FORUM V

Public Disclosure and Confidentiality

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The issue of public disclosure is a difficult one for social welfare agencies. Although the public has a right to know about decisions that will affect their welfare, the individual client also has the right of privacy and confidentiality. The dilemma between disclosure and privacy has become a major issue for the media, which strive to disclose the truth and yet remain above mere gossip and slander. This article examines the issues of public disclosure and confidentiality as reflected through Jewish sources. In highlighting the relationship of Jewish law to contemporary problems, it is my hope that the material in this article will be used by Jewish institutions to develop policies of confidentiality and public disclosure.

The Freedom of Information Act, which went into effect on July 4, 1967 and serves as the basis for public disclosure in American institutions, is grounded on two assumptions. The first is that the public has a "right to know." The First Amendment to the Constitution guarantees the public the right to free access of information. As President Johnson stated when he signed the Freedom of Information Act into law in 1966, "A democracy works best when people have all the information that the security of the nation permits" (Sherick, 1978, p. 7). The second assumption is that this right to know is exceedingly important because certain governmental institutions may make decisions in the interest of the public while deliberately withholding vital information from the people. In the past several decades, many agencies were covering up such environmental problems as toxic waste and the runoff from nuclear power plants. The government was maintaining, as classified information, detailed reports on citizens placed under public scrutiny because they attended political rallies or protest marches. Little information was provided to the public on key decisions that were made by political appointees, assistant secretaries, or other top government officials. Information was not divulged that would prove embarrassing, such as the misuse of government funds or contracts given to people who were politically well connected.

"Information has been described as the currency of power and many agencies have developed strategies and discriminatory practices which impair the abilities of citizens and public interest groups to effectively contest unwise governmental practices and industry actions contrary to the public interest" (Gordon & Heinz, 1979, p. 220). The right to know thus arises both out of an understanding that a free democracy needs an informed electorate and of a basic mistrust of government and governmental agencies. The American system is firmly grounded in the belief that only through free access to information can the American way of life be guaranteed.

The Jewish view regarding the public's "right to know" is based on different assumptions, which therefore lead to different conclusions. One assumption is that authority is good and always acts within the best interest of the people. It is assumed that rulers would never make decisions that would affect the public adversely. Second, the issue of disclosure and confidentiality is grounded in two laws found in Leviticus Chapter 19. The first commandment is that one "should not be a tale-bearer," and the second is that one has the responsibility to "rebuke one's neighbor." The command to rebuke one's neighbor serves

as the basis for open and free criticism, whereas the commandment of not being a tale-bearer limits the opportunity for open and free debate. In a debate on the Laws of Libel in the Knesset in 1963, the Minister of Justice said:

> The first of these two commandments (that is that one should not be a tale-bearer) serves as the basis in Jewish law for Libel and the second (that is to rebuke one's neighbor) serves as the basis for free public criticism . . . The laws forbidding libel in no way hamper free discussion and critical debate in no way requires defamation of character (Divra: Ha Knesset, 1963, p. 2403).

There are a number of cases in Jewish law that help define the issues of disclosure and confidentiality and clarify the Jewish view on the public's right to know. The cases are in these areas: the confidentiality of court decisions; censorship; and evaluation, libel, and gossip.

CONFIDENTIALITY

Jewish tradition seems to guard the confidentiality of court and yeshiva discussions. This position is based on the idea that free and open debate on intellectual issues may require people to take unpopular stands. The search for truth mandates one to be free to experiment with ideas and intellectual inquiry without fear that these positions will be made public and the author of the statements will be criticized by the public. A rabbi or a judge should not play to an audience, but rather should seek the truth without regard to pleasing the crowd. If one's ideas and opinions are made known, then the nature of the debate would necessarily change. The Talmud states:

> It was rumored of a certain disciple that he revealed a matter stated in the Beth Ha Midrash twenty-two years before. So Rabbi Ami expelled him from the Beit Ha Midrash saying: this man reveals secrets (Sanhedrin 31a).

