate the opposite: thus, the duty of the authority to publish an annual report that contains information about its activity and areas of responsibility (sec. 5 of the Law) means that the Law envisages the possibility of oversight of the activity of the authority as a system; hence the fact that the reasons for rejecting requests for information all involve considerations of the authority as a system and not

individual considerations (sec. 8 of the Law); hence the only concrete reference in the Law to an employee of the authority involves "information concerning the disciplinary affairs of a public authority employee, excepting information involving public processes stipulated by law" (sec. 9(b)(9) of the Law), in relation to which the authority is permitted to refrain from disclosing the information.

61. The said conclusion is also dictated by logic: the public authority is responsible for certain domains in relation to which it has been granted various powers. The interest of the public that wishes to examine the activity of the authority and to oversee it lies in the activity of the latter as a body that provides the public with services and acts as its trustee. The purpose of public oversight is to examine whether the private citizen obtains from the authority the service to which he is entitled: whether the authority fulfilled its goals and aims, what was the extent and nature of its activity, how it exercised its powers. It does not examine the service given to a person by a particular employee of the authority. It is the system that is open for public scrutiny, and not its employees.

To clarify: this does not mean that the employees of the public authority are immune from oversight. As a rule, claims about the manner in which employees of the authority operate should be examined in the framework of the authority or in public frameworks that are suited to the examination of complaints and other such claims. One cannot accept that every complaint about a public servant, his output and his efficiency at work, or the nature of his work will be a matter for public oversight, without all the relevant information being considered and without all the circumstances being weighed in a balanced and cautious manner. As the appellants point out, correctly, it is the system that is held accountable for its functioning, and which will be required, on the systemic level, to learn the lessons, adjust itself, and fix malfunctions, insofar as they have been located, even at the level of the individual employee.

62. This is the point: I am of the opinion that in these matters, the judiciary is different from other public authorities. As I pointed out in the discussion of the principle of the judge's duty to report, the judge holds public office and is obligated by all the duties that obligate a public servant. At the same time, the status, the obligations, and the powers of the judge differ from those of all other public servants. The crux of the difference between a judge and other public servants lies in the judge's judicial independence. In what way?

The judge enjoys personal independence that allows him to rule in accordance with the law and with the dictates of his conscience, irrespective of any other party, as is required by the very nature of the judicial process and of the objectivity that is essential to its conduct. I do not believe that there is any other public office bearer who enjoys such wide independence, for there is no public office bearer whose activity is not subject to audit, oversight and authorization by his superiors. As I have already mentioned, the fact that the decisions of the judge are subject to the appellate review does not negate the judge's judicial independence at the time of making the decision. In addition, as is known, the appeals court tends not to interfere in every matter, and its interference with the decisions of the trial court is cautious, restrained, and subject to clear rules that have been established in the decisions of this Court.

63. Personal judicial independence is also secured, as I explained above, by means of rules that were formulated in order to ensure the status of the judge and his office so that the work environment in which he operates will be free of pressure or concerns of personal ramifications for any particular decision, and will allow him to make quality decisions on the merits of the case. Particular emphasis should be placed on statutory provisions that establish the manner in which a judge's tenure ends: in accordance with sec. 7 of Basic Law: The Judiciary, a judge's tenure ends when he retires –at the statutory age of 70 years—or if one of the events enumerated there occurs. The only cases in which the judge's tenure may be ended against his will or when he has not been appointed to another position (sec. 7(3)) are if the Judges' Election Committee , by a majority of at least seven members, decides on termination (sec. 7(4)) or upon a decision of the disciplinary court (sec. 7(5)). Clearly, then, the judge is securely placed on the bench, and the termination of his tenure when he has not reached retirement age or voluntarily on his part is possible only in very extreme and exceptional circumstances. This is not the case with general employees of the civil service. Their employment can end, and in all events if it transpires that an employee is not suited to the task that he is meant to be performing, he can be transferred from his position to another one suited to his skills.

64. Another distinctive characteristic that derives from judicial independence is judicial independence internally vis-à-vis the courts system. The judge indeed belongs to the judicial branch, but is not subject to the oversight and audit to which civil servants in other frameworks are subject. It is the judge who sets his work schedule as well as the nature of the proceedings in his courtroom: he decides how many sessions there will be and their duration; he determines how much time the parties will have for questioning witnesses and raising various arguments through their respective lawyers. It is the judge who decides how to prioritize the handling of the cases: how his time as a judge will be divided between scheduling hearings for new cases and writing decisions, whether hearings will be held in new cases before old decisions have been written, and how much time will be devoted to each case. It is the judge who decides the tempo at which cases proceed, he sets the dates, but he also decides on the cancellation of hearings. He decides on the depth of the judicial reasoning and on how detailed it will be; when the decision is written and when it will be heard. In other words, to a large extent the judge's chambers are an independent, separate micro-system within the public system.

To clarify, the reality in which the judge operates is not without its limitations, which impact on the exercise of judicial discretion. Thus, for example, the law states that judgments will be rendered within thirty days from the end of the deliberations (sec. 190(d) of the Civil Procedure Regulations 5744-1984); various statutory provisions relate to fixing of dates of hearings, the extent and duration of hearings and the date on which judgment will be rendered, such as Title 16-1 of the Civil Procedure Regulations, which is concerned with hearing a case by way of fast track proceedings; and various directives are issued by the President of the Supreme Court and the Director of Courts. However, there is nothing in these to change the fact that a judge has no superior to whom he is answerable with respect to fulfilling his tasks or to whom he must explain administrative decisions that he has made. Neither is there anyone who will demand explanations about his decision to deviate from any particular

administrative directive. Even given the said limitations—each of which has the potential for detracting from the judge's independence—it may be said that the activity of the judge is independent and autonomous, and certainly so compared to other functionaries in the public service.

65. This independence and autonomy that the judge enjoys in his position has no counterpart in the public service, for the good reasons that I discussed. Oversight and supervision of the judge and of his conduct in the various frameworks are restricted and limited to cases which, as a rule, may be deemed exceptional and unusual. This is true on the substantive level of the judges' work, but it is also true in relation to its administrative aspects, such as the rate at which cases are heard. To a very large extent, the system depends, and justifiably so, on the judge's suitability for his job as determined on the basis of the appointment process, and on the integrity, fairness, and sense of responsibility of the judges. The fact that the judge functions as a type of independent, separate system within the judiciary, sets judges apart from other public servants in a manner that, even if the distinction made by the appellants between institutional information and information of a personal nature within the bounds of the Freedom of Information Law is correct in general, its significance, logic, and validity are nevertheless reduced with respect to judges.

At this stage I will proceed to an examination of the second tier of the appellants' arguments—the harm to judges and to the courts system as a result of disclosure of the requested information.

The Requested Data as an Index for Assessment of Judges

66. The appellants are of the opinion that there is a significant difference between systemic data, which is statistical or quantitative, and publication of that data in reference to, and naming the person responsible for, the material to which they pertain. There is logic to this argument. Whereas statistical data relate to the public authority as a system and constitute an index of its activity as a whole, or at most, are perceived as an index for assessing the performance of those at its head, publication of data pertaining to the performance of individuals places that individual in the spotlight, linking the data to him individually, sometimes even more than to the system itself.

Against this background a concern arises that connecting the data with the name of a particular judge will put him in the position of being the principal bearer of responsibility for the "performance of the system", i.e. for the data that is published, and expression will not be given to the additional considerations that make a significant contribution to the picture that emerges, beginning with the concrete circumstances of each case, as I have already discussed, and ending with the various systemic difficulties that the individual judge, no matter how dedicated and efficient he is, cannot solve and which ought not to be loaded onto his shoulders. The primary source of concern in this matter is the fact that in publishing the data with named segmentation, no expression is given to the heavy burden on the legal system overall, the reasons for which are extrinsic to the judges: ranging from structural reasons inherent in the system, to a lack of positions for personnel and to technological and social advances, which lead to the statutory regulation of various areas and, thereby, create additional legal processes, and ending in social-cultural reasons, such as

the absence of a tradition of solving disputes outside the courtroom, which leads to a multiplicity of proceedings (on this see Raanan Sulitzeanu-Kenan, Amnon Reichman, Eran Vigoda-Gadot, "The Burden on the Judicial System – Comparative Caseload Analysis of 17 States" (2007) http://elyon1.court.gov.il/heb/haba/Courts_burden_Final_report_5.07.pdf. See also per (then) Justice A. Grunis in CrA 4865/09 *Adv. Feldman v. Tel Aviv District Court* [*Nevo* – July 9, 2009] (hereinafter: *Feldman*). Focusing on the individual judge is liable to deflect attention from the system, its functioning and its problems, as well as from the potential solutions, such as adding judicial positions or adding another appeals instance (Eliahu Mazza, "The Burden on the Courts Harms the Public" (February 22, 2011) on the site of the Israel Democracy Institute, www.idi.org.il).

67. A concern that was raised, and which is not unfounded, is that publication of the requested data will bring about a situation in which the public's evaluation of the functioning of the judge will be based primarily on quantitative data, so that the dominant consideration in evaluating performance will be perceived efficiency—for as we have said, this is an assessment that will be based on data that does not provide an accurate picture of the present position—whereas the quality of the work of the judge and of his judgments will be cast aside.

The concern about efficiency as a major parameter in the evaluation of judges is magnified given the approach that seeks to view judges as people who provide a public service, like any other public authority. In the modern world, efficiency is a central component in evaluating the effectiveness of performance of bodies both public and private, as part of the concept of the efficient use of resources. In my view, an index of efficiency cannot, and should not, be the main index for evaluating the performance of the individual judge or of the system as a whole. An approach that claims otherwise misses, in my view, the essence of the judicial function in doing justice, in protecting human rights and the rule of law. Indeed:

> Justice cannot be achieved by means of conveyor-belt processes, and the setting of norms of law requires processes of thought which are sometimes complex and the implementation of which takes time. The judicial process sometimes involves components of an art form, but also of lofty ideals, intuition, and inspiration. In his judicial capacity, the judge is responsible, not only for determining the facts in a particular case and the judicial norm; these determinations are perhaps simple relative to the function imposed upon him to tailor the norm to the particular case, and in some cases, to set normative justice up against the circumstances of the case. The banalization of values, which is the hallmark of the previous century, led to the definition of the judicial function as providing a service to the citizen, exactly akin to transportation, cleaning, and health services; however, providing a service does not exhaust the judicial process (Levin, at p. 6).

The main index for examining judicial performance is substantive-qualitative: the judge's conduct in the courtroom, his scrupulousness in relation to the rights of the parties before him, the quality of his decisions,

their substance, and their reasons. Placing considerations of efficiency at the core of the judicial endeavor is likely to detract from its quality. It will lead to an erosion of the right to due process, is liable to harm the process of establishing the truth, will be detrimental to the doing of justice, which is the beating heart of the judicial task, and will lead, ultimately, to the public perception of the courts as bodies which are not led by substance and the doing of justice, but by their volume of output. More than anything else, it will entail harm to public confidence in the legal system. We must be on high alert against all these.

68. As mentioned, judgments are published and can be accessed by the public; however, it is clear that the public does not take the trouble to follow the whole body of a judge's decisions in order to formulate a position with respect to his work and its nature. Even in cases in which a judicial decision receives wide media coverage, this does not guarantee that this coverage will properly and fully report the main reasons for the decision. As opposed to this, in my opinion, it may be assumed that, to the extent that the requested data is published, it will receive significant public exposure, and will be seen as a far more concise, clear, and simple summarizing picture. This is the backdrop to the concern that the data will become the primary index in the hands of the public for evaluating the performance of the system and its judges, sweeping aside meaningful indices for evaluating the work of the judges. As stated, this is particularly troubling in view of the fact that the requested data cannot reflect an accurate picture of the situation.

69. A situation in which the judges are evaluated according to the number of cases closed or according to the number of cases remaining on their desks, therefore, involves significant interference not only with the work of the judges and their public image, but also in the manner in which the legal system as a whole is perceived by the public. However, I believe that this chilling picture, sketched out most skillfully by the appellants, is incomplete.

First, and insofar as we are dealing with a concern about creating an inaccurate picture of the judicial burden, the appellants are prepared to tolerate this outcome, with its harms, for they are prepared to publish the information, segmented according to judges, as long as the judges are not identified by name. In essence, the purpose of the legal system is to do justice. The doing of justice cannot be confined within a set time-frame. It requires a process of weighing, of analyzing, of cautiously examining in depth all the evidence and relevant material prior to a position being adopted by the judge. Arriving at the correct decision sometimes requires negotiation between the parties, or it involves waiting for external processes taking place concurrently. As mentioned above, judgments are not written on a conveyor belt. The judge cannot fulfill his function in a high-quality, full, and complete manner with a gavel in one hand and a stop-watch in the other. He cannot conduct hearings with the State seal above his head and an hourglass in front of him. Efficiency is not the be-all and end-all: achieving justice is. Without patience, without commitment to establishing the truth, the quality of judging will be harmed, and with it, the right to due process. The judiciary will be harmed, but above all, society and the state will be harmed (on this, see Agmon-Gonen, at p. 216).

Together with all the above, and at the same time, efficiency is not a pejorative word. Streamlining proceedings cannot justify harm to the doing of justice, but it can certainly justify the aspiration and endeavor to find the balance between doing justice and the length of time over which it is achieved (Levin, at p. 8). Public confidence in the judicial system does not rely only on the personal functioning of the judge and the number of cases that he has heard. Public confidence can also be influenced by administrative aspects of judicial performance. Drawn-out proceedings erode the foundations of public confidence in the judicial system, and it has already been said that "delays of justice are liable to lead to despair of the legal system" (Cohn, at p. 367). Drawn out proceedings may involve a breach of the right to due process (CrimA 1523/05 *Anonymous. v. State of Israel* [*Nevo* – March 2, 2006], para. 22 of my opinion). They are detrimental to the ability of the court to investigate the truth, whether due to the death of witnesses or dimming of witnesses' memory, or evidence being lost, or whether because the memory of the judge, too, and his impression of the witnesses, cannot be sharp and vivid when the opinion is written long after testimony is heard (see *Feldman*, at para. 8 and the references there). Prolonged proceedings are an ailment that can cause a delay of justice, and there are cases in which it even entails perversion of justice (CrimA 188/77 *Wertheim v. State of Israel* [51], 231). Justice delayed is justice denied, or perhaps justice whose shine is lost and whose value has been eroded (and see the apt words of Justice Berinson in CA 520/71 *Goldberg v. Belaga* [52], 462). The litigants whose rights to due process we are seeking to ensure are those same litigants who are waiting for a decision in their case. In this sense, the commitment of the judge to the efficiency aspect of his performance, too, is an expression of doing justice.

If so, efficiency cannot constitute the main index for evaluating the performance of the judge; at the same time, efficiency is an aspect that must be taken into account, one which bears weight in ensuring public confidence in the courts.

Burdening the Judges – Coping with Publication of Inaccurate Data

70. The appellants themselves believe, so it appears, that despite the fact that the requested data creates a partial picture only, it is possible to complete this partial picture with accompanying explanations and thereby prevent the damage of which they are warning. However, so they say, providing detailed explanations will impose a heavy burden on the judges and will arouse concern that the information that is provided is a matter of judicial discretion—information to which, as stated, the Law does not apply.

The starting point in this regard is that the requested data is included in the right to information according to the Law. As the trial court pointed out, the respondents are not asking for any additional explanations about the data. Insofar as the appellants believe that such explanations are necessary, it is a matter for their discretion. In their pleadings there is no real basis for any argument concerning the heavy burden that will be imposed on the system and on its judges should they be asked for such explanations, It appears also that any such explanations need not involve too heavy a burden: insofar as appellant no. 1 or a judge thinks that an explanation is required with respect to a particular case, it would be an

explanation which any judge would be able to give in that the case is being heard by him and is well-known to him. In my view, in such a case a short, laconic explanation would suffice, such as: "scope of the case", "absence of the judge due to a sabbatical/personal circumstances", "motion for stay of proceedings pending", "mediation proceedings", "full diary" etc. Short, succinct explanations will not, in my view, cause concern about sliding into the area of judicial discretion in conducting the cases. In my view, there is no obligation to provide explanations for the requested information, but this is a matter for the discretion of appellant no. 1, and in any case, it must be done in coordination with the judge.

Another possible conceivable solution is to develop software that allows for assessment of the cases being handled by each judge in all their aspects, producing as accurate a data interface as possible. I will mention in this context that from the Freedom of Information Report published by appellant no. 1 in 2012, it emerges that in that year, a comprehensive study on "case weighting" was completed, which "creates an index for assessing the judicial workload in cases of various types … Thus the legal system can obtain an accurate picture of dispersion of the load between the courts and between the different areas of law" (as stated by the President of the Supreme Court, Freedom of Information Report 5 (2012)). It is not unreasonable to assume, therefore, that it is possible to develop a data base that would produce a clearer picture. In this context, too, provision of more detailed information is a matter for the discretion of the appellants, to the extent that they should choose to provide more detailed information.

Publication of the Data – Harm to the Judges and their Independence

71. The appellants argue that providing the personally identifying information—as opposed to systemic information—will lead to harm to the reputation of judges and to their persecution, when they are unable to respond to the publication; it will upset their peace of mind and subject them to fear in a manner which can affect judicial independence. This argument is connected to another argument that was raised in relation to concern about misuse of the requested information,

As already explained, when the information is personal, it indeed places the public servant, rather than the system to which he belongs, at the center of attention. This being the case, there may be some who attribute to him the entire responsibility for the data that is delivered insofar as it concerns him.

a. *Concern about Debasement, Shaming, and Harm to Reputation*

72. I was troubled by the serious concern that the requested information will be used to embarrass the judge and publicly shame him, on the basis of incomplete information—something which, according to the appellants, will be detrimental to his performance as a judge and which will in all events also interfere with the functioning of the judiciary and its ability to carry out its task. The concern about harming the judge's reputation also arises here.

Indeed, it is clear that publication of the data, while connecting it to the names of the judges handling the cases, might be done in a manner that is liable "to disgrace a person in the eyes of others or to make him the object

of hatred, scorn or mockery on their part" (sec. 1(1) of the Defamation (Prohibition) Law, 5725-1965), "to disgrace a person on account of acts, conduct or traits that are attributed to him" (sec. 1(2) of the Defamation (Prohibition) Law, or "to harm a person's office, whether public office or otherwise, in his business, his occupation or his profession" (sec. 1(3) of the Defamation (Prohibition) Law). There would seem to be no need to elaborate on the fact that publication of the data may be done in a way that brings disgrace and that will be embarrassing to the judge, and that for the judge, like any person, his reputation is a source of recognition, pride, and personal dignity amongst people. "A person's dignity and his good name are sometimes as important to him as life itself; they are usually more important to him than any other possession" (CA 214/89 *Avneri v. Shapira* [1989] IsrSC 43(3) 840, at p. 856).

73. This is indeed a worrisome matter, and it weighed heavily on me at the decision-making stage. On another matter, the late Justice E.E. Levy wrote in relation to the judge: "What does he need in his chambers, what profit in his courtroom? He has nothing but his good name, his dignity and his reputation, the acquisition of which require the investment of years of toil but the destruction of which happens easily" (HCJ 2561/07 *Justice Michal Sharir v. Courts Administration* [*Nevo* – July 24, 2008], para. 8). The judge, like every person, has the right to a good name. This right is his, despite his office, which exposes him to the public eye. The good name of the judge, his dignity, the esteem that he has earned over the years of his employment, all these accompany him in the judicial seat and contribute to his status and to public confidence in him when he is hearing a case. Without this good name, public confidence in the judge and in his integrity will suffer, and the moral—as opposed to the legal—validity of his decisions will be negated.

74. The need to ensure public confidence imposes a heavy burden upon the judge to take care in all that he does, when sitting in judgment as well as outside the courtroom, and to act in a manner that comports with his position and that will secure the respect given by the public to its judges and to the system as a whole:

> A precondition for the proper functioning of the judiciary is that the public trust it, that it recognize its authority to sit in judgment, and that it accepts the legal decisions that it hands down (Introduction to *Code of Ethics for Judges* 5767-2007 (published in KT 5767 no. 6591 on June 5, 2007 , p. 934). This trust depends, first and foremost, on the existence of a moral foundation for the activity of the judicial system, and on the scrupulous maintenance of this foundation on the part of every judge in the system (CrimA 9893/06 *Elon-Lauffer v. State of Israel* [*Nevo* – December 31, 2007] (hereinafter: *Elon-Lauffer*), sec. 16 of the opinion of Justice A. Procaccia).

