



ENSURING TRANSPARENCY

**Preventing cover-ups of security affairs,
and protecting people's right to know**

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SUMMARY

Security prisoners in Israel are subjected to unusual treatment. The legal representation at their disposal restricts their ability to choose a lawyer and to be represented as they see fit in court proceedings. At the same time, the authorities have for years abused the use of sweeping gag orders, extensive censorship, and blackouts in all matters pertaining to security prisoners and classified offenses.

Where requests for gag orders for security reasons are concerned, courts and judges usually indulge the defense establishment and approve their vast majority, thus serving as a mere rubber stamp. Furthermore, under pressure from security authorities and fear of harassment, families cooperate with these sweeping gag orders. This dangerous situation, where the defense establishment not only wards off leaks of confidential security information – admittedly a worthy and important goal – but imposes sweeping blackouts and gag orders on marginal details that have no bearing whatsoever on classified matters requiring secrecy, has long gone beyond a slippery slope. In fact, gag orders would not only seem to be intended to prevent real and present danger to state security but to block any publicity that might expose the defense establishment's negligence and failings.¹ This shroud of total secrecy increases the danger of cover-ups of serious affairs, harm to transparency and the public's trust, and violation of the people's right to know.

The ability to withhold confidential information has evidently diminished in the digital era. Therefore, the danger has grown that the public, who can readily access information that has undergone no real fact-checking, may be fed erroneous and damaging data.

This state of affairs calls for a reckoning of the issue of security prisoners and classified security offenses from several angles, including that of human rights. At the same time, we must consider the improper use made by the authorities and the defense establishment of sweeping gag orders, and regulate the proper balance between preserving state security and the people's right to know.

¹ Yossi Melman, [Israel Has Another 'Prisoner X,' And Again Fails To Manage the Crisis](#), Haaretz, 6 June 2021.

This is why, following the recent disclosure of the death of an intelligence officer in a military prison and after reviewing similar cases, such as the "Prisoner X" affair of 2010, we are publishing this policy paper calling for anchoring in legislation an arrangement that balances state security requirements with the people's right to know.

Zulat for Equality and Human Rights proposes to establish an arrangement that ensures a proper balance on the issue. We propose to amend the Military Justice Law in order to prevent situations where there are detainees or prisoners in Israel whose detention or imprisonment is known only to the security authorities, as well as to amend the Freedom of Information Law in order to oblige the authorities to differentiate between information whose disclosure might harm national security and information whose disclosure presents no such concern. This way, secret and confidential information will remain unpublished, while information that poses no risk and whose disclosure contributes to the people's right to know and reduces the violation of this right will be published.

It should be noted that one of the flagship issues promoted by Zulat is transparency. This is the third paper of its kind in our series of policy papers to ensure maximum transparency in Israel.

BACKGROUND

There have been reports in recent weeks about an IDF Intelligence officer who was incarcerated last September in a military detention facility, put on trial on extraordinary classified charges, and died two weeks ago in circumstances that cannot be publicized at this point.² For over six months, all hearings on the affair were held behind closed doors and without informing the public at the IDF's request. Sweeping gag orders were imposed on all the hearings and identifying details pertaining to the officer.³ Due to the gravity and secrecy of the offenses, not even his immediate family knew what he had been charged with, and the indictment was almost entirely redacted.⁴

From their conduct in this and similar cases, one gets the impression that as far as the IDF, the defense establishment, and the state's authorities are concerned, it would have been better if the offenses committed by the officer, the fact that offenses were committed, the reasons for his arrest, and the circumstances of his death could have been concealed altogether.

As noted, this is not an isolated case of military-security hush-up and censorship. It was preceded by "Prisoner X," the notorious case involving Ben Zygier, a Mossad operative who immigrated to Israel from Melbourne, Australia, was held in solitary confinement in mysterious circumstances, and eventually died in late 2010. According to official documents, he committed suicide and was found hanging in his cell.

At the time, the state completely concealed the case, including the very existence of Zygier as a detainee. Much effort was made to prevent media coverage and responding to inquiries from human rights organizations seeking to expose the details. Moreover, his incarceration was kept in such strict secrecy that even the wardens at Ayalon Prison reportedly did not know his identity. The gag order issued by the court

² Yaniv Kubovich, [Israeli Army: Intel Officer Who Died After Being Jailed on Classified Charges Was Not Suspected of Espionage or Treason](#), Haaretz, 3 June 2021.

³ Yaniv Kubovich, [Israeli Intel Officer, Jailed for Classified Offenses, Dies Under Circumstances Barred From Publication](#), Haaretz, 2 June 2021.