Therefore, it is forbidden to still debate by publicly reporting positions of individual rabbis.

Moreover, a Jewish court that renders a decision is not required to provide the record of the discussion. The Shulchan Aruch states that if one of the litigants wants a written record of the court decision, it is merely permitted to state that Mr. X came before the court in a dispute with Mr. Y and the court ruled upon the evidence that one party was guilty and the other party was innocent (Shulchan Aruch, Chosen Mishpat 14:1). The transcript of the court's discussion of the issues is confidential and may not be disclosed. Jewish tradition supports the idea of confidentiality of debate and therefore limits the public's access to the discussion. The Jewish legal system is based on seeking truth and not necessarily satisfying the public's right to know.

However, Jewish law does seem to support the public's right to know in those cases where the public may come to harm if they did not have all the facts. The Chafetz Chaim wrote several volumes on the problem of gossip and tale-bearing. In distinguishing between the public's right to know and gossip or defamation of character, he writes:

> The Torah's attempt to prevent tale-bearing or evil speech is to stop people from hurting their neighbor or rejoicing in their downfall. If the reason for evil speech is to prevent others from imitating their qualities or preventing public harm, then it is a positive act (*Shmirat HaLashone*, Part 1, Rule 7).

It would seem from this statement that there is a right of the public to know in those cases where the public can be harmed by the actions of others. The community would certainly have a right to know about those administrative decisions that will affect the quality of their lives and their environment. An individual or an institution would be obligated to reveal the information for the good of the public. The public interest is the overriding concern.

An interesting case concerning the revelation of medical information is found in the Jerusalem Talmud.

> Rabbi Yochanan had scurvy and he was receiving treatment from the daughter of Domitian in Tiberias. One Friday, he went to her. He said to her "Do I need to be treated tomorrow on the Sabbath?"
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> She said to him, "No. But if you should need something, put on seeds of date palms split in half and roasted and pounded together with barley husks and a child's dry excrement. Apply that mixture but do not reveal to anyone this potion which I have prescribed for you." The next day he went to the synagogue and publicly revealed the potion in his speech (Avodah Zarah 2:2).

Rabbi Yochanan felt it was permitted to reveal the potion because it was within the public's interest. The public has a right to know about medical treatments that can help them. This, of course, raises serious questions about patents on pharmaceutical products.

CENSORSHIP

Although the overriding concern is the public interest, Jewish law also takes the position that the authorities have the right to limit access to information. A case for censorship can be established from an interesting Mishnah (Mishnah Megillah 4:10):

> The story of Reuven found in Genesis 35:22 should be read in the synagogue but not translated into Aramaic. The story of Tamar found in Genesis 38 can be both read and translated . . . The story of David and Batsheva found in Second Samuel II and the story of Amnor and his sister found in Second Samuel 13 should neither be read nor translated.

Censorship of the Bible is permitted in these cases because of the public's possible misunderstanding of great biblical personalities. The Talmud views the great heroes of the Jewish tradition in a particular way, and the rabbis did not want people to misunderstand the stories about these heroes or their motivations. Second, these stories all deal in some way with sexual perversions. The rabbis did not want individuals to talk about sexual perversions on the theory that talking about certain forbidden issues may lead one to violate those issues. There was the fear that when a forbidden issue reaches consciousness and is talked about, the bounds of society may be loosened and forbidden acts committed. The basic assumption is that someone who violates society's moral standards implicitly threatens society's belief in them. If the violations are not publicly read or talked about, then society's standards are defended and valued. Lastly, this case also raises the issue of the right of the authorities to censor materials in the public interest. This issue is most crucial for Israeli society in which the military censor has the right to forbid the publication of certain written materials based on national defense and safety requirements. Who determines the national interest?

A DEFINITION OF LIBEL AND GOSSIP

In this era of fiscal constraints, evaluation of programs and of personnel has become an important element of all social welfare institutions. Under American law, personnel evaluations must remain confidential and cannot be shared with a potential employer. The current employer can only report that a certain employee worked at a particular agency for a specific amount of time. He or she cannot disclose fully the nature of the employment or the evaluation of the employee. In contemporary American law, an employer can be sued for libel if he or she reveals the content of an evaluation.