However, maintaining the proper functioning of the courts is not only a personal task for the judge. It is not even a systemic task of the judiciary alone. Insistence on the dignity of the courts and the judges, including preservation of their reputation, is first and foremost a public interest. This is based on an understanding of the complexity of the role that is fulfilled by the judge in a democratic society, which for the most part leaves one side unsatisfied, and recognizing the importance of preserving public

confidence in the judiciary as a guarantee of a democratic society, in which the rights of the citizen and the resident are upheld (and *cf. Be'eri*, at p. 612). The concern for preservation of the reputation of judges does not stem from a quest for glory, but rather, from the obligation to ensure the status, the dignity. and the strength of the judiciary, which are essential for the performance of its duties.

75. The concern raised by the appellants regarding this matter is not unfounded. Unfortunately, we not infrequently hear harsh, strident criticism, sometimes unrestrained, directed at the judges. This is unfortunate, especially in view of the fact that the judge is unable to respond to the allegations made against him. As we know, the channel through which the court expresses what it has to say is the judgment. The judicial decision is not an arena for a polemic between the judge and his critics and those who speak against him. In fact, there is no arena, apart from the judicial decision, in which he can explain his intention and his reasons and respond to allegations made against him. As a result, the judge's critics will always have the "last word". (Then) Judge Aharon Barak discussed this:

> The judge is limited in his modes of response. He does not debate with his critics. It is not usual for him to defend himself in public. He does not act as his own defense attorney. His instrument of expression is the judgment. This is his primary defense . Hence the severity of bringing the judiciary as an institution into disrepute. One who does so cuts down the major branch on which our democracy sits (*Be'eri*, at p. 610).

Harming a judge's good name not only harms the judge, but is harmful to the legal system in its entirety, and ultimately also, and primarily, to democracy.

76. Thus, there is a concern for harming the reputations of judges and shaming them by means of the requested information. At the same time, the publication *per se* of the information is not initially loaded, either negatively or positively. There are judges who will be accorded praise and esteem on the basis of the information—whether justified or not, for this is not the index according to which the judge ought to be evaluated, and the information is not complete. There are judges who will not be harmed by the publication. Even with respect to those judges whose images will emerge in a less positive light, the publication will not necessarily be harmful and degrading in a manner that amounts to defamation (and *cf.*: HCJ 5133/06 *Movement for Quality Government in Israel v. Director of Wages and Employment Agreements, Finance Ministry* [*Nevo* – February 9, 2009]). Therefore, alongside the grave harm that will be caused, if indeed such publications should appear, it must be recalled, when examining the arguments of the parties, that, at this stage, what exists are only assumptions and concerns, and it is on this basis that the request to withhold information, to which the public is entitled under the law, rests. It may also be said that the very fact that the data is exposed and transparent to the public will lead to a strengthening of confidence in the judges and in the courts, and possibly even to a strengthening of the respect accorded to them by the public, as I will elucidate below.

B. Concern about Persecution and Intimidation of Judges

77. The appellants are also concerned that the requested data will enable the presentation of a partial and distorted picture, causing judges to be persecuted and exposed to disturbing publications that are threatening to them and that will upset the peace of mind and the confidence that are essential for their proper functioning. In their pleadings, the appellants emphasized the harm that would be caused by such publications to the essential working environment of the judge, in view of the complexity of the task; but it appears that their main concern, is about a situation in which attempts will be made to intimidate judges, to shake their confidence and to influence their performance.

It hardly needs mentioning that the concern raised in the pleadings of the appellants is grave and serious. The basic assumption that a judge is exposed to public scrutiny does not imply that he is shielded in armor that protects him from all harm. Criticism, when it is sharp, inappropriate, or unfair, may harm the judge like any public servant, like any person, and in the words of Shylock:

> I am a Jew! Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? (William Shakespeare, *The Merchant of Venice*, Act III Scene 1).

Indeed, the judge is of flesh and blood. Criticism is liable to hurt him. It may cause him to experience a feeling of injustice, precisely against the background of the reality in which judges toil day and night to fulfill their tasks. At the same time, the conclusion to which the appellants would lead us, and according to which criticism based on the requested information will end in harm to the performance of judges, does not take into account relevant counter-arguments, as will be discussed below.

78. The judge is a public figure. His role, as I have already said, is fulfilled in total transparency, as he is exposed to judicial, institutional, and public scrutiny. Nothing in the fulfillment of the judicial function is done in the dark. The power of the judicial decision is in its reasoning, which is accessible to anyone who wishes to see it. Indeed, the judicial endeavor is like art that is executed in a cell with glass walls (see *Elon-Lauffer*, per Justice Procaccia, para. 15), and it has been said that "a person who accepts public office exposes himself to a large extent to the watchful public eye (HCJ 2481/93 *Dayan v. Yehuda Wilk, Jerusalem District Commissioner* [1994] IsrSC 48(2) 456). See also *Government Corporations*, para. 26 of my opinion). The said transparency applies not only to the product of the judge's work—his rulings and decisions—but to the entire gamut of aspects of the judicial role.

As described at length above, judicial independence allows the judge to act to the best of his professional knowledge and understanding and in accordance with his conscience. The judicial decision is the expression of his world view and his jurisprudential, moral and ethical conceptions, in the manner that he chooses to interpret and apply the law in the concrete case. The judge is identified with his decisions, and he validates them with his signature. This is the situation in relation to all of his decisions,

including those dealing with difficult, troubling issues, with human and ethical dilemmas, and also with issues that are the focus of stormy, strident public debate. In all these cases, the judge is in the spotlight. His positions and his decisions are the subject of media coverage and criticism. As we have said, the criticism that is sometimes leveled at his decisions is not always based on the entirety of the facts or on knowledge of all the material and all the reasons. The judicial decision is not infrequently presented in an irrelevant manner and in a belligerent, aggressive tone. Sometimes the criticism is hurtful, sometimes even personal. And still, it is inconceivable that due to fear of such criticism or its potential effect on the judge, that judicial decisions would not be published or, alternatively, published without designating the names of the judges who wrote them. Even in matters that are difficult, that arouse strong feelings and raise weighty issues and interests, we do not assume that criticism will detract from the quality of the future decisions of the judge or from his professionalism.

79. Publications of the type described are liable, at least in some cases, to place the judge in tension, or under pressure; they are liable to cause him great distress or a feeling that he has been unjustly treated. Sometimes, their contents can damage the judge's reputation. At the same time, situations such as these are a "by-product" of the judicial function. In such situations, even if the published criticisms are very harsh, the assumption is that the professional judge will be able to dissociate himself, when judging a case, from the effects of criticism. The expectation is that a professional judge will be aware of the possibility that various publications might influence him, and will therefore summon up all his integrity, fairness and the sense of mission that guides him, and his professional skills, in order to dissociate influences of this type from the process of decision-making, continuing to do justice according to the law (*cf*. *Azulai*, at p. 576-577). When that is the expectation of the judge in relation to the effect of criticism that is directed at his judicial discretion and his rulings, can something different be expected of him in relation to publications that may deal with his efficiency? I would imagine that the answer is negative. The judge assumes a heavy responsibility by virtue of the very fact that his signature must appear on his decisions. The judge gains personal esteem for his rulings and legal analyses. It is therefore difficult to accept the argument that in the context of criticism, or of the publication of data concerning the cases that he is handling—a context that can engender positive, negative or neutral publications—precisely then his identity should be erased from the system. The assumption that a publication concerning his output will harm the judge, his confidence, or his peace of mind, more than would sharp criticism of his rulings, is to attribute excessive weight to this data, rather than to the qualitative aspects of the judge's work.

Let there be no mistake: I do not deny that criticism might be delivered in a hurtful, insulting, and, sometimes, even, sinister manner, and when that is its nature, it does not contribute to the work of the judge. This matter should, and will, be given due weight. At the same time, I am of the opinion that the embarrassment and the discomfort that might be caused are such that the judge is anyway exposed to them at present, even if they are dressed up differently.

C. *Concern about Misuse of Personal Information*

80. The appellants further argued that delivery of personal data bears greater potential for misuse of the information than does delivery of systemic information. I do not disagree. One can imagine different ways of misusing the requested information when it is identified with a particular judge: some of these were mentioned in one way or another by the appellants. This could be by means of publications that are liable to hurt the judge and publicly shame him, whether the publications relate to a specific case, or whether they are part of an attempt to affect the judge's position or his advancement; or the information could be used to request that a case be handled by a different judge in an attempt to bring the matter before a panel that seems more "comfortable" for the particular litigant. For example, it is possible to imagine a situation in which a request is made to transfer a case that was scheduled before a particular judge to another judge, on the grounds that a quick decision in this is a matter is important, when from the published information it emerges that the particular judge has an extremely heavy caseload.

81. I will admit that the concern that was raised about manipulative or irresponsible use of the data troubled me. As I have said, the requested data cannot sufficiently convey the dedication, seriousness, and commitment that characterize the work of the judges, as many members of the public—some of them litigants and those who have had recourse to the courts—know. The data allows for the presentation of only an incomplete and inaccurate picture which can adversely affect the judge's image, and as a result, the legitimacy of his decisions as well. In the final analysis, I concluded that the concern about shaming the judge and harming his dignity on the basis of the said data should bear weight at the end of the road, but at the same time, I wish to state several reasons which make it impossible for me to accept appellants' arguments in this context in their entirety.

First, the concerns that were raised by the appellants in this context, even if they are not baseless, are to a great extent speculative. It is to be hoped that any publication that is based on the requested information would be executed with the care and the responsibility that are necessary when reviewing the affairs of the legal system (*cf. Be'eri*, at p. 610). It is to be hoped that care will be taken to obtain the response of appellant no. 1 prior to publication, and that an effort will be made to obtain data in a complete and fair manner. I hope that as part of "responsible journalism" (CA 751/10 *Anonymous v. Dr. Ilana Dayan Orbach* [Nevo – February 8, 2012]) all the media will fulfill their obligation to the public to provide fair and substantiated reviewing and reporting. Of course, it is possible that there will be publications in which such care will not be taken. However, I am not of the opinion that on the basis of this mere possibility, which I assume will be the exception to the rule, it is right and proper to limit the right of the public to information concerning the judiciary, which has such a profound impact on daily life.

In addition, regarding publications that seek to influence the judge with respect to his handling of a particular case—and no one disputes that such publications are illegitimate— it would appear that this is one of the "occupational hazards". The judge fulfils a public office; in an open courtroom, he hears cases in which the public has an interest and which not infrequently receive media coverage. A partial answer to these concerns lies in sec. 71 of the Courts Law, which prohibits publications

about a pending criminal process, i.e., the prohibition of *sub judice*. As is known, recourse to this instrument is rare, particularly subsequent to amendment of the Law in 2002. It became applicable only to criminal processes, with civil processes excluded from its purview, and an extremely restrained policy has been adopted by the prosecution in this context (see the Guidelines for Prosecutors Regarding Prosecuting the Sub Judice Clause, *Attorney General Guidelines* 4.1102, (August 25, 2005)). At the same time, this instrument does exist. In addition, I see a difficulty in an approach that sees a substantive difference between the harm to a judge that will be caused as a result of a publication concerning his "efficiency", based on partial quantitative data, and the harm that will result from a non-complimentary, brash publication about him, about his judicial temperament, his judgments and his reasoning. I believe that of the two, the more damaging are publications that attack the judge's professionalism, his personality, or his discretion, and which impinge upon the basic characteristics of his fitness for the position. To my understanding there is no intention to prevent such publications (recently, it is true, there was a report about the opening of an investigation for degrading publications against judges on the Internet, but these were extreme cases, that give rise to a suspicion of a criminal offense, bearing no similarity to the present case).

As for the argument concerning the possibility of using the requested data for the purpose of holding back the judge's promotion, it is clear that there is no desire to encourage such use of the information. Nevertheless, here too I do not believe that the said concern can justify withholding the data from the outset. It should be clarified that the promotion of a judge is not subject to public trial—even if the public has the possibility of objecting to an appointment—rather it is a matter for the Judicial Selection Committee. All of the material relevant to the judge is laid out before the Committee, including material concerning the quality of the judge's work, decisions and judgments he has issued, as well as additional information from which one can learn about his performance. Thus, the process of selection is based on as complete a picture of the data as possible, and therefore it is not the publication in the media based on incomplete information which determines his fate.

Finally, the concern that was expressed about manipulative use of the information for the purpose of forum shopping can indeed cause unnecessary embarrassment for the judge, as well as placing an unnecessary burden on the courts. At the same time, the decision in these matters, too, must be on the merits. The fact that the data presents an incomplete and inaccurate picture is sufficient reason, in my opinion, in order to reject, when required, arguments and motions such as these.

82. Once again I will emphasize that I cannot rule out the possibility that the requested information will be used for purposes other than publications aimed at increasing the efficiency of the system or helping the litigating public. It is very possible that it will be used in an attempt to embarrass judges in general, or any one of them in particular. I turned this matter over and over again in my mind; ultimately I became convinced from my longstanding acquaintance—as a defense attorney, a prosecutor, and a judge—with the judges, with the system to which they belong with all its different courts, and with its ethos, that their inner strength, the way in which they conduct themselves, and their belief in the justice of their

path will enable the judges to cope with the publications and to continue fulfilling their tasks faithfully. The said concern will not deter the judges and will not detract from the public nature of the system, its transparency, or from the recognition of the importance of public and media exposure to the activity of the courts and to the public presentation of the way things are. The test for the court is not only in that it does its work properly, but in that it is prepared to expose the ways in which it works as required under the law.

D. *Damage to the Ability of the System to Recruit the Best Candidates*

83. The appellants further argued that the delivery of incomplete, misleading information is liable to detract from the ability of the public system to attract to its ranks the best candidates. With all due respect, this is pure speculation. The need to ensure the system's ability to recruit suitable candidates to the judiciary is not in any doubt. At the same time, a person who is appointed as a judge knows that the judge's work is conducted in a glass house. To choose to become a judge is to choose a way of life of which transparency is a central characteristic. A person appointed to the judiciary is aware that he will be required to sign his decisions, no matter how controversial they are. Given that he takes this into account before he submits his candidacy to become a judge, it is difficult to accept that the publication of the requested data is what will deter potential candidates from submitting their candidacy.

84. Turning to foreign legal systems on the present matter is of limited utility, for the issue of the transparency of the courts – the supervision and oversight of them - differs from system to system, and, to a large extent, involves additional questions, which are not part of our discussion, such as, the manner of appointment of judges, the conception of the role of the judge and his status, and the review mechanisms to which the courts are subject. In addition, it is significant that legal regulation of the right to information differs in nature from state to state, and since the Freedom of Information Law was enacted in Israel, the response to the appeal must be found within its parameters and not overseas. Nevertheless, I believe that in relation to the issue lying at the heart of the appeal—the ramifications of disclosing the information for judicial independence and public trust in the judges, and also, for the orderly functioning of the courts—a look at comparative law could provide additional confirmation of the fact that disclosure of the information will not lead to severe harm to the courts system.

85. The laws in various states ensuring that citizens have access to information held by governmental authorities vary in their scope and in the approach that they reflect to realization of the right to information. Thus, there are laws which have adopted the "institutional" approach, i.e., they define which bodies will be considered "public authorities" to which the law applies, whereas other states have adopted a functional approach that defines the documents that will be disclosed, irrespective of the identity of the entity that is holding them. There are states whose laws refer explicitly to the right to information held by the judiciary, but there are also states whose laws contain no concrete reference to this subject (see: Open Justice Initiative, Report on Access to Judicial Information (Draft of March 2009), http://10.51.38.100:9091/servlet/com.trend.iwss.user.servlet.sendcase?downloadfile=IRES-1758480305-E3F20870-24338-24305-265);

http://www.freedominfo.org). Many states have excluded the judiciary from the application of their freedom of information laws (such as Denmark, the United States, and Belize), but there are some states that have applied—either explicitly or implicitly—the right to information to the judiciary as well, at least insofar as the administrative aspect of its activity is concerned. Examples of such states are Belgium, the Dominican Republic, Jamaica, Pakistan, Slovakia, South Africa, Thailand, Trinidad and Tobago, and of course, Israel (David Banisar, "Freedom of Information Around the World" (2006) available at http://www.freedominfo.org/documents/global_survey2006.pdf).

It is also interesting to note in this context that the International Convention on Access to Official Documents 2009 recognizes a general right of access to official documents held by public authorities in various states. The definition of "public authority" under the Convention includes "Legislative bodies and judicial authorities insofar as they perform administrative functions according to national law" (Article 1(2)a(i)(2)). The Convention is not yet in force, for it has not yet been ratified by the minimum number of ratifying states.

86. On the specific issue of publishing data about the activity of the courts, most of the information and the data that is published in the various states is related to cases that are already closed. In other words, as a general rule, information is not published about cases that are pending. Our examination revealed that indeed, as a rule, information is not published about open cases in the courts mentioning the identity of the presiding judge. This rule has two significant exceptions.

The first is the European Court of Justice of the European Union, which publishes statistics concerning the judicial activity of the Court. *Inter alia*, data is published about the activity of the President and Vice President of the Court, including in relation to cases that are still pending. At the same time, regarding the other judges, the number of open cases is published, with no segmentation according to judges (ECJ Annual Report, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/en_version_provisoire_web.pdf).

A second exception, which in my view is extremely significant, relates to the US federal courts. As was mentioned, the US federal Freedom of Information Act ((FOIA) 5 U.S.C. § 552) excluded the courts system from its application. The state courts in the US publish information about their activity in a general manner, without attribution to a particular judge. However, in accordance with the federal law enacted in 1990—the Civil Justice Reform Act (hereinafter: CJRA)—information is published about the caseload of the judges of the federal courts system. The Act was passed against the backdrop of an attempt to reduce the costs of conducting civil litigation and to reduce delays in these processes. It does so, *inter alia*, by publishing information about cases (for the backdrop to the passage of this Act, see Patrick Johnston, "Civil Justice Reform: Juggling Between Politics and Perfection", 62 *Fordham L. Rev.* 833, 837 – 849 (1994); R. Lawrence Dessem, "Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!", 54 *U. Pitt. L. Rev*. 687, 689 - 694 (1993) (hereinafter: Dessem). *Inter alia*, the Act mandates the publication of semiannual reports that include a list—in which the judges' names appear—of motions pending more than six months, all bench trials

submitted more than six months, and civil cases pending more than three years (see e.g., http://www.uscourts.gov/uscourts/statistics/cjra/2010-03/CJRAMar2010.pdf). Under this Act, a general outline of the number of cases that have been delayed is not sufficient; the cases must be specified together with the identifying details of each.

It is interesting to note that in the framework of the discussion of the Act in the United States, arguments and reasons were heard similar to those that were raised in the present case. Thus, for example, it was noted that good reasons contribute to the workload of the federal courts system, such as cases which drag on for reasons unconnected to the judge, or delays that are necessary or appropriate in view of the circumstances of the case; the excessive caseload in the federal system; insufficient numbers of sitting judges; structural inefficiency inherent in the structure of the court system; and the complexity of the cases. As opposed to these there are indefensible delays, that cannot justify the heavily overloaded situation of the courts, most of them relating to the presiding judge, such as nonstructural inefficiency; indecisiveness; disability; or sloth and neglect (Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 Clev. St. L. Rev. 511 (1993) 513–519). In the framework of the processes that preceded the passage of the Act, Judge Robert Peckham claimed that publication of information concerning the number of cases in which there was a delay without appending suitable explanations for the delay, might mislead the public (Dissem, p. 692). Similarly, the Seventh Circuit Bar Association argued in the framework of its objection that publication of information about the status of motions and about closing cases was liable to lead to superficial conclusions, for factors such as the relative scope of the cases, the relative size of the docket in different districts, delays that have their source in the lack of judges in a particular district, or delays that stem from motions brought by the parties, would not be taken into account. In order to cope with this difficulty, the Act allows judges to append the reason for the delay, a possibility that I also raised above (ibid., 693-695). Geyh in his article points out that alternative mechanisms, both formal and informal, for dealing with the delay in handling pending cases have proven to be insufficiently effective, and thus, the value of publishing data about cases in which there has been a delay has risen as an important means of dealing with this problem (Geyh, at pp. 520-527. For a more critical presentation of the source of the demand in sec. 476 of the CJRA see: Johnston, pp. 858-859, who discusses the concern, which was also raised here, that judges will be evaluated mainly according to a measurable standard that cannot give full expression to their actual performance).