⁴ Galit Hareli, [Intelligence Officer Riding on a Scooter to His Tel Aviv Apartment Arrested and Shoved Into a Car in Broad Daylight](#), The Hottest Place in Hell, 6 June 2021 (Hebrew).

also banned the disclosure of the very existence of the gag order, and the Shin Bet prevented any report on the subject.⁵

Following the publication of the affair in a foreign television channel and other media reports, current Zulat President (and then-MK) Zehava Galon along with MKs Dov Hanin and Ahmad Tibi revealed the name of the prisoner as well as the blunders in the affair in the Knesset plenum, making use of the parliamentary immunity accorded to them by law.⁶

The case of the intelligence officer who died two weeks ago contains some unique inherent characteristics that ought to be considered. First, despite the sweeping gag orders regarding all details identifying the officer or the alleged charges against him, many rumors began to circulate on social media about his identity. These were followed by factual publications, including photos of the officer, his full name, stories of friends and family members, and many other details. An absurd situation emerged whereby a leading news site published a story on the case without revealing the officer's identity, whereas the readers' comments to the story repeated his name dozens of times.

The disclosure of cases where the rights of prisoners and detainees and the public's right to access information might have been violated, the growing use of social media as a major source of readily available and unchecked information necessitates an update and adjustment of the current situation in order to prevent distortions and minimize the damage caused by erroneous data relayed to the public.

Another matter that requires attention is the circumstances of the intelligence officer's death. According to reports, the IDF said the soldier was found in serious condition in his cell overnight and was taken to a hospital, where his condition deteriorated and he was pronounced dead. However, people close to the officer's family claim that, contrary to allegations, the officer did not commit suicide.⁷ A family member who reportedly spoke to him shortly before his death, said his voice betrayed no signs of distress either then or throughout his detention.⁸ Other associates claimed the autopsy revealed no

⁵ Ynet, ['Dead Mossad Agent' Affair Revealed](#), Ynetnews, 13 February 2013.

⁶ TOI staff, [MKs Protest 'Suppression of News About Jail Suicide of Australian'](#), The Times of Israel, 12 February 2013.

⁷ Yoav Zitun, [IDF Keeps Officer's Arrest and Death in Custody Under Heavy Censorship](#), Ynetnews, 2 June 2021.

⁸ Yossi Melman, [Israel Has Another 'Prisoner X,' And Again Fails To Manage the Crisis](#), Haaretz, 6 June 2021.

signs of bodily harm, hanging, physical injury, stabbing, or needle insertion, nor that the death was the result of a stroke or epilepsy.⁹

All of the above underscore the need for an in-depth independent investigation of the intricacies of the case and the circumstances of the officer's death, as well as the need to disclose additional details about the investigation in order to exercise the people's right to know and to shed light on what exactly happened in the dark bowels of a prison that the state is trying to hide from us.

This state of affairs calls for a reckoning of the issue of security prisoners and classified security offenses from several angles, including that of human rights. At the same time, we must consider the improper use made by the authorities and the defense establishment of sweeping gag orders, and regulate the proper balance between preserving state security and the people's right to know.

⁹ Galit Hareli, [Intelligence Officer Arrested and Shoved Into a Car in Broad Daylight, On the Way to His Tel Aviv Apartment on a Scooter](#), The Hottest Place in Hell, 6 June 2021 (Hebrew).

THE VIOLATED RIGHT: THE PEOPLE'S RIGHT TO KNOW

Every person has the right to demand and receive information, for this is the only way they will be able to formulate a position and pass criticism on government institutions, including the defense establishment, of course. The people's right to know is meant to protect the public from the concealment of information by government agencies or state institutions, and to allow citizens access to public information.

Academic literature on the subject cites two main reasons for the protection of this right in democratic regimes: One is that the people's right to know is a derivative of the right to freedom of expression in its positive sense. That is, in order for the citizens of a state to enjoy their right to freedom of expression and to win other people over to their views, the state must provide them with proper and sufficient infrastructure to obtain this information. Withholding such information de facto deprives citizens of the ability to invoke the protection of the constitutional right to full freedom of expression. Thus, ensuring the people's right to know and the right to receive information are prerequisites for the continued existence of a proper political-democratic regime.¹⁰

The second reason is proprietary. In other words, given that the people are the owners of government, the information held by state authorities belongs to the public and is intended for it, while the government holds it only as a trustee. Therefore, the government must ensure that the public has access to this information, which belongs to it in the first place.¹¹

During the second half of the 20th century, the people's right to know was recognized constitutionally or legally in many democracies, as well as in international conventions.¹² A comparison conducted in 2005 among the Council of Europe's 54 member countries and observers found that the people's right to know was anchored

¹⁰ Yoram Rabin and Roy Peled, [The Constitutional Right To Obtain Information](#), pp. 463, 467, Dalia Dorner's Book, 2009 (Hebrew).

¹¹ Dr. Hillel Somer, Dan Adar, and Amit Aliman, [Background Paper: The Constitutional Right to Freedom of Information](#), Herzliya Interdisciplinary Center, 23 June 2005 (Hebrew).