Jewish tradition is supportive of employee evaluations and urges a full disclosure of the evaluation with the employee. Maimonides writes,

> If one sees someone doing something wrong, it is the responsibility of the person to tell

> his neighbor that he is doing something wrong as it is written in Leviticus 19, "You shall surely rebuke your neighbor." This has been interpreted to mean that one has the responsibility to inform one's neighbor that he/she is doing something wrong whether it be a religious or an ethical action. It should be done in private discussion and not be made public (Mishneh Torah, Hilchot Deot, Halachah 7).

The reason for evaluation is to facilitate the personal growth of the employee. An employee grows only as the supervisor establishes an honest relationship with the employee and shares an honest evaluation of the employee's job performance.

The problem arises when the evaluation process results in the employee leaving the agency. Does the current employer have the responsibility to reveal the evaluation to another employer? Three factors must be considered: the nature of the evaluation; the nature of the job, whether administrative or dealing directly with clients; and the potential harm that can be caused by not revealing the real evaluation of job performance.

On the issue of revealing the nature of employee evaluations, Jewish law differs from American employment law in that it uses the standard of public interest. The sources argue that in the interest of the public confidential information may be revealed. According to Jewish law the public does really have a right to know confidential information about someone if the disclosure of that information may prevent public harm. Several examples are given in the sources. In one case, a physician may break the trust of confidentiality if by keeping quiet the physician could cause potential harm. If the physician knows that a patient has a serious illness and that the patient is arranging a marriage but has not told the potential partner of the illness, the physician is responsible for telling the partner of the illness (Pliskin, 1975, p. 176). If information is known about the lifestyle of a teacher and that lifestyle is potentially harmful to his or her students, then the information must be revealed. The Chafetz Chaim writes,

> If a person witnesses an evil tendency in another person, as an example, the person is either angry or proud or that person does not learn Torah, then he is obligated to publicize the matter to his students to prevent them from learning this bad quality. The Torah's attempt to prevent tale-bearing or evil speech is to stop people from hurting their neighbor or rejoicing in their downfall If the purpose of the evil speech is to prevent others from imitating his bad qualities and thereby preventing public harm, then it is a positive act (*Sefer Chafetz Chaim,* 1964, p. 95).

If a teacher has received a poor evaluation, then it would be the responsibility of the principal to inform the potential employer. One should not subject a new group of students to a poor teacher. The same would apply in all fields of social welfare.

Evil speech, slander, or gossip is defined as conversation about another person without reason or with ulterior reason. A person may not gossip about another person and thereby cause him or her harm. Jewish law rules that if one gossips and that gossip leads to economic harm, then the person who spread the gossip is liable to be fined according to the nature of the public embarrassment of the one who is being gossiped about. According to the Chafetz Chaim, one is permitted to speak evil speech in those cases when doing so could prevent public harm (Pliskin, 1964). However, one must first attempt to discuss the issue with the individual in private. It is only as a last resort that one may go public with specific information.

SUMMARY

The Jewish view is that the public has a right to know only in those cases where there is clear evidence that the public's interest is at stake. Therefore, as a general policy social welfare institutions are not re-

quired to open their board meetings to the public or to publish their internal debates about social welfare issues and policies. However, they would be required to inform the public of their policy decisions and of those governmental decisions that may cause the public harm. Communal agencies should take strong stands on those issues that would affect the public good adversely. Jewish law also encourages employee evaluations. The purpose of these evaluations is to improve the quality of service to the community. The evaluation can be made public only if it contains information that the employee could cause potential harm to the public interest. The public has a right to know when they will be harmed.

The strength of the Jewish community has been its ability to criticize and at the same time protect the dignity of the individual, walking the fine line between rebuking one's neighbor and not being a tale-bearer. It is the responsibility of Jewish communal agencies today to define, through their practice, the line between these two concepts.

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