It will be mentioned that in his article, which was published three years after the enactment of CJRA, Dessem argued that as a rule, journalists who published articles on the subject took care to include the reasons for the delays, insofar as the judges reported them (p. 701). It should also be mentioned that even though the article was published only three years after the enactment of the CJRA, it indicated a trend of improvement in the extent of the delays that were reported. The article does not look at the effect of the publication on public confidence in the legal system, but it pointed out that there had not been many reports written on the subject, and the matter was mainly taken up by newspapers intended for the legal community (ibid., at pp. 699, 706-707). A later article also indicated a

trend of reduction of the delays in handling cases (Jeffrey J. Connaughton, "Judicial Accountability and the CJRA", 49 *Ala. L. Rev.* 251, 253 (1997)). At the same time, it was mentioned there that the data from the "pilot" that was carried out on the subject indicated that the vast majority (85%) of district court judges who participated in the program did not change the way in which they conducted the cases before them in the wake of the Act.

87. The few articles that we were able to find relating to the effect of the reporting requirement in the CJRA on the legal system are not up to date, and therefore their ability to assess the long-term effect of the Act on the system and on public confidence in this system is limited. According to these articles, at their time of publication, there were indications that the CJRA was achieving its goal and reducing the time for handling cases (Geyh, at pp. 532-534). At the same time, even today, more than twenty years after the passage of the Act, the obligation to publicize pending cases according to the judges hearing the case still exists, and this is an indication of sorts that the Act did not harm the system and its functionality. Certain support for this can be found in the fact that in 2009, the Judicial Conference, which is comprised of judges in the federal judiciary, expressed its support of the Act when it voted to increase public accessibility to this information by making all the reports issued according to the requirements of the CJRA available, free of charge, on the courts' website (New release, *Judiciary Approves Free Access to Judges' Workload Reports: Courtroom Sharing for Magistrate Judges* (15.9.09), available at: http://www.uscourts.gov/News/NewsView/09-09-15/Judiciary_Approves_Free_Access_to_Judges%E2%80%99_Workload_Reports_Courtroom_Sharing_for_Magistrate_Judges.asp).

Of course, it is possible to argue that the fact that the Act apparently contributed to a reduction in the delays in handling cases does not prove that no harm was done to the manner in which judges handled cases, to their patience in hearing cases, to the profundity of the reasoning in the judgments, and so forth. Nevertheless it stands to reason that with the passage of so much time since the Act came into force, that, had there been such a claim, it would have found expression either in academic writings or in the discussions about extending the access to reports in 2009.

To sum up: in the United States data similar to that requested in the present matter is published by the federal courts. True, we cannot draw conclusive conclusions about the effect of the publication on the quality of judging and on the performance of the judges in its wake, but from the fact that the Act has already existed for many years, and that it was recently decided to increase public accessibility to the information—even if it is not clear whether this decision will be implemented—we understand that, apparently, there are no substantial claims about damage caused by the Act to the functioning of the courts in general, and to the performance of the judges in particular.

Activity of the Ombudsman for Complaints Against Judges and Public Oversight

88. The final matter that I wish to discuss is the appellants' argument that the proper balance between the interest of maintaining judicial independence and the judges' duty to report was prescribed by the

legislator in the framework of the Ombudsman's Law. Indeed, in establishing the office of the Ombudsman for Complaints Against Judges, a framework was devised which would allow for external oversight of judges and a true and substantive examination of the complaints brought against them, while preserving the dignity of the judiciary and its prestige (Strasberg-Cohen and Svorai, *Mishpat Umimshal*, at p. 373). In this spirit it may also have been thought that the fact that there exists a body that oversees the courts on an ongoing basis is sufficient in order to ensure oversight of a public authority, and that therefore there is less need for public oversight (and *cf*. *Keshet Broadcasting*, para. 81).

I do not accept this approach. First, in my view, the fact that a body exists for the purpose of oversight does not obviate the need for oversight by the public, and it certainly cannot deny the public, in the absence of sound justification for doing so, its right to oversee and criticize the governmental authorities (and *cf*. my position in *Government Corporations*, para. 33). "Public criticism is appropriate and desirable. It should not be suppressed. It should be encouraged. In a democratic state it is sometimes more important than review by the courts (*Ministry of Education*,, per Deputy President E. Rivlin, para. 11). This is particularly true in relation to the operation of the Ombudsman's office, which as a rule is set in motion with the lodging of a complaint, so that there is therefore no guarantee that it will cover the entire range of activity of the courts system. This is especially the case considering that, presumably, there are cases in which no complaints are lodged by the parties to a legal action. Precisely for this reason, there is room for the additional system of oversight provided by the public. In other words, the oversight exercised by the Ombudsman and public oversight operate on different planes and complement one another. It is difficult to accept, even given the special status of the judges, that they will be granted immunity from the Freedom of Information Law, unlike all other systems, and particularly where the legislator determined otherwise.

Summary and Conclusions

89. As discussed at the beginning of this deliberation, the Freedom of Information Law establishes a broad norm of the right of the public to view information that is in the hands of the public authority. In other words, the rule is that of handing over information, and where the authority wishes to refrain from disclosure, it can do so if one of the statutory limitations applies. The interest of the public in disclosure of the information must be considered, as well as an assessment as to whether the public authority correctly balanced all the relevant considerations. The following should be taken into account, *inter alia*: the public interest in the information, as opposed to the anticipated harm to the interest of the public authority as a result of disclosure of the information; the possibility of reducing the harm to this interest, while upholding the right to information by partial publication of the information or by erasing certain particulars which it is thought will cause the main harm to the interest of the authority. All the considerations that the authority should have taken into account for the purpose of its decision whether to refrain from disclosing the information must be examined, as well as the balance between them and its reasonableness.

The conclusion at which I have ultimately arrived is that the respondents have the right to receive the requested information, since I am unpersuaded that there is near certainty of the occurrence of the harm to

the courts system that the appellants claim will be caused as a result of handing over the information. My reasoning is based on the purposes of the Freedom of Information Law, the characteristics of the courts system, the transparency and public nature of its activity, the need to maintain public trust in the system, the nature of the performance of the judges, and their status and that of the courts.

90. *The parties to the petition*. As stated, particular importance must be attached to the nature and the essence of the public authority in relation to which the information is requested, "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: " (*Council for Higher Education*, at p. 251). The requested information concerns the judiciary, whose elevated status and the fact that it is amongst the most influential authorities are hardly a matter of dispute. The courts make a significant contribution to the fashioning of norms and standards; their activity touches upon all aspects of state activity and all areas of the lives of the individual and society. The public interest in knowing about the activity of the legal system, in its various aspects, is therefore clear.

On the other hand, the characterization of those requesting the information, who say that they want it for the sake of fulfilling their journalistic function, is also important in the present matter. The Law did not make the right to obtain information conditional upon the applicant providing a reason for his request (sec. 7(a) of the Law). At the same time, it is clear that the fact that the applicant's interest in the information serves a concrete, important purpose from his point of view is likely to be a consideration in favor of providing the information (see: *Government Corporations*, para. 10; *Keshet Broadcasting*, per Justice Y. Danziger, para. 10). The activity of journalists and the media is a guarantee for the existence of a free, civilized society:

> They are a vital means for the realization of freedom of expression and actualization of the possibility for the public to oversee the activities of the government and to contribute to the establishment of a fitting culture of government. The contribution of bodies and parties of this sort to shaping the the face of society depends largely on their ability to realize their right to information (*Government Corporations*, para. 36).

In the modern world, with the array of media and all the possibilities for disseminating information by means of existing technology, the media is the central means through which the individual realizes his right to information, to the exchange of views and to their crystallization (see also In re *HaAretz*, at pp. 479-480). The media is the central conduit through which the public can enjoy the publicity of proceedings in the courts and to learn from the journalists who frequent the courtrooms about hearings in the court and the judgments that are rendered.

In view of the public importance of the activity of the courts, and of the interest that the public has in knowing about this activity; in view of the fact that the requested information is administrative information held by appellant no. 1 and that it therefore comes under the right to information according to the Law; and having regard to the fact that the information has been requested by the respondents for the purpose of fulfilling their journalistic function, and that they therefore play an important role in

realization of the right of the public to information, my opinion is that the respondents have a public interest in disclosure of the information.

91. Ensuring public confidence in public authorities is one of the central purposes of the Freedom of Information Law. The Law reflects an approach whereby transparency of the activities of the public authorities, and the possibility of criticizing them on the basis of information provided, will lead to greater public confidence in the authorities and to their improved performance. Public confidence is a necessary condition for the judge's ability to fulfill his task. Public confidence in the judiciary is a fundamental, basic condition for the its effective activity, and thereby of the existence of democracy. Life in a civilized society is not possible if the individual does not put his trust in the judicial authority as the mechanism for resolving conflicts and for clarifying and protecting his rights (see also Barak, *The Judge in a Democratic Society*, at p. 49). Indeed:

> Public confidence in the judiciary is most precious asset that this branch of government has. It is also one of the most precious assets of the nation. As De Balzac noted, lack of confidence in the judiciary is the beginning of the end of society … And make no mistake: the need for public confidence does not mean the need for popularity. The need to ensure public confidence means the need to maintain a feeling amongst the public that the judicial decision is made in a way that is decent, objective, neutral and non-biased. It is not the identity of the claimants, but the weight of the claims that determine the law. This means recognizing that the judge is not a party to the legal dispute, and that he is not fighting for his power, but for the rule of law (*Tzaban*, at p. 148, and see *Judge Cohen*, at p. 461.)

As I explained above, in recognition of the fact that securing public confidence in the judicial system is not a temporary need but rather, an "ongoing need" (*Tzaban*, ibid.), the activity of the courts system is characterized by transparency and exposure to the public. This finds expression in the public nature of proceedings, in the publication of judicial decisions, and in the reports published by appellant no. 1, which provide a picture rich in detail about the activity of the courts. It is not for naught that I described the characteristics of the activity of the judges and the range of mechanisms which provide oversight and supervision of their activity. These demonstrate that, in fact, all aspects of the activities of the system and its judges are transparent and open to the public, or are subject to oversight. In particular, it should be stressed that the transparency of the courts' activity is not merely systemic transparency. In this most important, most sensitive, and most complex of all tasks—the task of judging— the transparency is personal. The names of the judges appear on every decision that they hand down, without exception, even in cases in which the outcome is hard on one of the parties and the judge is liable to come under fire from the parties or from the public, as well as in cases—even if they are the exception—in which the possibility of the judge's decision exposing him to some kind of threat cannot be discounted (and this has happened. Of course, in such a case, the judge is not expected to deal with the danger that has been created alone; the solution relates to security measures, but even then, the judge's name is not withheld).

Against this background, since judges act with transparency, and they are constantly open to criticism which at times may be irrelevant, coarse, and aggressive, relating to their discretion and their professional conduct,

it is difficult to accept the appellants' argument that it is the publication of the quantitative data concerning each judge's caseload that will engender serious harm to judges, culminating in harm to judicial independence and to public confidence in judges. It is difficult to accept that it is in fact criticism of the output or the speed with which cases are dealt that will be accorded, even by the judges themselves, greater weight and more significance than is accorded to criticism concerning their professional discretion. This position is contrary to the transparency and the mode of conduct that characterizes the system in its regular functioning, in the courtroom and in its function of deciding the law.

92. The appellants sought to bring up a list of consequences of the publication of the data, at the center of which lies the harm to the judges, to their safety and to their peace of mind, leading to harm to judicial independence and to public confidence in the judges. According to them, it is a near certainty that these consequences will ensue, and therefore the disruption to the orderly functioning of the system is a near certainty. In my view, judicial independence, transparency and public confidence ought to be guarded assiduously in order to ensure the proper functioning of the courts. However, in my view, near certainty of harm to the functioning of the courts has not been proven. I say this, even whilst assuming that the picture presented to the public will apparently be based on the requested information and, therefore, will create only an incomplete picture.

In the framework of the deliberation, I have pointed out that, even if one cannot discount absolutely the possibility of the occurrence of the consequences that the appellants fear, such as harm to reputation, the concern that judges will be evaluated purely on this quantitative data, or that they will be embarrassed, the picture is far more complex and does not permit the acceptance of these arguments as stated. Thus, many of the arguments that were raised sought to point out that the erroneous information will engender a reality in which the judge finds himself persecuted and pressured in a manner that is harmful to his judicial independence, and as a result, to the functioning of the system as well, due to his exposure to inaccurate, embarrassing publications, or because of attempts to use the information against him. And indeed, I cannot discount the possibility that there may be those who seek to use the information in a negative manner, not directed purely at improving the system (in this context I will mention that the fact that the respondents are interested only in information about the judges of the higher courts—the Supreme Court and the district courts—may indeed make one wonder how necessary the information is in order to present the overload of the courts, for it is clear, even to them, that they lack the requisite information for this purpose, and it is known that the heaviest workload falls on the magistrates courts. At the same time, I do not think that too much weight should be given to this consideration, in that the reasons for the request are unknown to us). As much as I cannot discount such a possibility, neither can I say that it will eventuate. Indeed, as I mentioned, most of the appellants' arguments contain a speculative dimension. Many of them relate to the fear of negative publicity, but they do not give weight to the possibility of positive or neutral publicity. It must further be assumed that not every unfavorable publication can cause the severe damage as argued.

93. Given that our concern here is with limiting the right to information, i.e., with the exception and not with the rule, I am of the opinion that the appellants' arguments do not assign appropriate weight to

the high personal, professional, and principled standard that the judge must meet, or to the extremely high level of responsibility that is expected of him (*Tzaban*, at pp. 148-149; DC 2/88 *Minister of Justice v. Judge Asher ben Itzhak Arbel* [1988] IsrSC 42(3) 63, 66-67). This high level of responsibility also involves the ability of the judge to recognize error and to accept criticism. Indeed, exposure to criticism is part of the judicial task, and as I already mentioned in another context, " … one who applies for a role such as this is also required to be prepared to meet the standard that is necessary by virtue of the nature of the task and the status of the person fulfilling it" (HCJ 2778/11 *Kosanovic v. Judicial Selection Committee* [*Nevo* – December 1, 2011]. The fact that the criticism may be harsh, and occasionally hurtful, does not in itself justify a violation of public's right to information. This is explained well by President Barak in *Be'eri*:

> Public criticism is important for the judiciary. It ensures, ultimately, the public trust in the judiciary (see S. Shetreet, *Judges on Trial* (1976), at p. 185). Judges accept this criticism with love. They understand that in a case that takes place before them, everything is on trial: the litigants, the law, and the judge himself. They know that criticism of them, even if harsh, is part of the "balances" that are required in a democratic society. Criticism, by its nature, is not flattering. It is properly leveled when it is civilized and relevant, and when it is anchored in the facts. But the boundary between what is permitted and what is forbidden is sometimes blurred. The need to preserve freedom of expression on the lawful side of this boundary is likely to justify refraining from bringing an action for expressions that overstep this boundary. The concern about prohibited expressions may well inhibit permitted expressions. The way to fight unfair criticism is by means of fair criticism of that criticism. The way to fight a lie is to expose the truth (*ibid*., at p. 612).

I will add that I accept, and it is well known, that the judge operates in a difficult, complex arena: the number of cases and their scope is constantly increasing, the fact that parallel to the legal process the parties not infrequently act in the media, and the involvement of various elements who try to influence the legal process—lobbyists, media advisers, public relations agents and others, all place the judge in the center of the stormy, emotional arena, in which the interests and the interested parties are numerous. They place the judge at the front line as the decision-maker. The judicial function involves, by its very nature, confrontations with a complex reality, with pressures of work, both in terms of quantity and substance, and with the gap between the litigation inside the courtroom and the way in which matters are presented outside to the public. In this situation, too, where one cannot discount various kinds of attempts to influence the judge, he is expected to adhere to his commitment to the rule of law, to decide on the merits in a professional manner, and to try to do justice in accordance with the law. Even in an arena that is susceptible to various influences, "…independence, autonomy, loyalty to the law and to one's conscience are embedded first and foremost in the heart and the mind of the judge; the spiritual resources must ensure that every obstacle is overcome" (Shamgar, at p. 257). In other words, the judicial function requires judges to have strength—a strength that emanates from a commitment to truth, to the law, and to the dictates of conscience. Even if it is not deliberate, it seems to me that the appellants' arguments assume that judges are liable to be swayed by uncomplimentary publications, even

in situations that are not the most extreme. I believe that judges are deserving of trust in their honesty and integrity, and in their faithful and scrupulous fulfilling of their mission. As such, I also believe that their inner strength, and the strength of the entire system, will allow them to cope, even with negative publications, should there be any.

I stress that I do not think that one should bury one's head in the sand when confronted with the extreme pressures that are not infrequently placed on judges, whether in the pleadings of the litigants in court, whether by the enormous workload, or whether by what appears in the media. It is not correct to belittle the concern about the creation of conditions under which it will be very difficult for the judge to fulfill his task. At the same time, as was explained, I do not think that the publication of the said data is what will confront the judge with such a reality, for even now, he is exposed to publications that can put pressure on him and even intimidate him. There is no option but for the judge to learn to stand up to the pressures, to dissociate himself from external influences, and to decide on the basis of the law and the dictates of conscience.

94. All of this would not be complete were I not to relate to the flip side of the coin. As is known, "Public confidence is not a given. Its existence must not be taken for granted. Public confidence is fluid. It must be nurtured. It is easier to harm it than to preserve it" (Aharon Barak, *Judicial Discretion* (5744-1984) 261). Judges are not the only ones with responsibility for public confidence in the courts. The public too, and particularly the media, which wields a great deal of power, has a contribution and heavy responsibility in this context. Criticism of public servants in general, and of the courts in particular, when it is not on the merits and when it is intended to hurt more than it is intended to correct matters, can produce devastating results for society as a whole. Instead of bringing about the correction of defects, for the sake of improvements and increased efficiency, it is liable to erode the foundations on which our system rests. Indeed: "The rule of law involves constant maintenance of the confidence in legal institutions" (HCJ 433/87 *Rechtman v. Israel Bar Association* [1987] IsrSC 41(4) 606, at p. 610). Therefore, responsibility, sensitivity, and caution are required on the part of those who seek to criticize the courts, their decisions, and their performance. It should be recalled that public servants, too, deserve having their dignity and their reputation preserved in public, and care must be taken to express a fair position that is based in fact, for otherwise, the criticism lacks value.

95. Finally: the information requested is information to which the public has a right of access under the Freedom of Information Law. It is administrative information held by the courts, in relation to which the legislator's position that it is subject to the Freedom of Information Law was explicit. The position taken by the appellants, according to which provision of information mentioning the names of the judges will interfere with the activity of the courts, due to its adverse effect on judicial independence and public confidence in the courts, is contrary to the general operation of the courts system, which is characterized by maximum transparency and openness. Given the regular transparency of the system, as well as the pressures and the public criticism to which the judges are accustomed today in relation to the contents of their decisions, I do not find that the harm claimed by the appellants will occur with the degree of near certainty that they were required to prove. Today, too, judges are susceptible to harm to their reputations, their public images, and

their peace of mind, and they must confront this risk as part of their job description. When public interest in the details of the activity of the courts is high, and when the activity of judges is characterized by their personal identification with the product of their work—judgments, decisions, and the way in which proceedings are conducted in public—I am not convinced that the appellants' proposal to expose the data without the names of the judges is satisfactory, and in my opinion, the petition should be granted.

As I have expressed in the framework of this discussion, making a decision on the appeal was difficult for me, mainly due to the concern that the outcome would entail harm to judges who are currently serving, and might embarrass them. I am aware that my judgment will be received by some of my fellow justices, and by the public, too, as a decision that will result in harm to judicial independence. For my part, I believe that the strength of the judges and of the system will stand them in good stead, and that provision of the requested information is likely, at the end of the day, to increase and fortify public confidence in the courts and in the judges—confidence which, as we have said, is essential for the functioning and the vitality of the legal system. At the end of the day, one cannot help but ask: is there a true justification for withholding from, or denying, the respondents, as well as the entire public, details about cases that are awaiting decision in the various courts? For the reasons elucidated at length above, I believe that there is no justification for so doing and that it ought not to be done.