¹² Yoram Rabin and Roy Peled, [The Constitutional Right To Obtain Information](#), see footnote 18, pp. 483-484 (Hebrew).

in the constitution of 36 countries. In most of the rest, this right enjoyed other judicial or legal protection.¹³

¹³ Ibid, p. 475, Rabin and Peled note that this right is not explicitly written in the constitution of most long-standing democracies, but is explicitly anchored in constitutions enacted relatively late in the 20th century, by which time awareness had grown about the importance of this right.

PROPER BALANCE REQUIRED BETWEEN THE PEOPLE'S RIGHT TO KNOW AND STATE SECURITY

We propose to establish an arrangement that ensures the right and proper balance between the people's right to know and state security by amending two laws: the Military Justice Law and the Freedom of Information Law.

As it stands today, the Military Justice Law-1995 allows situations where the very existence of detainees or prisoners is known only to the security authorities, a state of affairs that calls for rectification. It is inconceivable that people in Israel should be incarcerated or detained, and that this should be completely hidden from the public eye. Information about the very existence of a detainee or prisoner must be transparent, visible, and public knowledge, certainly amid strict adherence to the confidentiality of details of the affair, to the extent that this is necessary.

On the other hand, the enactment of the Freedom of Information Law in 1998¹⁴ heightened the legal protection of access to government and public information by Israel's citizens and residents. The law clearly states that *"every Israeli citizen or resident has the right to receive information from a public authority in accordance with the provisions of this law,"* thus giving all citizens the possibility to demand information from a public authority even if the latter does not directly pertain to them.

Having said that, such disclosure is restricted or forbidden altogether in cases where the information might endanger state security, infringe on the privacy of other citizens, or if its acquisition entails an unreasonable outlay of resources. Moreover, Article 14 stipulates that the provisions of the Freedom of Information Law do not apply to such security bodies as the IDF, Mossad, Shin Bet, and others.

Although constant tension would seem to exist between the people's right to know and state security, this strain could actually be alleviated by establishing the proper balances between these two important values to ensure that state security comes to

¹⁴ [Freedom of Information Law 1998](#), Nevo (Hebrew).

no harm and that the damage to the people's right to know is reduced to the minimum possible.

An arrangement could be established that safeguards the proper balance on the issue, stipulating that a public authority must differentiate between information whose disclosure might harm national security and information whose disclosure poses no such concern. This way, secret and confidential information will remain unpublished, while information that poses no risk and whose disclosure contributes to the people's right to know and reduces the violation of this right will be published.

In fact, security prisoners are treated unusually in Israel. Although they receive legal representation, their cases are brought before a judge, and their families are allowed to visit them in prison, they are kept out of the public eye. As for gag orders citing security reasons, the courts and judges usually indulge the defense establishment and approve the vast majority of requests, thus serving as a mere rubber stamp.

For their part, under pressure from the security authorities and fear of harassment, families cooperate with the sweeping gag orders issued by the courts. This dangerous situation, where the defense establishment not only wards off leaks of confidential security information – admittedly a worthy and important goal – but also imposes sweeping blackouts and gag orders on marginal details that have no bearing whatsoever on classified security matters, has long gone beyond a slippery slope. In fact, the gag orders would not only seem to be intended to prevent real and present danger to state security, but to block any publicity that might expose the defense establishment's negligence and failings.¹⁵ This shroud of secrecy carries the danger of concealment and cover-up of serious affairs, for the simple reason that it provides greater freedom of action.

In light of all this, we propose to anchor in legislation an arrangement that balances state security requirements with the people's right to know. Such an arrangement will not allow situations where there is a detainee or prisoner whose detention or imprisonment is known only to the security authorities or where the very existence

¹⁵ Yossi Melman, [Israel Has Another 'Prisoner X,' And Again Fails To Manage the Crisis](#), Haaretz, 6 June 2021.

of a detainee or prisoner is classified, and will oblige the authorities to publish some unclassified information.

Had the authorities disclosed some safe information at their own initiative in the cases of the intelligence officer, "Prisoner X," and other classified prisoners, this would have probably led to greater transparency, increased the public's trust, averted a rumor mill and "fake news," and even prevented or at the very least reduced the wanton and gratuitous leak of classified information on social media and would have guaranteed the realization of the people's right to know. In doing so, everyone would have benefited: the public, state security, and the security prisoners.



In May 2020, we launched Zulat for Equality and Human Rights, a unique institute that combines research and analysis via social media networks and conventional media, and acts as a bridge between the political arena and civil society. Zulat's studies portray the political and public reality, but our work only begins there. As an activist think tank, we fight back by working to set an alternative agenda, change the public discourse, and advance policy and legislation to uphold democracy and human rights. We represent a broad perspective on human rights, that looks at universal rights, civil rights - private as well as collective, and social rights – as a whole. We believe all different types of rights depend and relay on one another.

[Read more about our mission on Zulat website](#)

Zulat for Equality and Human Rights

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