State Audit Work that Raises a Suspicion of Criminal Conduct – the Case of Israel

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Introduction

In course of an audit, the State Comptroller often discovers facts which suggest the possibility of criminal conduct. However, in Israel, the State Comptroller does not have legal authority to carry out criminal enforcement or investigatory activity. According to Section 14(c) of the Israeli State Comptroller Law 1958 [Consolidated Version] (hereafter: the "State Comptroller Law"), when a suspicion arises regarding the possible commission of a criminal act, the State Comptroller is required to notify the Attorney General. This phenomenon is hardly unique to Israel. Many countries have defined procedures for dealing with suspicions that arise during the work of the supreme audit institution [hereafter: "the SAI" or "the SAIs", as relevant] regarding possible criminal conduct.[1] Examples of such procedures, as they are used in other legal systems, are presented below - in their specific relevant contexts.

Thus, over the years, pursuant to Section 14(c), when suspicions of criminal acts have arisen during the course of the State Comptroller's work in conducting audits - these suspicions have been brought to the attention of the Attorney General.[2] In some cases, the notifications are then followed by the Attorney General ordering an investigation, and some of these investigations have led to criminal trials [3] or disciplinary hearings. [4] Despite its seeming simplicity, the language of section 14(c) often raises various questions of interpretation affecting the state audit work, as well as the reciprocal and working relationships among the State Comptroller, the Attorney General, and the Israel Police. This essay will discuss a few of the interpretation issues that are inherent in Section 14(c), as

1 We conducted a survey among the SAIs of several countries, regarding the process through which state audit institutions handle suspicions arising during the course of an audit, regarding the commission of a criminal act. As part of the survey, we asked the following questions of the various SAIs included in the survey: "As part of a study being undertaken by our Office, we are examining the various ways different legal systems deal with criminal matters uncovered in the course of an audit undertaken by the SAI. If possible, we would very much appreciate if you could clarify for us how your Office deals with situations in which an audit reveals suspected criminal activity; please refer us to the relevant sections of legislation (and any written guidelines and academic material, if it is not too much trouble) that deal with this issue." The SAIs of India, Japan, Poland, Hungary, and the United States were gracious enough to respond with highly detailed answers. In addition, we obtained information about Serbia, Portugal, Germany, the Czech Republic, Greece, Slovenia, and Italy - from the following sources: National Audit Office, State Audit in the European Union (2005) (UK); Kristin Reichborn-Kjennerud, Thomas Carrington, et al, *Supreme Audit Institutions' Role in Fighting Corruption,* Paper for the 15th Biennial CIGAR Conference 2015 in Valletta, Malta 4-5 June, 2015 (2015). These data were verified by an examination of the relevant laws of the various countries.

2 Obviously, the examples in this essay do not refer to cases that are still being examined by the Attorney General.

3 See, e.g., the widely covered court decision in the criminal prosecution of the then Director-General of the Interior Ministry, Aryeh Deri, CrimC 1872/99 (Jerusalem) *State of Israel v Deri* (published in Nevo, September 24, 2003); see also, the verdicts in the *Hevroni* case, *infra* note 67, at pp. 94 and 101, discussed below.

4 At times, the State Comptroller informs the Attorney General of suspicions regarding the commission of a criminal act, but the Attorney General decides that only a disciplinary hearing is required.

well as the ways in which the section's language interacts with other relevant legal texts. The objective of this article is thus to present the first research regarding the problems arising in the Section 14(c) context, and their effect on the state audit process and on the State Comptroller's relations with the State Attorney's office and with the Israel Police (hereafter: "the Police").[5]

1. Legislative History: The Development of Section 14(c) of the State Comptroller Law

The reporting mechanism currently set out in section 14(c) of the State Comptroller Law has undergone several transformations over the years. Section 10(c) of the State Comptroller Law of 1949, the original version of the statute, provided that "the Comptroller **may** […] notify the Attorney General […] in the event that he finds suspicion that a criminal conduct has been committed" (emphasis added).[6]

Section 10 was changed by the 1958 amendment of the original law. After the amendment, Section 10(c) read as follows: "should the audit reveal that the audited body behaved in a way that raises a suspicion of criminal activity, the Comptroller **shall notify the Attorney General of the matter**" (emphasis added).[7] That same year (1958), the section was included in the law's consolidated version and, because of the new numbering, it became the consolidated statute's Section 14(c).[8]

In 1966, the language of Section 14(c) was changed yet again, and the following text was added: "The Attorney General will inform the Comptroller and the Committee on the manner in which the matter was handled, within six months of being notified."[9]

Due to an additional amendment enacted in 2001, the phrase "should the audit reveal that the audited body behaved in a way that raises a suspicion of criminal activity" was replaced

5 There is very little discussion of Section 14(c) in the legal literature. In her book, BASIC LAW: THE STATE COMPTROLLER (2005) (in Hebrew), Miriam Ben-Porat refers to the section only a few times (at pp. 99, 236, 264, 313, 321). The only legal article written about Section 14(c) to date was published in the mid-1970. See, Shmuel Hollander, "A Suspicion Regarding a Criminal Act: Section 14(c) of the State Comptroller Law" (Hebrew), 24 STUDIES IN STATE AUDIT, 17 (1975); see also the brief reference to the section in an essay by former State Comptroller Yitzhak Ernst Nebenzahl, "The Significance of 'Incorruptibility' in the State Comptroller Law," 133, Paragraphs 3-4, in *Gedenkschrift in Memory of Avraham Vinshel* (Naftali Lifshitz, Yitzhak Ganon, and Reuven Hecht, eds., 1977) (in Hebrew).