96. It is precisely out of recognition of the general burden on the legal system, and precisely in view of the transparency characterizing the activity of the courts, and precisely out of a duty to maintain public confidence in the courts system, that it appears that withholding the requested data, which the public has a right to obtain, sends out a hard message of an attempt to keep the details of the work of the courts in the dark. I believe that the system has nothing to hide. I believe that it is right that the public should be made aware of the Sisyphean task, and of the unimaginable pressure under which the judges operate. Precisely out of a conception whereby judges act openly in all aspects of their work, in bright sunlight, would it be incorrect to refrain from handing over the information for reasons that reflect, mainly, a lack of confidence in the strength of the judges and in their total commitment to their mission.

And finally, the words of (then) Justice M. Cheshin should be heard:

> The courts, or should we say, the judges of the courts, know that they face judgment on a daily and hourly basis, and as is the way of humankind, one who is on trial acts as befits one standing trial in public. In performing his judicial function, the judge must always regard himself as sitting in a glass house or in a display window that looks out onto the street; every passer-by is entitled to look at him, to examine him and to criticize him - and to praise him and to boast about him. In translating these values into legal language, we speak about freedom of expression and also about freedom of the media as deriving from the public's right to know. Indeed, the media in its various forms is merely the public's agent. It constitutes a type of amplifier and magnifying glass for events that happen in a certain time and certain place. See and compare: MApp 298/86 *Citrin v. Tel Aviv Disciplinary Tribunal of Bar Association* [1987] IsrSC 41(2) 337, at p. 358. And in this way,

> the entire public may know if legal processes are being conducted properly. This is the transparency and the review that must accompany all those who hold the reins of authority and powers of enforcement in the state, which is characterized as an open regime (*Yanos*, at p. 110).

If my opinion is accepted, the appeal will be denied. In order to enable the appellants to prepare themselves in appropriate fashion to implement the judgment, I propose that they be ordered to hand over the data concerning the Supreme Court and the district courts as requested in the petition, relating to the end of the 2015 legal year, no later than December 31, 2015. I also suggest that the appellants be ordered to pay the defendants' legal fees in the amount of NIS 20,000.

Justice Y. Danziger

I concur in the comprehensive, important, and incisive judgment of my colleague Justice E. Arbel, subject to the following reservations.

My colleague ordered the appellants to deliver to the respondents the information that is the object of the petition, "relating to the end of the 2015 legal year." I personally think that there is no justification for this "leniency".

In their request of August 8, 2009 under the Freedom of Information Law, which was submitted to Judge A. Gillon, who served as the supervisor for the Freedom of Information Law in the courts administration, the respondents requested "the *most current* information you have on the matter, and the information concerning *the previous three years*." In their petition, which was submitted on March 24, 2010, the respondents asked for "*all the quantitative information* concerning the number of open cases being heard by each of the district court judges in the state, and the justices of the Supreme Court, and *all the information* concerning the time that has elapsed since the opening of each of the open principal cases." Hence, already in 2009, the respondents asked to receive the most current information that the appellants possessed, as well as the historical information. After their request was denied, the respondents submitted the petition that is the object of this appeal, in which they reiterated their request that they be given current information. As we know, on April 14, 2011 the petition of the respondents was granted, when the District Court ordered that the "requested information" be handed over to the respondents. The delivery of this information was postponed due to the decision of Justice H. Melcer of July 12, 2011 to stay execution of the judgment until the decision on the appeal.

I believe that today, five years after the respondents submitted their request under the Freedom of Information Law, and three years since the date on which the District Court, sitting as an Administrative Affairs Court, ordered the appellants to disclose the information, the respondents' petition should be granted in full, and the judgment of the District Court should stand as given—including in the matter of the dates to which the information relates.

Underlying this conclusion is the fact that disclosure of updated information, and not "deferred" information, is the relief that was sought in the respondents' petition and which was granted in the judgment. Similarly, the relief of postponing the time period to which the information relates was not requested by the appellants in their appeal. I am of the

opinion that the case at hand does not belong in the category of exceptional cases in which it is justified for the appeals court to grant relief that was not sought in the statement of claim or in the statement of appeal (*cf.* CA 8854/06 *Adv. Corfu v. Sorotzkin* [*Nevo* – March 20,2008], para. 22).

In my opinion, when the court concludes that an order should be given to disclose information, the default position is full disclosure of the requested information, and the exception is limitation or restriction of the disclosure (*cf.*, e.g., the relief that was granted in AAA 1245/12 *Movement for Freedom of Information v. Ministry of Education* [*Nevo* – August 23, 2012], per Deputy President E. Rivlin, para. 22). As pointed out by my colleague Justice Arbel, information which it has been decided to disclose is information held by the authority in trust for the public and there is no justification, as a rule, for preventing the public from gaining access to its own property. True, in certain cases there may be a departure from this default position. However, that will happen only when weighty reasons for so doing exist: in most cases, these are primarily related to the legitimate reliance of the objects of the information on the situation that pertained prior to the decision concerning disclosure [see, e.g., AAA 9341/05 *Movement for Freedom of Information v. Government Corporations Authority* [*Nevo* – May 19, 2009], per Justice E. Arbel, para. 42 (Sept. 5, 2009); AAA 398/07 *Movement for Freedom of Information v. State of Israel – Tax Authority* [2008] IsrSC 63(1) 284, per Justice E. Arbel, para. 65, and per E. Rubinstein, para. 5 (Sept. 23, 2008)].

My view is, that in the present case, reasons which would justify limiting the disclosure do not exist. This is due, first and foremost, to the weighty reasons presented by my colleague, Justice Arbel, for denying the appeal. Similarly, from the moment that the respondents' petition was accepted by the District Court, the appellants (or any of the objects of the information that was to be disclosed) were not at liberty to rely on the non-disclosure of the information, and they ought to have prepared themselves properly for the possibility that the judgment of the District Court will remain in force, including in relation to the operative relief. It is also clear that the stay of judgment that was issued cannot change this conclusion. The stay of judgment that was granted only "froze" the situation that pertained prior to the issuing of the judgment, but it could not create a legitimate expectation that the judgment will be cancelled or that it will, in itself, bring about a change in circumstances that would justify changing the relief that had been granted. This applies with even greater force, in view of the fact that the District Court determined as fact that the information that was requested is "information that exists in the hands [of the appellants] and its delivery to [the respondents] in its present state can be executed, with relative ease, by way of producing the appropriate computer report." This finding is also consistent with the letter of Judge Gillon to the respondents, dated December 14, 2009, according to which, "*after looking thoroughly into the subjects that you raised in your application, we have answers and data" concerning the information that was requested in the petition.* In light of these words, which related to the situation that pertained at the time that the District Court issued its judgment, it would appear that no real hardship will be caused to the appellants as a result of disclosing the most updated information that they possess.

Accordingly, in my view, an order should be issued to disclose the most updated information that the appellants possess, i.e., information relating to the 5774 [2013-2014] legal year. In order to give the appellants time to prepare for the implementation of our judgment, I propose that they be required to deliver the information to the respondents no later than December 12, 2014.

Justice N. Hendel

Background

1. This administrative appeal deals with a petition for the publication of information under the Freedom of Information Law. The information requested is the number of open cases that are being heard in the Supreme Court and the district courts, and the time that has elapsed since each case was opened, together with the name of the judge who is hearing each of the cases.

The Administrative Affairs Court in Jerusalem granted the respondents' petition (AP 43366-03-10 [*Nevo*], President M. Arad). My colleague, Justice E. Arbel, in her comprehensive and thorough written opinion, proposed denying the appeal and affirming the decision of the Administrative Affairs Court. Let me state right away that my opinion is different: I think that the appeal should be allowed. My colleague described at length the sequence of events in the proceedings and the pleadings of the parties, and I will not repeat these here. I will focus only on the legal foundation and the reasons that have led me to the conclusion that the appeal should be allowed.

On the Freedom of Information Law, 5758-1998

2. It is important, at the outset, to once again emphasize the importance of the Freedom of Information Law, and of the purposes underlying it. This Law is based on the understanding that the public information that is held by the public authority is not its private property. In this, the fundamental meaning of being a *public servant* is emphasized to all. The public servant's work, and the information that is created in the course of that work, is neither private information nor the property of the state. The information is held in trust for the benefit of the public and as such it must be accessible to the public.

Moreover, the free flow of public information constitutes an important condition—and possibly even a necessary one—for the proper functioning of a democratic regime. The Freedom of Information Law opens the gates of information to every citizen or resident. The Law instills the values of transparency of government. Freedom of information is the basis of the "supreme right" of freedom of expression: without information there is no opinion, and without opinion there is no expression. Free information is also required for the existence of ongoing and relevant public criticism of the activities of the authorities. The general public is thereby given the opportunity to participate in governmental activity. Hence can be understood, the importance of freedom of information for the actualization of the democratic regime as well as for increasing individual confidence in the authority and its activities. It would seem that the information revolution is a major indicator of human development in the last 25 years. The Freedom of Information Law is what its name says it is. The rights of the individual go hand in hand with technological progress (see and

compare: AAA 7744/10 *National Insurance Institute v. Adv. Yafit Mangel* [*Nevo* – 15.11.2012], para. 5 of my opinion; AAA786/12 *Joulani v. State of Israel* [*Nevo* – November 20, 2013], para. 3 of my opinion).

3. The Freedom of Information Law is a masterpiece of balances. On the one hand, the Law explicitly anchors the right to obtain information (sec. 1 of the Law). On the other hand, together with the declaration of the right to obtain information, the Law recognizes that freedom of information is not the be-all and end-all. The disclosure of information may sometimes entail various negative consequences. It is not only the right to information that is relevant, but also additional rights and interests such as the right to privacy, public safety, and others. Freedom of information is a relative right. Hence the need arises to strike a delicate balance between values, rights, and interests.

The Freedom of Information Law was enacted in 1998. The experience of 16 years has taught, in my opinion, that, although we are at the beginning of the road, the public makes great use of the tools granted to it by the legislator. Many judgments have shaped the parameters of the right to obtain information. The Law supports the disclosure of information, but balance is required, and this finds expression in the provisions of the Law. These provisions specify, for example, when a public authority may not hand over the information that was requested, how information concerning a third party must be published, and so forth. Individual petitions to obtain information, and the fundamental questions that arise within their framework, must be examined through the prism of the provisions of the Law. The purposes underlying the Freedom of Information Law will be realized by means of implementation of the provisions of the Law, which reflect the decisions of the legislator.

We stress this again because the overall context of the case before us cannot be ignored. The Court is in fact being asked to decide, with no choice in the matter, on a petition to disclose information that concerns itself. This kind of complex situation is naturally liable to create problematic incentives: on the one hand, to needlessly bolster the natural tendency not to allow publication of the information, or precisely the opposite—to strengthen the tendency to publish the information only for fear of "what people will say." The deciding party is likely to be influenced by the ramifications of publishing the material. For this reason, there is a risk of overcompensation (or as the Americans say a tendency to "bend over backwards") in precisely the opposite direction. Against the backdrop of the situation described, it should once again be stated that in this petition, as in every petition relating to freedom of information, the court is bound by the normative framework of the Freedom of Information Law and its provisions. If it should be found that the checks and balances established by the legislator do not justify handing over the information, this outcome must be respected, and the converse also applies. The Court is required to apply the Law and to decide on the matter of delivering information that concerns the courts system in the same manner as it treats matters relating to every other authority, examining the particular nature of the authority, as far as that is relevant to the decision. No more, and no less.

Summary of the Dispute

4. In the framework of the Freedom of Information Law the legislator distinguished between three levels of delivery of information:

information which must be provided, information that must not be provided, and information which there is no obligation to provide.

The default position, as stated in sec. 1, is that every citizen or resident has the right to obtain information from a public authority in accordance with the provisions of the Law. Together with this, the legislator listed types of *information that must not be provided*, such as information whose disclosure constitutes an invasion of privacy or may pose a threat to national security (sec. 9(a)). The third level—*information that does not have to be provided*—is what concerns us here, as will be explained. This is a category that is more difficult and more complex to apply and to determine. It includes various circumstances in the presence of which, the legislator has determined that the authority has discretion whether or not to respond to a request for information. Thus, for example, the authority is permitted to reject a request to obtain information if handling the request necessitates an unreasonable allocation of resources, or if the information was produced more than seven years prior to its filing and locating it involves substantial difficulty (sec. 8(1)-(2)).

5. In the present case, the dispute between the parties to the appeal focuses primarily on sec. 9(b)(1) of the Law—information the disclosure of which is liable to disrupt the proper functioning of the public authority. Owing to the importance of the section, I will quote it in full:

> A public authority is not obliged to provide information … the disclosure of which is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties.In this case, information has been sought about the number of open cases that are being heard in the Supreme Court and the district courts, and the amount of time that has elapsed since they were opened, together with the name of the judge in each case. The question, therefore, is whether disclosure of the requested information "is liable to disrupt the proper functioning of the public authority or its ability to carry out its duties." According to Justice Arbel's approach, the answer is negative. In other words: it is not permissible to refuse to provide the information on the basis of the defense established in sec. 9(b)(1).

Justice Arbel's position rests on several main tiers: *first*, according to her approach, *near certainty* that publication of the information will interfere with the performance of the authority is required. *Secondly*, the main aspect that must be examined according to her approach is the concern for harm to public confidence in the legal system, and more precisely: the manner in which the legal system and the judges are perceived by the public. *Thirdly*, my colleague presented the arguments of the appellants and the concerns about interference with the work of the judges as a result of publication of the requested information. Her conclusion is that even though there is substance to these concerns, they do not reach the probability level of near certainty.

Let me state, already at this point, that I do not necessarily disagree with the first tier, which is the basic legal position concerning the required level of probability for the purpose of application of sec. 9(b)(1) of the Law. For the purpose of our discussion here, I will assume that indeed, near certainty is required, as my colleague holds. However, my opinion is that even according to that strict standard, near certainty exists that publication of the requested information will disrupt the work of the judge.

For this reason I propose to my colleagues to allow the appeal, and to determine that the authority was permitted to refuse to provide the requested information.

The Standard of Probability in Section 9(b)(1)

6. Section 9(b)(1) deals with information whose disclosure "is liable to disrupt" the functioning of the authority. The question is, what is the relevant level of probability for the concern about disruption? This can be presented as a choice between the standard of "near certainty" and that of "reasonable possibility". The language of the section does not provide clear support for either alternative.

In this context it will be recalled that Deputy President E. Rivlin held that only where there is near certainty of disruption with the proper functioning of the authority will there be sufficient cause to limit the freedom of information (AAA 6013/04 *State of Israel – Ministry of Transport v. Israeli News Corporation Ltd.* [2006] IsrSC 60(4) 60 para. 22; AAA 1245/12 *Movement for Freedom of Information v. Ministry of Education* [*Nevo* – August 23,2012], para. 7). On the other hand, Justice I. Amit remarked: "I am not convinced that secs. 8 and 9 of the Law stand at a lower level than that of the right to obtain information anchored in sec. 1 of the Law." Justice Amit subsequently added that "I would be careful about determining *a priori* that the balance between the right to know and other opposing interests, such as the security of the state and its foreign relations or the efficient functioning of the public service is a vertical one" (AAA 3300/11 *Ministry of Defense v. Gisha* [*Nevo* – September 5, 2012], para. 9, and the dissenting comment of Justice E. Hayut in para. 5 of her opinion, *ibid*.; *cf*. Justice Arbel's discussion of the limitation in sec. 9(b)(4) – AAA 7024/03 *Geva v. German* [*Nevo* – September 6, 2006], para. 15).

Personally, in the framework of this case I would leave pending the fundamental legal question concerning the required standard of probability for the purpose of sec. 9(b)(1)—near certainty or reasonable possibility. It appears that the case law leans more towards the first possibility. Of course, an intermediate level that is found at some point between the two extremes is also possible. One way or another, my opinion is that no hard and fast determination should be made at this point, so as not to create further disputes on an issue which in my opinion is not essential to deciding the case before us. For the purpose of the ensuing discussion, I will therefore assume that within the bounds of sec. 9(b)(1), there must be near certainty that publication of the information will disrupt the functioning of the authority or its ability to perform its duties. The question remains as to whether in the present case, the existence of near certainty such as this can be established.

Public Hearing: Substantive Aspect v. Administrative Aspect

7. The principle of the public hearing is one of the mainstays of the judicial process. It is based on various justifications, including the public's right to know, improving the quality of judgments, and increasing public confidence in the court (CrA 11793/05 *The Israeli News Company v. State of Israel*, per Justice E. Arbel (April 4, 2006), paras. 13-15). This important constitutional principle is also entrenched in sec. 3 of Basic Law: The Judiciary, and in sec. 68(a) of the Courts Law. The principle is that the deliberations of the court will be open to the public, and the doors will be closed in exceptional cases only.

The technological advances of recent decades have immeasurably increased the dimension of publicity of the court's deliberations. Today, every decision—and particularly those of this Court—appears on the internet, almost instantaneously, and is universally accessible. The various data banks allow for rapid and convenient access to all decisions, and include advanced search functions according to key words, chronological segmentation, segmentation according to subject matter, and more. This is as opposed to the situation that prevailed 25 years ago, for example, when, naturally, judgments were almost never computerized, and most were inaccessible to the general public. I remember feeling, at the time that I was appointed as a judge, that in many respects, from a technological perspective, there was no significant difference between the work of the judge then and that of a judge in England 200 years ago—except for the electricity and the air-conditioner. The judge wrote his judgments himself, or was helped by a stenographer—the "typist" of those days. Paper and ink were essential working tools. Lawyers cited judgment that were published in the Supreme Court Reports [*Piskei Din*], or in which they themselves had appeared, or about which they had heard. It was difficult in the district courts, and certainly in the magistrates courts, to have the judgments printed. It seems that everything has changed since then. The English judge of the 18th century would have difficulty in understanding some of the technological activity that takes place today surrounding the judge. This development has allowed for easy and accessible documentation. We can simply conclude, therefore, that the extent of exposure and publicity of the work of the judge increases over the years. Today, every person can easily obtain judicial decisions; he can peruse them, and learn how each and every judge acts, thinks and rules. The principle of the public hearing is realized also through the presence of large numbers of citizens—who are not connected to the case—in the courtrooms, and broad coverage in a wide variety of media. This is the situation, and it is good that it is so.

8. In the context of the principle of publicity, a clear distinction must be drawn between two aspects of the judicial task: the legal-substantive aspect as opposed to the administrative aspect. The legal-substantive aspect is concerned with the hearing, its contents, the manner in which it is conducted by the judge, and the decisions and judgments that the judge is required to issue and for which he must provide reasoning. The principle of public hearing, in all its glory, controls this aspect of the judicial function. Of course, the law lays down some exceptions. The courtroom is open, the hearing is public, and the decision is published. But this does not apply equally in relation to the administrative aspect. This aspect is concerned with the administrative wrapping of the judicial task, such as decisions concerning distribution of cases, setting dates for hearings, the rate at which cases are heard, and the date of publication of the judgment. In all that concerns the principle of publicity, no analogy can be drawn from the legal-substantive aspect of the work of the judge to the administrative aspect of his work. The reasons will be elucidated below.

The administrative aspect of the judicial function is extremely important. In truth, over the past twenty years it is possible to discern an "administrative revolution" in the Israeli legal system. This "revolution" has been possible not only due to technological developments (particularly the dramatic developments in access to computers and the internet), but also in view of the growing awareness of those in the profession of the importance of the administrative aspect of the judicial tasks. In this context, let me mention, for example, the annual reports of the courts

administration, published each year since 2006. These reports contain a wide range of data, including detailed lists of names of office bearers and contact information; data concerning the number of cases opened, closed and pending in each judicial instance according to various segmentations; comparative data between regions and courts and so on and so forth. The reports are open for perusal by the general public, and are available, free, on the internet. Another example is the *Net Hamishpat* [Law-net] system, which enables the submission of documents and perusal of decisions through remote access. I will also mention the growing responsibility of the courts administration, recourse to external consultants in order to streamline the system, the more professional-administrative definition of the role of the court president and his deputies, the convening of meetings of presidents, and further training sessions for judges. Mention will also be made of the directives and the regulations that are published by the President of the Supreme Court, the object of which is to improve and to regulate the administrative aspects of the proceedings in the various courts. These directives relate to administrative topics connected to the efficiency of the system, such as motions to postpone the dates of hearings and consecutive trial dates. This is in addition to frequent meetings between the President of the Supreme Court and the Director of the Courts and the presidents of district and magistrates courts, the compilation of monthly reports concerning the pace of the judicial work, the scheduling of discussions, as required, between the president of the court and its judges, distribution of cases, etc. The direct involvement of the President of the Supreme Court in the administrative aspects of the activity of the courts, unlike the situation that prevails in many other legal systems, is an expression of the importance of the administrative aspect and of the considerable investment in this matter.

9. Insofar as the administrative aspect of the judicial task is concerned, three theoretical models come to mind. *One model* totally exempts the judge from managing the administrative aspects of his affairs. According to this model, the judge is assigned cases, and he is asked to hear them and to publish judgments one after another, in the order in which they were assigned. A *second model* obligates the judge to deal with all the administrative aspects of the cases on his docket. A *third, combined model* is followed in this Court, as in judicial systems in other states.

In this combined model, on the one hand, external factors determine the panel on which each judge will sit and which cases he will hear. In the Israeli system, these aspects are within the purview of the presidents of the courts, of the judge that presides over the panel, and to a certain extent, of the court diary as well. These determine not only which cases will be heard by each judge, but also the dates of the hearings and their order, and sometimes even the identity of the judge who will write up the judgment. In a wider circle, some of the directives that are issued by the President of the Supreme Court—which were mentioned above— also shape the agenda of the judge at the administrative level. On the other hand, the judge bears responsibility for the administration of certain aspects of the schedule of each individual case, and at the same time of all the cases on his docket in its entirety. For example, in the case of an accused person who is in detention, or in a civil suit in a fast track procedure, the legislator prescribed that the judge must set a clear timetable for completing the case. Beyond that, the judge must deal with the internal management of his schedule, within the parameters that have been set for him: in cases in

which he is sitting as a single judge, he must decide how many cases he will hear every day, at what times and for how long. He must decide how to prioritize the process of writing up judgments and decisions, for example, whether to first devote time to writing a long judgment with important ramifications (such as a case of murder which entails a life sentence for the accused or his acquittal), or instead, to write up a number of judgments each of which deals with a relatively minor financial dispute but which have been awaiting decision for a long time and are clearly important to the parties themselves.

10. Every judge, every day, all day, is required to handle—and in fact does handle—administrative judicial decisions alongside the substantive judicial decisions. The judge must be aware of this dual responsibility. However, the differences between the two must be emphasized: substantive decisions in all areas of the law are written, reasoned and detailed. They are published. They are made after a public hearing has taken place, conducted by a judge, and after the written and oral pleadings of the parties have been weighed. They are the fruit of the exclusive discretion of the judge. It will be recalled that "a person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the law" (sec. 2, Basic Law: The Judiciary).

The situation is different in relation to the administrative aspects of the judicial task. Here, the judge does not act and decide alone. There are, as we have said, parties other than the judge himself who decide how many and which cases will be heard by each judge at every stage. In addition, it must be recalled that virtually all the daily administrative decisions are made, by their very nature, without hearing the pleadings of the parties, and without reasoned, detailed decisions being published. In fact, these decisions are not written up. To illustrate the special nature of decisions such as these, it will be stressed that we are not referring, for example, to a decision which was made in the framework of an ongoing case to postpone the date of the hearing or to excuse a witness. Decisions such as those are written and published, after the response of the opposing party is received. This is not what we are dealing with; rather, we are dealing with expressly administrative decisions.

Near Certainty of Disrupting the Judicial Task

11. The respondents, correspondent Hila Raz and TheMarker newspaper, primarily asked for two items of information in relation to each judge of the district courts and of the Supreme Court: the number of open cases, and the amount of time that has elapsed since each case was opened, together with the name of the judge hearing each case.

Publication of the requested information is analogous to shining a powerful spotlight on the administrative aspect of the work of the individual judge. Shining the spotlight is liable, as I understand it, to lead to disruption of the work of many judges and of the judicial system overall, at the level of near certainty. I will discuss six reasons which have led me to this conclusion.

First I will comment that while the petition dealt with information concerning the district courts and the Supreme Court, and not with information about the magistrates courts. I do not see any reason for creating a real distinction, from the point of view of the considerations for publishing the information, between the courts. I also do not think that such a distinction can be justified. Clearly, denial of the appeal and

publication of the information will give rise to additional requests, also in relation to the magistrates courts, the traffic courts, the family courts, the youth courts and the religious courts. In my view, therefore, a uniform outcome is inevitable. It is not superfluous to note that the scope of the cases in the magistrates courts is larger by many degrees: thus, for example, in 2013, more than 600,000 cases were opened in the magistrates courts (including the family and traffic courts), compared to some 60,000 cases in the district courts (see: The Judiciary in the State of Israel, *Report for the Year 2013 Pursuant to the Freedom of Information Law 5758-1998* (2013): hereinafter: Report of the Judiciary (2013)).

a. *Publication of the material will harm efficiency*

12. First, it is hard to believe that publication of the requested information *per se* will put an end to interest in the subject. On the contrary, experience shows the opposite to be true: publication together with names is expected to increase and strengthen the preoccupation with the administrative aspect of the task of judging, but in a particular way which is not beneficial. Therefore, I am not dismissing the fundamental intention of the respondents: to create public awareness and public involvement in the subject of judicial overload. My reservation relates to preoccupation with the administrative aspect through the requested prism. This way will create a certain dynamic.

As a result of the publication, interest will grow like a snowball, because these are not dry figures, but names and faces. Upon publication of the information, many questions can be expected, with near certainty, to arise: why is a particular judge given too many or not enough cases, and why does another judge take so long to publish decisions in so many cases? The questions can also be expected to arouse a desire to provide answers. Assume that a particular judge finds himself at the bottom of the chart, for example, because the number of open cases on his desk is the highest. This judge can be expected to want to explain matters. Pressure will be created to justify the existing situation, or alternatively, to change it at all costs. One way or another, it is clear that publication of the information requested by the respondents will lead to increased preoccupation of each judge with justifying and defending himself in relation to the administrative aspect of the judicial task, at the expense of the substantive aspect. More precisely, there is no need to relate to the harm to each and every judge in the system. It is sufficient that near certainty exists of harm to a particular judge or to certain judges. This harm will have an impact on the functioning of the whole system, in view of the fact that every judge in his courtroom deals with the entire world of a specific case between individual litigants.

This Court "dwells among its people." It seems that anyone familiar with Israeli reality cannot avoid the conclusion that publication of the information will invite pressures, and these will lead to unnecessary activity that will, with near certainty, be detrimental to the entire legal system. The difficulty arises in particular because this is an administrative matter, rather than a substantive matter, connected to the task of judging. It is presumed that the court, when it is about to convict a person of a criminal offense or to find him liable in tort, will not be affected by various media publications concerning substantive matters. This is irrespective of the wider issue of *sub judice*. However, the publication that we are dealing with relates to administrative aspects—how many cases remain open on the desk of each judge and so forth. As was explained,

these are aspects for which there is no clear legal answer, and they are not necessarily decided according to the dictates of a judge's conscience. If in relation to every administrative aspect it would be necessary to conduct a hearing, to hear pleadings, to formulate a reasoned decision, to expose the decision to review on appeal, and subsequently, to also deal with publication of the information, with all the implications therefrom—efficiency will not benefit thereby. The opposite is true. Many resources, which as it is are insufficient, will be diverted to unnecessary channels. The individual judge will be forced to devote more time to clearly administrative decisions and to defending his decisions—precious judicial time which is not to be found in abundance. With all the understanding for the desire of the respondents to contribute to efficiency—publication of the requested information will bring about precisely the opposite result. With the present load, the addition of this component is liable to disrupt the proper functioning of the activity of the system or its ability to perform its tasks.

My colleague, Justice Arbel, discussed the fact that publication of the data is also liable to have the effect of causing embarrassment. It must be stressed: it is not the emotional aspect that is of interest, but rather, the legal consideration of interfering with the judicial performance. This interference will occur, with near certainty, as a result of the fact that the judge and the legal system as a whole will be required to allocate resources to over-occupation with administration and with justifying administrative decisions at the expense of dealing with the substance. Another task will be created, keeping many parties busy for long periods of time. This task will create a certain blurring of the boundaries between the substantive and the administrative. These latter decisions are not public, the reasoning behind them is not elaborated upon; in fact they are not written at all. It is good that it is so. The reason for this, *inter alia*, is that these are not individual decisions of the judge, but systemic decisions that are made in a complex procedure in which many elements are involved. The individual judge is not the dominant element in this process, and certainly not the factor which makes the decisions.

b. Frustration of Respondents' Declared Purpose

13. Section 10 of the Freedom of Information Law states:

> In considering a refusal to provide information under this law, based on the provisions of Section 8 and 9, the public authority will take into account, among other things, the interest of the applicant in the information, if cited in the request…

We see that according to the legislative requirement, the interest of the person requesting the information must sometimes also be considered. This is so when secs. 8 and 9 apply to the case, i.e., when it is a matter of information that the authority may refuse to provide. In such a case, refusal to provide the information rests, as stated, on the reasons specified in sec. 9(b)(1) of the Law. Hence, the interest of the respondents in the requested information, according to the position they presented in their request, must also be taken into account.

In the present case, the respondents explained at the beginning of their application that they are submitting it "in view of the supreme public importance in relation to the workload … that is imposed on the courts system." Thus, the declared interest of the respondents in publishing the information is the workload of the courts system and its public importance.

An investigation into this subject has two parts: one is establishing the existence of overload and its extent. The second is recognition of the fact that this is an undesirable phenomenon from the point of view of the functioning of the system, which certainly ought not to be exacerbated. As for the first part, the focus of the investigation is "the courts system". What the respondents want is to expose the problem of overload. Insofar as this is a systemic matter, the courts administration agreed to deliver the details. As for the second part, as I explained, publication of the information pertaining to the personal performace will, in my view, achieve the opposite of easing the problem of overload. Not only will the load not lighten, but resources that are dedicated today to time management and to the writing of judgments and decisions. and in general to lightening the load, will be diverted to dealing with these publications and with the shockwaves that are created.

Indeed, the declared interest is the overload of the system. Systemic data was and will be supplied by the appellants. However, the petition deals with an additional dimension that is not systemic, i.e., that of the individual judge. In this context there are three reservations: first, this dimension is not consistent with the declared interest. Second, the name requirement is liable to affect the functioning of the authority. I have dealt with these reservations elsewhere. Third, the requested information on the individual level does not contribute to an understanding of the issue of overload, and is even liable to mislead. I will now elaborate on this reservation.

The publication of data in relation to each judge concerning the number of open cases, and the amount of time over which they have been open, is a double-edged sword: on one end —this is a simple, absorbable item that can be easily understood and internalized. On the other end —this item does not correctly reflect the complex reality. By way of illustration, it will be recalled that recently, the Israeli Courts Research Division published the case index for the assessment of judicial workloads (available at http://elyon1.court.gov.il/heb/Research%20Division/Research.htm). The purpose of this index is to try to correctly assess the workload on the various judicial instances, in order to develop effective tools for the allocation of resources, the regulation of caseloads, and improved management of the courts. The index that was developed relates to some one hundred types of procedures that come before the magistrates courts, the district courts, and the regional labor courts. For each type of procedure, the average time invested in the case is measured. These units of time are translated into weighted units. For example, the minimum weight—1—is accorded to orders of search and entry in detention proceedings in the magistrates courts. The maximum weight—1826—is given to cases of serious felonies that are heard before a bench of three judges in the district court. The weight of each case is determined according to two main parameters: *the number of events* that comprise the judicial work in a particular case, and *the complexity of the events* (from the point of view of the time required). The data concerning the number and complexity of the events was obtained, *inter alia*, through a qualitative methodology, by a group of judges, and a quantitative analysis of the computer data and of representative samples of cases.

I have discussed this somewhat in detail in order to explain one very important point: the information requested by the respondents in the present case, which they are presumably interested in publishing, is liable

to be misleading; in fact, it cannot be anything but misleading. Due to the huge variety of judicial procedures, extremely complex statistical work is required in order to compare workloads. There are cases which can be wrapped up in one short session. There are cases which require dozens of sessions in order to hear all the testimony—for example, a complicated criminal case with many witnesses, or a case in torts on grounds of medical negligence, with many expert witnesses.

Indeed, as the famous American author Mark Twain remarked (in the name of the British Prime Minister, Benjamin Disraeli) with a humor that contains some truth: "There are three kinds of lies: lies, damned lies, and statistics." Statistics are liable to mislead even in the context of the information with which we are concerned here. The summarized figures—the number of cases and the time that has elapsed—do not reflect the complex, complicated reality. As a result, superficial publication of the data as requested by the respondents will not properly fulfill the declared purpose of exposing the problem of overload, but rather the opposite: it will engender a superficial focus on numbers that do not accurately reflect what is happening. Instead of allocating time and resources to an accurate and precise foundational treatment of judicial overload, an unnecessary pursuit after the "magic numbers" that are to be published will be initiated, and what was supposed to be a blessing will become a curse.

Of course, statistics can be taken in various directions. But what is special here is that the Freedom of Information Law specifies the interest of the person requesting the information as a consideration. The respondents mentioned in their application the burden on the courts. This is an important, legitimate interest. But to the same extent, it is legitimate to ask whether the requested information indeed serves that interest. Had the Law made publication of the information obligatory, this consideration would not be relevant. But, as stated, that is not the situation.

c. *The Position of the Appellants in the Present Proceeding: Anonymous Information as Opposed to Name-Bearing Information*

14. In the course of the peregrinations of this case, the appellants agreed to publish the requested information without mentioning the names of the judges. It should be clarified that the intention was to publish all the information—the number of open cases and the amount of time for which each case has been open—segmented according to judges, but without identifying them. The respondents, on the other hand, insist on publishing the names of the judges. The dispute, therefore, boils down to the question of whether to publish the names of the judges.

This definition of the dispute highlights, in my opinion, another genuine difficulty in accepting the respondents' position. As stated above, the information is sought against the background of the issue of the burden on the courts system. It seems to me that this goal could be realized in a satisfactory manner by publishing the information anonymously, as the appellants suggest. This suggestion allows for a comparison not only between courts but also between judges. It is difficult to see the marginal benefit—from the point of view of the judicial workload, which is the main thing—in publishing the information with *names*, as requested by the respondents. At the same time, the marginal cost as a result of publishing the named information is high, for the reasons specified above: publication of the names of the judges together with the statistics relating to open

cases will lead, with near certainty, to a situation in which many judges will not be content with their place on the list. In the nature of lists, there are those who are at the top and those who are pushed to the bottom. If the name-bearing publication would bring about greater efficiency—so be it. But I think that the opposite is true. There would be increased, superfluous preoccupation of the whole system with the personal side of these administrative aspects, in a manner that will be detrimental to efficiency and will only increase the burden.

d. Delays, Workload, and Dealing with them: the Individual Level vs. the Systemic Level

15. A fourth, no less important, aspect is that of the distinction between two levels of the problem of judicial overload or delays: the particular work of each and every judge, as opposed to the functioning of the system as a whole. Each level requires handling on a different level.

Let me put it as follows: to the extent that a problem of overload focused on a specific judge occurs, alternative mechanisms designed to resolve the difficulties already exist. As compared to these mechanisms, the marginal benefit that will ensue from publication of the requested information is not high. On the contrary: in certain senses, the publication will even undermine these existing mechanisms. Alternatively, to the extent that there is a systemic problem of judicial overload, publication of the requested information will only increase the bewilderment and confusion. The publication will direct the spotlight on the performance of the particular judge, identifying him by name, and thus it will divert the public and professional conversation from the main subject to the marginal one. Instead of the cooperation that exists between the parties administering the legal system—chief among them the presidents of the courts and the courts administration—with a view to improving the performance of each judge, tension will be created between the individual judge and his superiors and other elements in the system. Every decision that is made under these circumstances, e.g., changes in assignment of cases, will be susceptible to public criticism, and so it continues. Decisions such as these are also liable to affect other judges, and a chain will develop of unnecessary reactions, both in terms of time and in terms of human resources.

16. I will discuss, very briefly, the main alternative mechanisms for dealing with individual problems of judicial conduct.

In one circle, the president and deputy president in every court devote much time and resources to dealing with the administrative aspects of the work of the judges who are serving in that court. In another circle, the courts administration and the President of the Supreme Court issue various directives which are designed to improve efficiency and the administrative aspects of the work of the courts. These circles are also involved in the handling of problematic cases. I have discussed all of these above.

Another important mechanism is the Ombudsman for Complaints against Judges. My colleague, Justice Arbel, reviewed at length the *modus operandi* of the Ombudsman (paras. 43-44), and I will not repeat what she said. I will point out only that an individual who thinks he has been waiting too long for a judgment to be handed down in his case, or alternatively, who thinks that he has been waiting a long time for a date to be set to hear his case—is at liberty to approach the Ombudsman and to report this to him. The Ombudsman examines every complaint on an

individual basis, and if necessary, even solicits the reaction of the judge about whom the complaint has been made—all by virtue of the mechanisms provided in the Ombudsman's Law.

e. Paving a Detour Route

17. Section 14(a)(12) of the Freedom of Information Law states:

> The stipulations of this law shall not apply to the following agencies, or to information created, accumulated, or collected by them: … (12) the Ombudsman for Complaints against Judges—under the Ombudsman for Complaints against Judges Law, 5762 - 2002.

Accordingly, the information concerning complaints that are investigated by the Ombudsman remains confidential with respect to names. That is the point: acceptance of the respondents' position and publication of the requested information are liable to provide a "detour route" that will erode the provisions of sec. 14(a)(12). Individual complaints that were lodged with the Ombudsman will indeed not be published together with the name of the judge, but other sensitive information about the judge—such as the number of open cases he is dealing with and the time they have taken—will certainly be published. Clearly it is possible that there will be overlap between the information that is published and the information that was supposed to be confidential by virtue of the provisions of sec. 14(a)(12).

It is true that this reason alone would not constitute cause for allowing the appeal before us. However, it is important to understand that sec. 14(a)(12) reflects a principled determination of the legislator concerning treatment of the individual matter of a judge who has mishandled, or at least allegedly mishandled, his cases. The legislator prescribed that, despite the basic principle of freedom of information, in such a case, disclosure of the information to the public should be restricted. This is mainly for reasons to do with the delicate balance between oversight, which also relates to the administrative handling of a particular case—for example, why has judgment not been handed down—and the major public interest in maintaining judicial autonomy. This balance was intended to achieve efficiency. It is the proper balance, as determined by the legislator. This determination must be respected.

This matter is not only formal but also purposive. The legislator determined that all information produced in the framework of the Ombudsman's investigation of a complaint about a judge does not come under the purview of the Freedom of Information Law. This determination represents a position that may have ramifications for the present appeal. In all that concerns substantive judicial decisions, the court, including the individual judge, is exposed to public oversight. A judgment allowing an appeal is an open indication of mistakes that occurred in the decision of the lower court, and includes of course, the name of the judge whose decision is the subject of criticism. The substantive aspect of the judicial task must be public, as a component of the power of the principle of public trials.

The situation is different with respect to expressly administrative decisions. Experience teaches us that publication in the town square is not the best and most efficient way to solve a problem of this sort. Patently

administrative problems of the individual judge should be solved by other means. This is a constructive approach that is applied in practice. Publication in such cases will not contribute to, and is even liable to hinder, the finding of an effective solution. Take the example of a judge who invests many hours in his work, but has difficulty in keeping up with the pace. Another judge does not manage to complete the hearings during regular hours. As stated, the president of the court is supposed to be aware of the situation. It may emerge that the judge is slow in a particular kind of case as opposed to other cases, and thought should possibly be given to changing the kind of cases that are assigned to him in the future. Alternatively, it may be that easing the case-load of the individual judge for a short period is warranted, in order to allow him to close the gap.

This point is emphasized for two reasons. First, the administrative aspect of the judicial task at the level of the individual judge is indeed subject to oversight. Secondly, the legislator determined that information must not be disclosed concerning a complaint that is under investigation by the Ombudsman. This determination reflects the proper balance between the different rights and values that are involved, insofar as the individual treatment of problems that are encountered by an individual judge is concerned. This balance, in my opinion, also requires that name-bearing data indicating a particular inability of the individual judge to cope with his caseload should not be published. In the framework of the balance, the principle of judicial independence is also taken into account. It is extremely important to preserve this principle in order to allow the system to function properly. Preservation of this principle should be combined with the aspiration to improve the administrative aspect.

f. Comparative law

18. Justice Arbel discussed at length the situation in other countries, particularly in the United States, where partial information about judicial caseload is published, particularly in the federal courts system. I will make two comments.

First, it is important to emphasize the major finding that emerges from the review: in most Western states, data about pending cases is not published, *a fortiori* data about open cases including the identity of the judge hearing the case (see para. 86). Of course, an automatic analogy cannot be drawn. Every legal system stands on its own. However, one cannot ignore the fact that insofar as publication is concerned, the "nays" outweigh the "yeas". In other words: the most common approach is not to publish information of the type requested here by the respondents. In the United States, too, it would appear that the reference is to federal judges only, or at least to only a few additional individual states.

Second, Justice Arbel pointed out that in the United States, information pertaining to the caseload of the judges of the federal system is published frequently, pursuant to the Civil Justice Reform Act 1990. Pursuant to this Law, semiannual reports are issued, which include various lists of cases in which no decisions have been rendered, according to the names of the judges. The comparison with the United States is tempting at first glance. In actual fact, however, the comparison is misleading, mainly due to the significant differences between the structure of the federal courts and the structure of the courts system in Israel.

There is an enomrous gap between the American legal system and the Israeli legal system regarding judicial caseload. For example, the United

States Supreme Court—on which nine justices serve—hears oral arguments in approx. 100 cases annually. Incidentally, there are high courts in other countries (such as New Zealand) that hear less than half that number. For the sake of comparison, in 2013 in the Israeli Supreme Court, over 3,500 major cases were opened, i.e., cases that are heard before a bench of three of more justices: petitions to the High Court of Justice and civil, criminal or administrative appeals (*Report of the Judiciary* (2013), p. 18).

The gap is even greater in relation to the lower instances of the federal courts (district judges and magistrate judges). Thus, for example, the latest report—published in 2013—shows that in the United States District Court for the District of Columbia ., the number of cases stood at 344, and 24 judges served the district, i.e., approx. 14 cases per judge. In districts comprising the First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico), the number of cases was 1,210, with 60 judges serving—approx. 20 cases per judge. In Israel, as opposed to this, the figures are completely different. To illustrate, below is a table of the number of cases per judge in the Israeli district courts, correct for 2011 (based on the Freedom of Information Law report for that year):

District	**No. of Judges**	**No. of Cases**	**Cases per Judge**
The North	14	3655	261
Haifa	27	7489	277
Tel Aviv	52	13886	267
Jerusalem	25	4430	177
The South	20	3834	192
The Center	26	6456	248

A quick glance at the table is sufficient to reveal the large gap—of almost incomprehensible dimensions—between the situation in Israel and the situation in the United States. Of course, as explained above, the numbers themselves may be misleading. A careful examination of the matter requires that distinctions be drawn between different types of proceedings, and that they be accurately weighted. Incidentally, statistical work such as this is liable to emphasize with even greater force the magnitude of the burden imposed on the district courts in Israel as opposed to the federal courts in the United States, mentioned in the report. For example, in Israel the district courts have exclusive jurisdiction to sit as a court of first instance in cases with multiple witnesses, such as the felonies of murder and organized crime. One way or another, the numerical gap is so wide and significant that it is difficult to ignore. It is certainly not obvious that it is possible to rely on a comparison with the situation in the federal courts as in indication for the question that arises in this case.

It should be added that in the federal courts mentioned above, it is common for the judge to sit in the courtroom relatively infrequently, e.g., once a week for several hours. The rest of the time is devoted to studying the case and writing decisions and judgments. In Israel, as opposed to this,

it is not uncommon for the judge to sit in the courtroom every day of the week for many hours. In fact, in the last twenty years, judges have tended to spend even more hours in the courtroom than in the past, and hearings are scheduled for later hours as well. This is not surprising. The number of cases has grown. The difference between the judge who hears 20 cases and the one who hears 200 cases is clear. For the numbers mentioned with respect to the US federal judge, as presented in the Report, the demands of administrative work are not great. In fact, the judge can almost be exempt from dealing with the subject. An outcome whereby a judgment is delayed for a long time is liable to demand an explanation. In Israel the situation is different. Here, as described above, the judge must devote considerable resources to managing his own schedule. As a result, if every judge were also to be required to devote resources to justifying his administrative conduct, even more time would be taken up, causing disruption with near certainty. In my opinion, therefore, not only is this comparison out of place, but it only serves to highlight the difference with respect to the administrative load the judge bears.

Conclusion

19. This case deals with the publication of information about the legal system. The decision in this petition must be made in accordance with the provisions of the Law and the balances it embodies. In particular, the legislative determination whereby the authority is permitted not to publish information that is liable to disrupt its proper functioning must be implemented.

The courts system is special in the extent of the publicity that characterizes its work. In all that is connected thereto, the developments of recent years are to be welcomed. However, in the present case we are dealing with the publication of information connected to another type of judicial endeavor, specifically the administrative aspect of the judicial task, and more accurately: a personal focus, done by naming each judge, on the management aspects of each and every judge's work. This aspect is administered as a team by the judge and other elements in the system. It is fed by factors not within the judge's control, such as the number of cases and the number of judges in the court. The individual judge does not select which cases he will hear, their degree of difficulty or their variety. The great number of proceedings in the Israel legal system requires the judge to make daily administrative decisions, e.g., which judgment to write up first, and even which case to schedule for a hearing at 8:30 a.m. and which at 11. These decisions, as opposed to the ordinary work of the judge, are by their nature not the outcome of a hearing, they are not reasoned in writing, and they are not published. It is clear that no public dialogue can take place with the parties on these subjects.

The legal system invests much effort in improvement. Placing the spotlight on the individual judge, as if he were the sole or dominant cause of the overload of the courts system, will only motivate him to respond, to explain, to justify, and to defend himself. Named publication of the list of open cases, a type of judicial "hit parade", will only increase the tension and the pressure not to fall to the bottom of the chart. Nothing good will come of this. This is an important point, in view of the declared interest of the respondents in the publication of the information—the overload in the courts system, and the fact that this is a matter within the discretion of the authority. An honest analysis of the situation leads, in my opinion, to the conclusion that there is near certainty of the fact that publication of the

information will disrupt the proper functioning of the courts system or with its ability to perform its tasks. Therefore, and considering the absence of a contribution made by publication of the information, the decision of the authority was within its competence and it meets the criterion of reasonableness. I will add that alternative solutions are applied in practice, involving the investment of vast resources and with a view to dealing with the exceptional caseloads in the various courts. At the same time, the appellants have agreed to publish the requested information anonymously, i.e., without appending the name of the judge. This is an appropriate outcome that achieves a balance between the different interests that rest on the scales.

The result is that from a legal point of view, there is no justification for overturning the decision of the appellants not to hand over the requested information. This is because there is near certainty of the fact that publication of the information will detract from efficiency and will even frustrate the respondents' purpose; there is insufficient justification for the respondents' insistence on publishing the information together with the names, as opposed to anonymously; the concentration on the individual judge misses the point—the systemic aspects of judicial overload; publication of the information will harm the alternative mechanisms prescribed by the Law and by custom; there is no relevant basis in comparative law for the publication of information of the type that was requested—possibly even the opposite. I will once against stress that it was the legislator who determined that where there is a concern about disruption with performance, there is no obligation to hand over the material. This is an appropriate consideration, prescribed by the legislator. And just as this consideration is relevant to other authorities in the State, it is also relevant to the Court.

Finally, my view is that the appeal should be allowed, and that the judgment of the Administrative Affairs Court should be overturned. Instead, it should be ruled that the petition is denied. This is subject to the declaration of the appellants concerning the delivery of information without mentioning the names of the judges, as specified above.

Justice E. Rubinstein

1. My colleagues, Justice Arbel and Justice Hendel, disagree fundamentally about the decision in the appeal before us. This disagreement is now confined, according to the positions of the parties in the case, to the question of whether, in addition to the information that the appellant is prepared to hand over, concerning the number of open cases before each judge in the Supreme Court and in the district courts, and the time that has elapsed since each case was opened, the *names* of the judges will also be specified. Let us recall: the respondents' request for information that would include all the above was made "in view of the supreme public importance of the burden imposed on the courts system," and the District Court accepted their position.

2. My colleague Justice Arbel's discussion was wide-ranging and comprehensive, with an analysis of the Freedom of Information Law and the case law that followed in its wake; she described the special nature of the judicial enterprise, the foundations of judicial independence and the various institutional review mechanisms as well as those of the public. Subsequently, my colleague considered the exception in sec. 9(b)(1) of the

Freedom of Information Law, whereby "A public authority is not obliged to provide information in any of the following categories: 1. Information, the disclosure of which is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties." The implementation of this section lies at the heart of the dispute. Justice Arbel found that the criterion for applying the reservation is "near certainty that publication of the requested information will interfere with the activity of the judiciary" (para. 57). She also discussed difficulties—the fact that indeed, delivery of the requested information would create an incomplete picture concerning the overload; nevertheless, in her opinion, the autonomy of the judges reduces the force of the appellants' argument as to the distinction between handing over institutional information and personal information (para. 65). It was further stated that efficiency cannot be a major index for assessing a judge's performance, although it must be taken into account (sec. 69), and in any case, data that is made available for publication can be accompanied by explanations, at the discretion of the system (para. 70). Justice Arbel discussed the concern about harming the judges by embarrassing and denigrating them and damaging their reputations, and she believes that this concern is not baseless (para. 75), but in her opinion, at this stage they remain concerns only, and that the conflict will not necessarily be harmful to the extent of constituting libel—the publication may even strengthen public trust in judges (para. 76). My colleague does not think that criticism, even if it is liable to be harmful, could impact the decisions of the judge on their merits (para. 78); in her opinion, "their inner strength, the way in which they conduct themselves, and their belief in the justice of their path will enable the judge to cope with the publications and to continue fulfilling their tasks faithfully" despite concerns about misuse of the information (para. 82). Justice Arbel does not accept the appellants' claim that the existence of the institution of the Ombudsman for Complaints against Judges—under the Ombudsman for Complaints against Judges Law, 5762-2002— detracts from the need for public oversight (para. 88). Finally, she believes that for the sake of ensuring public confidence, and despite the concerns, the information ought to be handed over (paras. 92-95) and the appeal denied.

3. My colleague Justice Hendel, in his interesting opinion, leaves pending the question of the standard required for the application of sec 9(b)(1), and he is prepared to assume, for the purposes of this case, that we are dealing with near certainty (para. 6). According to his approach, the administrative (as opposed to the substantive) aspect of the work of the judge and the publication about it, which is the object of this case, is liable, with near certainty, to disrupt the judicial task, by detracting from efficiency, due to the pressures created and the embarrassment caused (para. 12); the declared purpose of the request relating to the overload will be frustrated, for the statistics are liable to be misleading (para. 13); the existence of alternative mechanisms, including oversight of judges on the part of the presidents and deputy presidents of the court and by the Ombudsman for Complaints of Against Judges (para. 17) lessen the need for publicity. According to Justice Hendel, there already is a great deal of publicity in the legal system, whereas the requested publication will, with near certainty, disrupt the functioning of the system (para. 19). Therefore, in his opinion, the appeal should be allowed.

4. In this case I found myself in a dilemma, caught "between a rock and a hard place". My dilemma was this: on the one hand, we live in an

age of transparency. The Freedom of Information Law has been with us for sixteen years; these years parallel, more or less, the virtual revolution, which brought the internet into our world, and the world no longer operates as it used to. The freedom of information revolution accompanied the information revolution—they arrived hand in hand. Enormous amounts of information are to be found in the virtual network, and if we are to be absolutely honest, the data that the appellants have agreed to hand over in this case open a door —so it seems to me—which affords quite easy access to the names of the litigating parties themselves, even if they are not published; this was also argued by counsel for the respondents in the hearing before us, and he mentioned online anonymous comments (talkbacks). Furthermore, the judiciary, owing to the sensitivity of its task and what is required for public confidence, ought to be as open as possible to criticism. As opposed to this, the legislature's position in the Ombudsman for Complaints against Judges Law, was that there must be a certain measure of caution in the publications: the law as a rule came down against publishing the names of the objects of the complaints, except for a narrow window that was opened in sec. 13(d), by a joint decision of the President of the Supreme Court and the Minister of Justice. Primarily, I believe that there are quite a few judges—of course, not all—whose work is nearly certain to be disrupted by the disclosure, in accordance with the present criterion. Moreover, the subject on which the request of the respondents focused is overload. Apparently, for the purpose of examining overload, the names of the judges are not necessary; the information that the appellants are prepared to deliver would suffice. Indeed, the Freedom of Information Law does not require a "motive" behind the request for information; sec. 1 states that "Every Israeli citizen and resident has the right to obtain information from a public authority, according to the stipulations of this law." But again—the declared purpose of the respondents can be satisfied in its entirety by the data whose delivery is not in dispute. The question is whether "the trouble is … worthy that the king be disturbed" (Esther 7:4).

5. For the purpose of this case, I too am prepared to adopt the standard of near certainty, as proposed by President Aharon Barak in his lecture, "Freedom of Information and the Court" (with the publication of Professor Z. Segal's book *The Right to Know in the Light of the Freedom of Information Law* (2000); and see also his article of that name, *Kiryat Hamishpat* 3 (5763-2003) 95, 103). He described the requirement as including a "severe, serious, and grave disruption …". Given such a criterion, which path should a person choose? I would add here that in relation to the present matter, Prof. Segal also writes (p. 199) that near certainty is required, and personally he is in favor (pp. 143-144) of publishing the names, but he also sees value and importance in publishing without names.

6. For love of Jewish law, I will begin with several Jewish law sources relating to the judge, as cited in my lecture, "An Understanding Heart—On the Judicial Enterprise" (medical conference in Haifa, chaired by Prof. Moshe Feinsod, January 3, 2012). The Bible describes the qualities required of judges: "… you shall provide out of all the people able men, such as fear God, men of truth, hating unjust gain … . And let them judge the people at all seasons" (Exodus 18:21-22). The Medieval commentator Rabbi Abraham ibn Ezra explains in his short commentary, "*Able men* – who have the strength to suffer … *fear God*—that they will not acquire a bad reputation, *men of truth*—that they are not false, *hating*

unjust gain—money." Rabbi Shlomo Itzhaki (Rashi) explains: *Able men*—rich men who will not need to flatter or to show favor; *men of truth*—these are people commanding confidence, who are deserving that one should rely on their words; *hating unjust gain*—men who hate (pay no regard to) their property when it is to be made the matter of a law-suit, in accordance with what we say (*Babylonian Talmud, Tractate Bava Batra* 58b): "Any judge from whom one has to wring the money [he owes only] by means of a law-suit is no [fitting] judge ." Scripture also said of judges, through the words of Moses: "Hear the causes between your brothers, and judge righteously between every man and his brother and the stranger that is with him. You shall not respect persons in judgment, but you shall hear the small and the great alike; you shall not be afraid of the face of man; for the judgment is God's" (Deuteronomy 1:16-17). The closing words of these verses is saying that it is the Lord who gave the law, and there must therefore be no deviation from it; however it may also be interpreted as meaning that the Lord is, as it were, present in the courtroom: "God standeth in the congregation of God …" (Psalms 82:1; see the commentary of Aharon Mirsky, *Da'at Mikra, Devarim [Deuteronomy]* on this verse).

The sages dealt extensively with the judicial task and they said (*Babylonian Talmud, Tractate Shabbat* 10a): "Any judge who renders a judgment that is absolutely true, even [if he sits in judgment for only] one hour [i.e, a short while] is considered by scripture as if he became a partner with the Holy One, blessed is He, in the act of creation." To judge absolutely truly is a great virtue, as Justice Menachem Elon said (see "These are Obiter Dicta … They are Fundamentally Flawed and Should Not be Followed", in M. Mautner, A. Sagi & R. Shamir (eds.), *Multiculturalism in a Democratic and Jewish State* (1998), 361, 361; cited also in *Neshama Yetera Bamishpat* , a collage of Elon's writings by Dr. (now Professor) Aviad Hacohen (2004), pp. 25-26).

The sages also said, "Rabbi Shmuel bar Nachmani said in the name of Rabbi Yonatan, A judge should always view himself as though a sword is resting between his thighs and Gehinnom is open beneath him" (*Babylonian Talmud, Tractate Sanhedrin* 7a). Maimonides (Sanhedrin 23:8-9) formulates this as follows:

> A judge should always view himself as though a sword is resting at his neck and Gehinnom is open beneath him: He should know whom he is judging, before Whom he is judging, and Who will ultimately exact retribution from him if he deviates from the path of truth … Whenever a judge does not render a genuinely true judgment, he causes the Divine Presence to depart from Israel….

Incidentally, there were sages of the *Mussar* Movement who viewed each person as his own judge: "Judges and officers shalt thou make thee in all thy gates" (Deuteronomy 16:18) means the gates of a person's body—his eyes, ears and mouth. This applies *a fortiori* to a judge, who under Jewish law, as well as in our times, is subject to strict laws of professional ethics.

The sages also said: "Do not judge your fellow until you have stood in his place" (the words of Hillel the Elder, *Ethics of the Fathers* 2:4, and see the article of Dr. Aviad Hacohen, "Do Not Judge your Fellow Until You Have Stood in his Place", *Parshat Hashavua* 351 (5769)); true, there is a dispute as to whether this *mishnah* is addressed to judges, but one could certainly invoke it in the context of "First correct (lit., adorn) yourself and

then correct (lit., adorn) others" (*Babylonian Talmud, Tractate Bava Metzia* 107b), and as cited by Hacohen from the commentary of Rabbi Ephraim of Luntschitz, "Kli Yakar" on the verse, "Judges and offices shalt thou make thee" (Deuteronomy 16:18), "Correct (lit., adorn) yourself first", and only then, "and judge the nation"—"correct (lit., adorn) others". All this is from the abovementioned lecture, the name of which is taken from the prayer of King Solomon (I Kings 3:9).

See also the article of Rabbi Yair Kahan, "Zion will be Redeemed with Justice" (website of the Har Etzion Yeshiva, *Shoftim*, 5774), which deals with the obligation to appoint judges in our land and in diaspora communities, and ends with the verse that was often quoted in 1948, with the Establishment of the State of Israel: "Zion shall be redeemed with justice, And her penitents with righteousness" (Isaiah 1:27); on the establishment of the legal system in the State of Israel, see my book, *Judges of the Land* (5741-1980), p. 35 ff. We see the great importance that the Jewish national ethos attaches to the law, to the judge, and to the responsibility he bears.

7. What supports Justice Arbel's opinion? As she pointed out, it is difficult to overstate the importance of the purposes underlying the Freedom of Information Law. The public cannot obtain effective oversight of the activity of the authority without being given the information relating to such activity, within the bounds of transparency; it is not possible to demonstrate involvement in the governmental enterprise without such information; and it is difficult to see how the public and individuals within the public can realize their basic liberty and their rights, without having access to the information that has amassed in the various governmental bodies (AAA 6013/04 *State of Israel – Ministry of Transport v. Israeli News Corporation Ltd.* [2006] IsrSC 60(4) 60 (hereinafter: *Ministry of Transport*),, at p. 73; HCJ 7805/00 *Jerusalem City Councilor Roni Aloni v. Jerusalem Municipality Commissioner* [2003] IsrSC 57(4) 577, at p. 605). The Freedom of Information Law anchors the conception that had crystallized even earlier in the case law, whereby the authority has no proprietary right in the information that it possesses, and it is a trustee for the public and acts on its behalf (HCJ 2594/96 *College of Management Academic Studies (School of Law) v. Israel Bar Association* [1997] IsrSC 50(5) 166, 173; see also AAA 8282/02; *HaAretz Newspaper Ltd. v. State of Israel, Office of the State Comptroller* [2003] IsrSC 58(1) 465, at pp. 470-471). Hence the broad language—which we mentioned, of sec. 1 of the Freedom of Information Law, and on the other hand, the restrictive interpretation of the reservations to delivering information, including sec. 9(b)(1) which is the object of our interest; therefore, the judiciary should in general be subject to criteria that are similar to other authorities, even given the special nature of the judicial function. See on this matter also the words of President A. Barak, as quoted by Prof. Segal in his book: "It is only natural that the courts administration which deals with the administrative aspects of the courts system will be subject to the obligation to provide information, *like any other authority"* (from a letter sent by President A. Barak on March 17, 1998 to MK D. Zucker concerning an examination of the ramifications of the Freedom of Information Bill on the courts system: Segal, p. 143, n. 395; emphasis added – E.R.).

8. However, there is a strong, significant opposing side, which operates in the direction of the position taken by my colleague Justice Hendel: the appellants are prepared to take a sizeable step towards the

respondents, and to disclose the requested details, but without mentioning the names of the particular judges. This gives rise to the real dilemma in this case, for the information that is normally sought by virtue of the Freedom of Information Law is institutional information, rather than individualized, named information, which is born of an understanding that, as a rule, the person performing the activity is a public servant, who in what he does represents the system itself, in accordance with his function, and he operates on the basis of policy set by the system. Therefore, disclosure of the name of the person executing the action is often of no real importance, certainly not to an extent that would justify harming his ability to perform his task as required or in a manner that would harm his reputation unnecessarily; and as was determined in a similar context: "It is as clear as daylight that the discussion of the reasonableness of the regulation will focus on the considerations that led to its enactment, and not on the identities of the people who were proposing it or objecting to it" (CC (Tel Aviv) 2060/99 *Israel Bar Association v. Minister of Justice* [*Nevo* – December 5, 1999], per (then) Judge O. Mudrik). Thus, for example, if information is requested concerning the extent of payment of municipal taxes in a particular municipality, and no one is claiming negligence on the part of any particular clerk, it is doubtful whether publishing their names is worth anything, when all they did was to collect the payments in accordance with municipal procedures. Moreover, as my colleague Justice Hendel pointed out very correctly, exposure of the names of employees is liable to interfere with their ability to perform their tasks properly, for they will devote a significant amount of their time and their energy to justifying their actions and defending their reputations; and to this must be added, as stated, the concern about embarrassing the employee—to which we will return; this is so with respect to every employee, and also with respect to judges.

9. As Justice Arbel pointed out, the judicial function is different in its essence from other functions in the public service. As an aspect of this, judicial independence, which is vital for the fulfillment of the judicial function, is much greater than the independence of other functionaries in the public service; and as stated in sec. 2 of Basic Law: The Judiciary as a constitutional norm: "A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law." What is the meaning of judicial independence with respect to the publication of name-bearing information? On the one hand, since the judge determines the fate of persons, of finances, of the public administration, the names too are important. At the same time, there is close oversight of the activities of the judge, both substantively, via the appeals court (with the exception of the Supreme Court, whose judgments are not appealable) and administratively, as in this case, by the presidents of the courts and their deputies and the Ombudsman; there is also an ethics committee whose decisions (non-name-bearing) are published. On the other hand, is it likely that named publication, which is liable to distort the truth, as my colleagues pointed out, will have a severe impact on the work of the judges?

10. Unlike Justice Arbel, who, despite her uncertainty and her appreciation of the difficulties, believes that these cannot tip the scales. Justice Hendel is of the opinion—as we have said—that publication of the requested information, together with the names of the judges, is liable to cause damage to the judiciary at a level of near certainty. The reasons given in support of this determination are not trivial, particularly the

concern that the attempt of the judges to deal with the publication of information about their pace of work—information that is indisputably incomplete and not exhaustive—will detract from the efficiency of their work and its quality, and thus, the purpose for which the information was requested will be frustrated; this is so particularly, according to Justice Hendel, when the appellants are prepared to disclose the statistical information without disclosing the names of the judges, and thus a picture of the workload borne by the judicial system will be reflected, with only minor damage being caused.

11. Can these reasons cited by Justice Hendel tip the scales towards refraining from publishing the data? In another context, this Court said, some time ago:

> One should ask, wherein lies the statutory authority for depriving a citizen of the right to view material, knowledge of which he has a legitimate interest? All this "secrecy", which erects a partition and a screen between the government and the citizen, should not have a place in the orderly administration of a democratic regime … I believe, therefore, that the petitioner was justified in his demand, not only because his right to view the documents stems from the provisions of the law, but—and mainly—because basic good sense and logic in public relations between the government and the citizen necessitate this conclusion … *only for weighty reasons can the authority claim confidentiality of a particular document*, and whoever claims confidentiality—bears the burden of proof (HCJ 337/66 *Estate of Kalman Fital v. Assessment Committee, Holon Municipality* [1967] IsrSC 21(1) 69, 72, per Justice A. Witkon [my emphasis – E.R.]).

This consideration supports the delivery of the requested information, in accordance with the position of Justice Arbel. However, we still have not answered the question of possible disruption of the work of the judge.

12. I will mention here the possibility that the information that is to be delivered will be exploited for the purpose of embarrassing the judges. I do not belittle this consideration, and as Justice Arbel pointed out, it can make the decision in this case a very difficult one. As I mentioned in a previous case, "sometimes the public servant has nothing but his good name, and if that is besmirched, what is left?" (LCrimA 7383/08 *Ungerfeld v. State of Israel* [*Nevo* – July 11, 2011], para. 9) (hereinafter: *Ungerfeld*); in this, judges are no different from anyone else (and see on this matter HCJ 2561/07 *Michal Sharir v. Courts Administration* [*Nevo* – July 24, 2008], per Justice E.E. Levy, para. 8). It is true, as I pointed out in *Ungerfeld*, that when we are dealing with more highly-placed public officials, who by virtue of their function are exposed to public criticism, it can be expected that their ability to withstand the criticism, and even real insult, will be greater than that of a minor official in the system. Judges occupy a high rank, and by the nature of their profession they are exposed to public criticism on a daily basis, but they are supposed to have a relatively high level of tolerance for criticism, and even for real insults and vilification, which are, unfortunately, not infrequently published against judges. See on this the words of the late Judge A. Azar, in a judgment stating that the State must release the names of district psychiatrists in a particular context:

> In every choice of profession there are advantages and disadvantages. From this point of view the psychiatrist is similar to the policeman, the prison warden, and the judge. Together with authority comes criticism and the willingness to bear it … as pointed out by *Justice Netanyahu: "The greater the power and authority … the greater the importance of the limitations and the means of oversight* (CA 558/84, *ibid*. [*Carmeli v. State of Israel* [1987] IsrSC 41(3) 757 – E. R.] , at p. 767)" (OM (Tel Aviv) 200871/98 *Israeli Association Against Psychiatric Assault v. Ministry of Health* [*Nevo* – 2000] (Emphasis in the original – E. R.)).

13. My position is as follows: in my opinion the solution to this complex situation is itself complex and not binary, but rather, a cautious middle path; we must confront the matter at "eye level". There are judges with respect to whom the possible harm stemming from publication of the data is something that can be dealt with and which will not interfere with their work; there will, however, be judges with respect to whom there is near certainty of disruption with their work, in that their resources in terms of time will be devoted to the publications and to refuting the claims in them, for both subjective and objective reasons: subjective—because they will feel hurt to the depths of their souls in their belief that they have suffered an injustice, and they will lose sleep and their work will suffer, due to the thought that they cannot, due to their place and position, respond appropriately; and objective—for overload is in no way reflected only in the dates on which cases are opened: it is dependent on the case and the circumstances. Moreover, in my view it is significant that a sizeable portion of the complaints lodged pursuant to the Ombudsman for Complaints Against Judges Law involve delays in rendering judgment, but as we have said, the judges' names are not, as a rule, published, by virtue of the Law. We are dealing with similar material here, and even if the Freedom of Information Law does not contain a specific legislative provision concerning judges, the possibility of an analogy cannot be overlooked. All of these involve shaming, and the sages stated, "He who publically shames his neighbour is as though he shed blood"" (*Babylonian Talmud*, *Tractate Bava Metzia* 58b)—no less! And see further in my opinion in CFH 2121/12 *Major R. v. Dr. Ilana Dayan* [*Nevo* – September 18, 2014 para. 8]. *And of course, when I say "shaming", I would be equally cautious in relation to those who are not judges.* The correct thing in my view is to find a middle road.

14. Therefore, if my view is accepted, we would act in the following manner: first, insofar as this court—the Supreme Court—is concerned, in view of its primacy of place in the system and in order not to create even the slightest impression that it is trying to prevent the presentation of data, including personal data, in relation to its activities, I would suggest adopting the path of my colleague Justice Arbel, namely, that the information should be published in its entirety with all its components, after the completion of the 5775-2015 legal year, towards the end of 2015. In this I do not see eye-to-eye with our colleague Justice Danziger, who is of the opinion that the information should be published here and now; I think that there is room for a gradual process, as proposed by Justice Arbel, due to the exceptional nature of the name-bearing information.

15. Regarding the district courts, in my opinion we must proceed with tiny steps. If my opinion is accepted, there should be an additional waiting

period, during which the outcome of publication of the names in this Court will be examined, so that lessons can be learned—whether no great harms have ensued and the concerns have proven unfounded, or the opposite; and in order to determine in a sound manner whether we ought to have a part in what may emerge to be nothing other than embarrassment. A decision on this matter will be made by the appellants, after they have learned these lessons, by the end of the 5776 (2016) legal year; this decision will of course be subject to judicial review, and everyone's rights will be reserved.

16. This, of course, is additional to the agreement of the appellants to publish the relevant information without mentioning the names of the judges. I propose that we order that this information be published within 45 days of the handing down of this judgment. With respect to this Court, the information containing the judges' names will be published as emerges in the opinion of Justice Arbel; regarding the district courts, the decision will be made before the end of the 5776-2016 legal year. I also propose, once more in keeping with the spirit of Justice Arbel's opinion, that each judge be given the opportunity to respond to the data that concerns him alongside the name-bearing publication. In my view, therefore, the appeal should be partially allowed as stated.

Justice S. Joubran

1. Should information concerning the number of open cases being deliberated in the court before each judge, the time taken to deal with them, and the name of the judge hearing each case be disclosed? My colleague Justice Arbel, in her thorough written opinion, answered this question in the affirmative. She explained that the rule expressed in the Freedom of Information Law is that of disclosure of information, and that the exception for disrupting the proper functioning of the judges, which allows the authority to refrain from handing over the requested information, does not apply here. In the balance between the concern about interference with the functioning of the judges and the public interest in publication of the information, my colleague found that the public interest in publication prevails. Underpinning her position is the principle of freedom of information, which is based on public confidence in the system of justice as well as the rights to know and to exercise effective oversight of its activity.

2. My colleague Justice Hendel, as opposed to this, believes that the names of the judges should not be published. According to him, the publication of anonymous information regarding the state of handling of each and every case suffices. He believes that turning the spotlight on each individual judge, as opposed to a study of the systemic aspect of the requested information, misses the main point, which is the overload in the courts. Personalized presentation of the information focuses the problems of the judiciary as a system, on the judges, without justification. Justice Hendel bases his concerns on a distinction that he draws between the administrative aspect of the judicial task and the legal-substantive aspect. According to him, the principle of freedom of information applies to the legal-substantive aspect through the principle of the public nature of trials; but from here one cannot draw an analogy to the administrative aspect. The number of open cases and the time over which they are heard are part of the administrative work of the judge; and in any case, they stem from

factors that are not in the judge's full control. Personalized disclosure of the requested information will affect the judge's system of considerations and lead to preoccupation with his apparent efficiency, which will harm his legal-substantive work.

Justice Arbel was not unaware of these concerns laid out by Justice Hendel; in the final analysis, however, she believes that for the most part they are speculative, and that their professional fortitude will enable judges to cope with the unflattering publications. My colleague Justice Rubinstein, unlike Justice Arbel, believes that the expression that should be accorded to these concerns is by means of incremental relief, as stated in para. 13 of his opinion.

3. I will confess that I vacillated a great deal regarding the decision in this appeal and also with respect to the appropriate relief. Let me begin by saying that with respect to the decision, I ultimately decided to concur in the opinion of my colleague Justice Arbel, according to which the appeal should be denied.

As for the relief, I believe that there should be incremental, future-oriented implementation of the judgment, similar to the opinion of my colleague Justice Rubinstein. Like him, I too believe that a distinction should be drawn between the Supreme Court and the district courts; and between publication of the information without the names of the judges and publication of their names.

4. If my opinion is accepted, *publication of the information* relating to the Supreme Court, *without the names of the judges*, in accordance with the appellants' agreement, will be effected immediately, upon the rendering of this judgment, in accordance with the most current information in the hands of the appellants, and subject to there being no possibility of making a connection, by means of the information, between the judge hearing the case and the case itself. As for the *names of the judges*, they will be published at the end of the 5775 (2014-2015) legal year.

Regarding the *district courts*, if my opinion is accepted, *publication of the information without the names of the judges* will be effected at the end of the 5775 (2014-2015) legal year. Publication of the *names of the judges* will be effected at the end of the coming calendar year, i.e., the end of 2015.

This delay will allow the courts administration and the judges to prepare themselves for the said change, minimizing concerns about interference with their work, and thus, minimizing concerns about a miscarriage of justice and about adversely impacting the doing of justice.

5. Below are the reasons for my position, which is based primarily on the various concerns about disruption of the work of the judges and how to minimize them despite the publication.

One cannot make light of the concerns expressed by my colleagues in relation to the potential harm to the work of the judge. True, the starting point is that the judicial task requires of the judge personal strength and a certain resilience in the face of criticism. But the accepted view is that this strength and resilience are directed at what my colleague Justice Hendel calls the "legal-substantive aspect", as distinct from the "administrative aspect". According to this view, public criticism should be directed towards the wisdom of the work of the judge, and not towards its

efficiency. The traditional objective of the judicial task is the constant search for the truth. This is the very heart of the role of the judge. The assumption is that in his search for the truth, the judge does all he can to achieve the correct legal result, according to the best of his personal understanding. In order to do so, he requires personal and administrative freedom and autonomy (Daphna Avnieli, "Who Will Control the Judges - and How?" *Mishpat Umimshal* 9 (5766-2006) 387, at p. 389). Regarding this, Judge Berinson said that "the judges of Israel are famous for performing their judicial task faithfully. It is well known that they are usually subject to the pressure of difficult, voluminous, strenuous and nerve-wracking work. Time is short and the work is always great. And nevertheless … in no way should the noble values of doing justice be sacrificed on the altar of speed and efficiency" (CA 33/75 *Air Thermo Ltd. v. Atarim.* [1975] IsrSC 30(1) 547, at p. 554). Moreover, according to this outlook, the judge acquires public confidence through the contents of his decisions and their justness; these are also the legitimate basis for public criticism leveled at him. It would appear that in view of this outlook, the rules of public trial apply to the substance of the legal process and not to the manner in which it was administered (see: para. 8 of the opinion of my colleague Justice Hendel),

6. Publication of the names of the judges who are hearing each and every case is not consistent with the said outlook, and it also gives rise to a non-trivial concern that the criticism of the judicial task will be diverted from its natural destination. From a situation in which the work of the judge is evaluated in terms of legal validity, justice, and procedural fairness, the weight will be shifted to an examination that focuses on indices of efficiency and speed. The concern is that administrative criteria will replace legal criteria as the basis for criticism of judicial performance. On the importance of efficiency in the performance of the judge it has been said: "Important as it may be—[it] is not the most important value … first and foremost, one must ensure that the judicial system enables a fair trial so that quick and efficient justice does not become quick injustice" (Shimon Shetreet "The Fundamental Values of the Judicial System in Israel",*Or Book for Supreme Court Judge Theodor Or* (2013) 617, at p. 635 (hereinafter: Shetreet, "Fundamental Values"). Public confidence, needless to say, is the "purse and the sword" of the court and the judge; and there are grounds for saying that, due to the desire to win this confidence, the judge's attention will unconsciously be drawn, to one extent or another, by those efficiency indices.

7. Efficiency *per se* is not necessarily negative, and the opposite may even be true. It can speed up the operation of the legal system, thus reducing the duration of legal proceedings and preventing a miscarriage of justice for the litigants. It happens not infrequently—although this is not the rule—that legal proceedings take too long. And it happens that the reasons for the delays are not sufficiently justified. In those cases, the harm to the litigants is not justified, and would be better avoided. In cases in which the drawn-out proceedings are not justified, the rising importance of the efficiency index is consistent with the demand to publish information, including the names of the judges.

8. And yet, despite the importance of the efficiency of the legal system, the work of the court, unlike that of the litigants, is, as a rule, not limited in time, and there is a reason for this. The pace at which each matter is dealt with and how long it takes are likely to change from case to

case: it is a matter for the discretion of the judge. Beyond the considerations of urgency and importance of every matter, which every judge weighs (see: para. 19 of Justice Hendel's opinion), the pace at which a case is handled and how long it takes are often the result of the case's factual or legal complexity. Decision-making in fact-filled cases requires intimate familiarity with the factual basis which, not infrequently—as any experienced jurist will attest—extends to a great many pages and takes shape during long hours of deliberations. In addition, decision-making in cases which are legally complex—sometimes in new branches of the law, and sometimes in complicated branches of the law—requires comprehensive, exhaustive research in order to construct the normative framework. An incomplete picture of the factual mosaic and insufficient familiarity with the legal materials in each and every case is liable to affect the quality of the judicial performance. Exhaustive research and familiarization with the facts are the mainstays of the work of the judge, and we know that "he that repeated his chapter a hundred times is not to be compared with him who repeated it a hundred and one times" (*Babylonian Talmud, Tractate Hagiga* 9b). These, by their very nature, involve an investment of a considerable amount of time. Assigning too great a weight to the index of efficiency is liable to bring about a reduction in the amount of time invested in the work of the judge. Such a process involves, as we have said, harm to the quality of the judicial performance. Certain defects in the work of the judge, needless to say, are liable to lead to a miscarriage of justice and to undermine the doing of justice.

9. Harm to the quality of judicial performance is also liable to find expression in a reduction in the scope of legal reasoning in judgments. Providing the reasons for a judgment is the "mouthpiece of the judge", by means of which the decision in the judgment is explained to its various addressees—the parties, the legal community, and the general public (Barak, *The Judge in a Democratic Society*, at p. 295). In the present case, the information that is requested relates to the Supreme Court and the district courts. In relation to each of these two judicial levels, the role of legal reasoning is slightly different, but each role is very crucial.

The reasoning in the district court provides the basis for the decision on appeal in the Supreme Court. Exhaustive reasoning allows the appeal instance to focus upon, and to reduce, the scope of disputes, and occasionally even to end them without the need for a written judgment. The disadvantages of insufficient reasoning, on the other hand, are many, so much so that it seems unnecessary to explain. Amongst the other disadvantages, non-exhaustive reasoning is liable to make the task of the panel hearing the appeal more difficult, to make the legal process cumbersome, and to harm the continued orderly and fair conduct of the case. Inhibiting the reasoning of the trial court is likely, therefore, to be a two-edged sword, and instead of promoting efficiency it is liable to detract from it.

The reasoning of the Supreme Court is also essential. True, it does not serve as the basis for an appeal, but it establishes case-law, directs behavior and instills values, and serves as a fruitful basis for essential academic and public discourse. The reasoning of the Supreme Court is also the major ethical basis that often nourishes the public confidence in the legal system in general, and in the Supreme Court in particular.

10. The concern that judicial decisions will be affected, either consciously or unconsciously, by these or other influences was not

unknown to the legislator, and it found expression in various pieces of legislation, including the norm concerning autonomy established in Basic Law: The Judiciary and in reg. 5 of the Code of Ethics for Judges, 5767-2007, which provides that the judge is not dependent on any person, not only in judicial matters but also "in any other field in which he acts" (ss. (b)). The regulation further provides that the judge shall fear no one, and shall not be influenced in fulfilling his role by public opinion, concern about criticism or a desire to please (ss. (3)). The work of the judge is also protected by means of the norm of *sub judice* that appears in sec. 71 of the Courts Law; by the rules of immunity in tort; by the rules governing testimony from a judge; and by the rules concerning his appointment and the terms of his employment (see: paras. 30-33 in the opinion of Justice Arbel).

11. It is against this backdrop that the difference between publishing data about the number of open cases and how long have they been in the process of being handled, without attaching the names of the judges, and the request of the respondents that the names be published, must be understood. When the non-named data is presented, the spotlight will be turned on the legal system as a system and not on the judges as individuals. It seems to me, that in most cases, this is what ought to be. It is the courts system, as a system and as an administrative authority, that has the resources, and the ability, to deal with the criticism, to internalize it, to refute it, and, if necessary, to provide explanations that will shed some light and dispel it. Because the reasons for the judicial overload are mainly a systemic matter, the system as such is also the correct address to which criticism should be directed. According to the existing distribution of the work, administrative information concerning statistical data about the number of open cases and the time taken to deal with them is in the hands of the courts administration. As such, that is also the body that bears responsibility for the what the data reflects , as well as being the relevant object of criticism. As opposed to this, the judgments themselves, which are the product of the judge's work, are published by the judge himself. Criticism of the contents of the judge's work is naturally directed at the judge, and not at the system. The concern is that publication of the names of the judges will divert criticism from the system, at which it ought to be directed, towards the judge instead.

Is this concern sufficient reason to refrain from publishing the information, including the names of the judges?

12. The Freedom of Information Law does not contain a purposes section specifying the main purpose that guided the legislator. My colleague Justice Arbel, enumerated several purposes, without determining their hierarchy (for a further review of the purposes, see: Jonathan Arbel and Tehilla Shwartz Altshuler, *Information Wants to be Free: Implementing the Freedom of Information Act in Israel* (Israel Democracy Institute, 2008) (hereinafter: Arbel and Shwartz). It would seem to be important to identify the relevant purpose in accordance with each case, as an interpretative aid, in order to balance the need to publish information with the need to refrain from exposing it. I believe that of the purposes in the Law discussed by my colleague, the principal purpose in the present case is to afford the public an opportunity to criticize governmental acts and omissions, or in other words, to expose the modes of operation of the public authorities (this is also the main purpose according to the late Ze'ev Segal, see: *The Right to Know in Light of the Freedom of Information Law*

(2000), 101-103; it is also the main purpose mentioned by the Minister of Justice during the debate on the Freedom of Information Law Bill — protocol of the deliberations of July 1, 1997 and May 19, 1998). The demand to expose the acts of government to the public is identified with the saying that "sunlight is the best disinfectant" (attributed to U.S. Supreme Court Justice Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (1914) 43). Underlying this saying is the assumption that the authority will conduct itself in the best way possible, even if only due to the fact that its activity is exposed to public scrutiny. Exposure of the activity to public scrutiny is intended to prevent *modes* of conduct and *methods* of decision making that the public wishes to reject. In our case, the assumption is that exposure of the administrative data concerning the handling of cases, together with the names of the judges, will increase the efficiency of the legal system.

13. Against this background, a balance must be struck between freedom of information and the need to refrain from handing over the information. In the present context, this balance is struck, as Justice Arbel explicated, in the framework of an examination of the exception due to interference with "the proper functioning of the public authority" in sec. 9(b)(1) of the Law. The central consideration in this balancing, as she explained, is "the public interest in the publication of the information." In the framework of considering the public interest in the publication of the information, regard must also be given to the public interest in refraining from such publication. In other words, the question is whether the public will benefit more from the information's being published or from its remaining confidential. In our case, as stated, the requested "information" includes two tiers: The first is the anonymous statistical data concerning the number of open cases and the time over which they are handled; the second is the names of the judges who are handling each case.

14. With respect to the question of the publication of the anonymous statistical data, the interest of the public would seem to be clear. Publicizing this data will expose the public to the judicial overload and to its ramifications for the duration of legal proceedings. This information will provide an opening for public discourse on the merits, which constitutes the very core of a democratic regime (cf: Aharon Barak, "Freedom of Information and the Court", *Kiryat Hamishpat* 3 (5763-2003) 95, at p. 97), and it will allow the public to formulate a position on the conduct of the system, including its efficiency. This discourse is the basis for bringing about structural changes and changes in the allocation of resources, in legislation, or in the actions of the executive branch of government, the goal of which is to increase the efficiency of the system. The existence of this discourse is dependent on the publication of the information. Hence, public interest in the information's being published is clear.

15. Unlike publication of anonymous statistical data, the question of the public interest in publication of the names of the judges does not necessarily have an unequivocal answer. Such publication is likely to engender benefit to the public interest, but it arouses a non-negligible concern. In broad terms, the concern is that the "efficiency index" will partially replace the "quality index". Publication of names—and Justice Arbel discussed this at length—is likely to motivate judges to make an effort to climb to the top of the chart, or at very least, not to be at the bottom. When this process of increasing efficiency does not come at the

expense of other essential aspects of the work of the judge, but only speeds it up, there is a public interest in the publication. But when vital aspects of the work of the judge are harmed, the interest of the public is liable to lie in refraining from publication of the information.

16. With respect to balance: in Justice Arbel's opinion, the probability standard by means of which the balance should be sought within the parameters of sec. 9(b)(1) is that of "near certainty" of interference with the functioning of the authority. Recourse to a uniform standard for the entire range of cases in which information is requested is not a given, but I am prepared to start out from the assumption that in the present case, that is the appropriate standard of probability (this is also the position of my colleagues, Justices Hendel and Rubinstein). The public has an interest in knowing how its judges manage their dockets; the rate of progress on cases; and the connection between the progress on each case and the judge who is dealing with it. To the extent that it will lead to increased efficiency in the judge's performance without detracting from its quality, an order should be issued to hand over the information. As opposed to this, if increased efficiency will lead, with near certainty, to interference with the judge's work, the information should not be handed over.

17. With respect to the *Supreme Court*, I accept the position of my colleague Justice Arbel, whereby harm to the work of the judges is not a near certainty. The Supreme Court is the highest court in the courts system, and naturally, concern that publication of the names of the judges will affect those judges' promotion is not actual. A justice of the Supreme Court has more auxiliary staff available to him than the judges of other courts, and the main thrust of the process of streamlining can be channeled to this staff, without harming the "inner core" of the judicial task. Moreover, it would seem that public interest in publishing the names of the justices of the Supreme Court is greater than in the district courts, *inter alia* because the Supreme Court is quite frequently called upon to decide on issues that are of social importance, in which the public has a great interest. In addition, as my colleague Justice Rubinstein points out (para. 14 of his opinion), due to the seniority of this highest instance, and in order not to create the impression that this Court is taking the law into its own hands, the public interest in publication of the names is greater.

18. Against this background, the assumption underlying the position of my colleague Justice Arbel, whereby the judge will be able to dissociate himself from the criticism, is reasonable with respect to justices of the Supreme Court. The obvious conclusion is that in the Supreme Court, interference with the functioning of the justices is not a near certainty, and therefore publication of the names of the justices who are handling the cases should not be prevented.

19. If my opinion is accepted, *publication of the information* relating to the Supreme Court, *without the names of the judges*, as agreed by the appellants, will be effected immediately upon the rendering of this judgment, in accordance with the most current information held by the appellants, and subject to there being no possibility of connecting, by means of this information, the judges hearing the cases with the cases themselves. As for the *names of the judges*, in order to allow sufficient preparation time for the aforementioned change: they will be published at the end of the 5775 (2014-2015) legal year.

20. As for the *district courts*, a categorical assumption that all the judges will be able to dissociate themselves from the criticism and avoid disruption to their work is not free of doubt. Criticism of the judges of the district courts is likely to have a greater effect than criticism of justices of the Supreme Court, *inter alia* due to the concern of the former that such criticism may impede their promotion. In addition, less auxiliary staff is available to the judges of the district courts than to the Supreme Court, and the concern that the harm will affect the "inner core" of the work of the judge is therefore greater. It is also true that reducing the time taken to hear evidence or the time spent on legal research is liable to affect the legal decision already at the level of the trial court. To the extent that an error is a non-legal one, i.e., it relates to factual findings and the conclusions therefrom, there is a concern that the error will be perpetuated, thus causing harm to due process and to justice. In view of what has been said, owing to the greater concern about interference with the functioning of the judges in the district courts, it appears to me that a different balance is required to that relating to the Supreme Court.

I believe that this balance must be found, not at the level of the decision, but at the level of relief. At the level of decision, even though the concerns described above are not light, they do not amount to categorical "near certainty" of interference with the orderly functioning of the judges. However, in order to alleviate the concern about harming the work of the judges, it appears that on the level of relief, there are good reasons for applying the judgment in an incremental, forward looking manner. Publication of the names of the judges is a substantive change from the present practice in the courts. Even those who support publication would surely agree with that. The purpose of the publication is to expose to public scrutiny another aspect of the judicial task which until now has been overseen from within the system (see Shetreet, "Fundamental Values", at p. 635, near the text "The President or the Deputy President are responsible from the administrative perspective for the judges …"). As a result of the act of exposing the names of judges, certain birth pangs can be expected. Presentation of the raw data will create an inaccurate picture. In order to present the data in a manner that is not misleading, a certain amount of preparatory work is needed, such as providing explanations for the state of some drawn-out cases (see: para. 59 of the opinion of Justice Arbel and para. 12 of the opinion of Justice Hendel). Beyond this, placing the names of the judges in the public spotlight can be expected to bring about a change in the maner that they conduct the administrative aspects of their work. Also, the system, as a system, is likely to slighty alter the manner in which cases are assigned (Shetreet, "Fundamental Values", at p. 635: "Today, the courts administration dictates to the judges the required pace of work …"). The district courts, unlike the Supreme Court, are not a single body, and their preparation for changes, and their adjustment, will naturally require more time. These changes require preparation and thought, both on the level of the individual judge and at the systemic level. In general, it may be said that these changes are primarily a matter of justice seen. But in order that these changes not harm justice itself, incremental implementation of publication is required. Therefore I am of the opinion that in the district courts, there should be incremental, forward looking implementation of the judgment: At the first stage, the data should be published without the names of the judges. This intermediate situation will allow the system, as a system—including the courts administration and the presidents of the district courts and their deputies—as well as each

judge, to internalize the change and to plan the administrative aspect accordingly. At the second stage, after a pause that will allow for the situation to be studied and for preparation, the names of the judges in the district courts, too, will be published.

Therefore, with respect to the district courts, if my opinion is accepted, *publication of the information without the names of the judges* will be effected at the end of the 5775 (2014-2015) legal year. Publication of the *names of the judges* will be effected at the end of the coming calendar year, i.e., the end of 2015.

21. After having completed my writing of this opinion, I read the opinions of my colleagues Justice Hayut and Justice Vogelman, who concurred in the relief proposed by my colleague Justice Arbel in para. 96 of her opinion. The date of implementation proposed by Justice Arbel is, in the final analysis, *deferred*, i.e., it is set for the end of the 2015 legal year and no later than December 31, 2015. Ultimately, the distance between our positions regarding the date of implementation of the *names of the judges*—which is the focus of the dispute—is not great. In these circumstances, I concur in the relief that was proposed in para. 96 of the opinion of Justice Arbel.

Justice E. Hayut

I concur in the comprehensive opinion of my colleague, Justice E. Arbel, and in her conclusion whereby the appeal should be denied and an order issued for the material to be delivered in a manner and at times as specified in para. 96 of her opinion.

1. A public authority in a democratic state—such as the judicial branch in Israel—possesses powers granted to it by law which it is obligated to apply for the sake of the public and for its benefit. It is considered a trustee of the public, and from this two important conclusions follow:

First, the information connected with the activity of such an authority is not its own property, and it, too, is held by it in trust for the public. In the words Justice H. Cohn, which are like fine, vintage wine:

> ‘… the private domain is not like the public domain, for the one acts with regard to its own property; if it wishes, it may give, and if it wishes, it may refuse. The other was entirely created merely to serve the common good, and it has nothing of its own: everything that it has is deposited with it as a trustee, and as for itself, it has no rights or duties that are in addition to, or different and distinct from, those that derive from this trust or that were conferred on it or imposed on it by virtue of statutory provisions HCJ 142/70 *Shapira v. Jerusalem District Committee of the Israel Bar Association* [1971] IsrSC 28(1) 325, at p. 331).

Secondly, the authority as a public trustee is accountable to the public which it serves. An as stated by (then) Justice M. Cheshin in a similar context:

> ‘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 (HCJ 3751/03 *Ilan v. Tel-Aviv-Jaffa Municipality* [*Nevo* – 2004], para. 15).

These and other important rationales are what provide the foundation of the principle of freedom of information, which has been a recognized, entrenched principle in the Israeli legal system for many years, and since 1998 has also been anchored in primary legislation of the Knesset, i.e., in the Freedom of Information Law (see AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper* [2006] IsrSC60(4) 217, at pp. 230-232 [hereinafter: *Council for Higher Education*], and see Justice Arbel's broad survey in paras. 20-25 of her opinion).

2. The point of departure for the principle of freedom of information is that every citizen or resident of Israel has the right to obtain information from the public authority. This right—the right to know—is included in the list of human rights, and as such, it stands on the highest rung in the hierarchy of rights (see: AAA 3300/11 *Ministry of Defense v. Gisha* [*Nevo* – September 5, 2012], para. 5 of my opinion). But like every other human right, it is not absolute, and the provisions of the Freedom of Information Law define and delimit it when the conditions it specifies are present (sec. 1 of the Freedom of Information Law). Thus, for example, sec. 9(a) of the Law enumerates the type of information which the public authority is not permitted to deliver, and sec. 9(b) enumerates the information that the public authority is not obligated to deliver. The crux of the dispute between the appellants and the respondents at the stage of the appeal before us is the question of whether, as the appellants claim, the respondents should be satisfied with the information regarding the cases that are pending in the district courts and in the Supreme Court *without designation of the names of the judges* or whether, in accordance with the position of the respondents and of the trial court, the appellants must also supply details of the identities of the judges who are handling the cases. The appellants base their position—according to which information specifying the names of the judges should not be delivered in this context—on the limitation established in sec. 9(b)(1) of the Law, whereby:

> "A public authority is not obliged to provide … information, the disclosure of which is liable to disrupt the proper functioning of the public authority, or its ability to carry out its duties"."

This limitation seeks a balance between the right to know and the important public interest in preserving the proper functioning of the public authority. As my colleague Justice Arbel pointed out (see paras. 53-57 of her opinion), the law is that when there is a clash between a constitutional right to obtain information from a public authority and between the said interest in sec. 9(b)(1) of the Law, the balance is a "vertical" one and therefore, as a rule, the public interest will prevail only where there is near certainty of the harm involved (AAA 6013/04 *State of Israel – Ministry of Transport v. Israeli News Corporation Ltd.* [2006] IsrSC 60(4) 60, pp. 82-84; AAA 1245/12 *Movement for Freedom of Information v. Ministry of Education* [*Nevo* – August 28, 2012], [hereinafter: *Ministry of Education*] per Deputy President E. Rivlin, paras. 7-8). Here it is important to distinguish between the *possibility of the occurrence of the harm* to the

public interest, which the limitation seeks to protect—with respect to which near certainty must be demonstrated—and between *the magnitude of the harm* to the interest, if it eventuates, which also carries weight in the framework of the balancing act, but with respect to which the authority is not obliged to demonstrate "special harm", and it should retain flexible criteria that can be applied having regard to the data and the circumstances of each and every case (*Council for Higher Education*, para. 21; AAA 1825/02 *State of Israel, Ministry of Health v. Retirement Homes Association* [2005] IsrSC 59(2) 726; *Ministry of Education*, para. 8).

3. The concerns about interference with the proper functioning of the judiciary that were raised by Justice Arbel in her written opinion and by Justices Hendel and Rubinstein in their written opinions are definitely worrying and they warrant attention. Particularly worrying in my view is the concern that the special emphasis on the efficiency of the judiciary and publishing the open cases together with the name of each judge individually, are liable to "breathe down the necks" of the judges and cause them to speed up the hearings and the rendering of judgment excessively, at the expense of quality. After all, the judges are not a "production line" for judgments. Judge Arbel discussed this, saying incisively: "The judge cannot fulfill his mission in a high-quality, full, and complete manner with a gavel in one hand and a stop-watch in the other …" (sec. 69 of her opinion). Indeed, it is important to bear in mind that efficiency is not everything, and therefore, evaluation of the activity of the judiciary according to "production units and output" is liable to distance the legal discourse from the substance which lies at the very heart of this activity—doing justice. On this matter, Professor S. Shetreet's words from over thirty years ago are on point, and still apply today:

> Because the goal of the legal process and the system of justice is to do justice, one must be wary of the tendency to examine them according to criteria of production units and units of output, and of the tendency to apply to them, without special adjustment, concepts of efficiency from other areas of organization and administration (Shimon Shetreet, "Practical and Value Problems in the Administration of Justice," in S. Shetreet (ed.), *Recent Developments in Israeli Case Law and Legislation, Collection of lectures delivered at the Seminar of Judges* 80-98, [81]).

Moreover, as my colleagues elucidated at length, without individual consideration of the scope of each case and its weighting from the point of view of the judicial time that it requires, the picture created is liable to be superficial and absolutely inaccurate. At the same time, and like my colleague Justice Arbel, I too believe that these concerns do not meet the standard of near certainty that harm will be done to the proper functioning of the judicial authority if the requested information is delivered, and therefore, my opinion, like hers, is that the right to know prevails in the present case. This conclusion is further validated in view of the fact that we are dealing with the judicial authority, which not infrequently orders the enforcement and implementation of this right with respect to other authorities, and it is therefore important that on this matter, we act in accordance with what the sages say, and that we "preach well and act well"

4. For these reasons I concur, as stated, in the opinion of my colleague, Justice Arbel, including in relation to the schedule laid out in

para. 96 of the opinion, in order to allow time for each of the judges involved to append an explanatory comment to the information regarding the open cases on his desk, as he sees fit.

Justice Vogelman

My colleague Justice E. Arbel discussed, at length and comprehensively, the normative basis that was required for the decision—beginning with the Freedom of Information Law, moving on to the special nature of the profession of the judge that constitutes a way of life, and ending with a comparative survey. I agree with my colleague that the judicial function requires—in its very essence—maximum transparency, which is a *sine qua non* for public confidence in the legal system; a fundamental conception that is expressed, *inter alia*, in the principle of the public trial; and the obligation to provide reasons. In my opinion, transparency indeed is characteristic of the conduct of the judicial system, on various planes.

At the same time, there is no denying that a hard look at reality makes it difficult not to agree with the conclusion of my colleague Justice N. Hendel, that compared to the existing systemic mechanisms for dealing with specific problems of overload in relation to particular judges, the benefit that will accrue from publication of named information is not great, whereas the publication is liable to cause a considerable degree of personal and systemic harm. It is not for nothing that the comparative survey presented by my colleagues reveals that, with the exception of the United States, there are no countries in which information is published in the format requested in the present case. In the United States too, to which my colleagues refer, such publication is not pursuant to regular legislation dealing with freedom of information, but rather, to special legislation which focuses on the judiciary, and subject to conditions that map out more particular, specific disclosure than what was requested here.

That is the point: the question that required our decision in the present proceeding is not whether the delivery of information that includes the names of the judges serves the public interest. We must decide whether the interpretation of the arrangement found in the Freedom of Information Law, with its limitation, leads to the conclusion that the requested data is not of the type that the authority is obliged by law to deliver, bearing in mind that the primary legislator did not see fit to exclude the judicial system from the application of the Freedom of Information Law insofar as administrative information is concerned. Like my colleague, Justice (ret.) Arbel, I too see no reason to determine that in the affairs of the judiciary, of all places, there should be a deviation from the balancing formula that we have fixed in our case law, whereby the public interest outweighs the right to obtain information if there is near certainty that disclosure of the information will cause real harm to the orderly functioning of the authority (see e.g. AAA 1245/12 *Movement for Freedom of Information v. Ministry of Education* [*Nevo* –August 23, 2012, para. 7). Even if I assume that disclosure of the names will indeed lead to real harm to the functioning of the judicial authority as my colleague Justice Hendel believes, I cannot say that there is near certainty that such harm will be caused on the systemic level.

My colleague Justice Rubinstein does not disagree with the normative framework and what that involves, but he points out that publication of the

information together with names will affect different judges differently, hence the different relief that he suggests. In view of my conclusion regarding the absence of near certainty of harm at the systemic level, and since I found that the relief suggested by Justice Arbel allows for a suitable period of organization, I do not see any reason to limit this relief.

Therefore I concur in the conclusion of my colleague Justice (ret.) E. Arbel and the relief that she suggests.

Decided by the majority opinion of Justice (ret.) E. Arbel and Justices S. Joubran, E. Hayut, Y. Danziger and U. Vogelman to deny the appeal. In order to allow the appellants to make the appropriate preparations for implementing the judgment, it was decided that they will be required to deliver data regarding the Supreme Court and the district courts as requested in the petition, in relation to the end of the 2015 legal year, and no later than December 31, 2015. Regarding the manner of disclosure of the information, the dissenting view of Justice Y. Danziger is that the appellants should be ordered to disclose the most recent information they possess, namely, information relating to the 5774 (2013-2014) legal year, no later than December 31, 2014. It was also decided that the appellants will pay the respondents' legal fees in the amount of NIS 20,000.

The above is contrary to the dissenting opinion of Justice E. Rubinstein, in whose opinion the appeal should be partially allowed but only in relation to the district courts, to be reconsidered periodically (whereas the material relating to the Supreme Court should be delivered as determined in the majority opinion), and the opinion of Justice N. Hendel, whereby the appeal should be allowed in its entirety.

27 Elul 5774

September 22, 2014