6 Section 10(a) of the State Comptroller Law, 1949, SH [*Sefer Hahukim* – Israel Laws] 8 (May 24, 1949).

7 Section 10(c) of the State Comptroller Law, 1958 (Amendment), SH 245, 76.

8 State Comptroller Law, 1958 [Consolidated Version], SH 248, 92.

9 State Comptroller Law (Amendment No. 30), 1996, SH 1572, 134.

by "[i]f the audit work gives rise to a suspicion that a criminal act has been committed."[10] The explanation originally given for the proposed amendment was that, "[i]n practice, in most cases in which the State Comptroller notifies the Attorney General of a suspicion regarding a criminal act, the act is not that of the audited body itself, but rather that of an employee or official in that entity or in a different entity"[11], requiring an amendment of the statutory language.

The most recent amendment of Section 14(c) was enacted in 2007, adding a reference to disciplinary infractions. It provides that the State Comptroller may inform the Attorney General if the audit raises a suspicion of "a disciplinary violation as defined by law."[12] Thus, in the current version of the State Comptroller Law, Section 14(c) reads as follows:

> "If the audit work gives rise to a suspicion that a criminal act has been committed, the Comptroller shall notify the Attorney General of the matter and may do so if the audit work gives rise to a suspicion that a disciplinary infraction as defined by law has been committed; the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled within six months of being notified."[13]

2. Interpretation of Section 14(c) of the Law

Each phrase of Section 14(c) presents questions of interpretation that require clarification. We shall discuss all of these, according to the order of their appearance in the text.

10 State Comptroller Law (Amendment No. 33), 2001, SH 1781, 174.

11 Draft amendment of the State Comptroller Law (Amendment 33) of 2001, HH [*Hatz'aot Hok* – Proposed Laws] 2977, 498.

12 State Comptroller Law (Amendment No. 39), 2007, SH 2121, 66.

13 See and compare a parallel arrangement in Chapter 7 of the State Comptroller Law, which establishes the limits of the State Comptroller's authority and the manner in which the Comptroller may act, as Ombudsman. Section 43(d) of Chapter 7 provides as follows: "When the investigation of [a] complaint gives rise to a concern that a criminal offence has been committed, the Ombudsman shall bring the matter to the knowledge of the Attorney General; and he may do so when the investigation of a complaint gives rise to suspicion that a disciplinary offence has been committed pursuant to any law. The Attorney General shall inform the Ombudsman and the Committee, within six months from the day that the matter was submitted to him, of the manner in which he has dealt with the subject." Although these are parallel sections – one places the burden of notification on the State Comptroller and the other refers to notification by the Ombudsman – this essay discusses section 14(c), but not Section 43(d).

A. "If the audit work gives rise to …"

The phrase "[i]f the audit work gives rise" imposes on the State Comptroller a duty to notify the Attorney General of any matter which is discovered in the course of work being done in preparation of an audit, and which gives rise to a suspicion that a criminal act has been committed.[14] Although at first glance, this phrase appears to be simple and clear, two basic questions arise regarding its interpretation. First, must the suspicion that a criminal act has been committed arise as a direct consequence of the audit itself, or will the reporting duty also apply to any suspicion arising as a result of the handling of other matters at the institution under audit? Second, is it only information or a suspicion regarding the commission of a criminal act that was discovered directly by State Comptroller employees themselves that should be brought to the Attorney General's attention? Or should the Attorney General be notified regarding any suspicion regarding the commission of a criminal act that was brought to the attention of the auditors, while they were working at the institution under audit?

With regard to the first question, the policy of the State Comptroller's Office, based on an opinion issued by the Office's own Legal Department[15], is that the phrase "[i]f the audit work gives rise" should be broadly interpreted,[16] so as to include all information giving rise to suspicions of criminal acts that has come to the attention of State Comptroller personnel through their work in the audited institution.[17]

As for the second question, it is not appropriate for the State Comptroller's Office to be required to serve as a conduit for providing information to the investigating authorities, and employees in the audited institutions should not be encouraged or incentivized to provide information to audit personnel if that information is not substantively relevant to the audit. The State Comptroller's Office does not operate as an intelligence gathering unit for the Police and thus, whenever necessary, individuals are told to notify the police directly about their suspicions or knowledge regarding criminal acts.

14 Similarly, in this context, the German law provides that if suspicions arise during the course of audit work, they must be reported. But the law specifies that the suspicions must have arisen "in the course of field work." See "Audit Rules of the Bundesrechnunshof," Section 27(3); in contrast, the formulation in the law regarding the Japanese SAI is broader, and refers to findings that are "as a result of its audit"; see Sections 31-33 of the Board of Audit Act (Jp).

15 Hereafter, all references to the Legal Department refer to the legal department of the State Comptroller's Office.

16 The question of whether the State Comptroller is **obligated** to bring suspicions about the commission of a criminal act to the Attorney General, or whether the State Comptroller has the discretion to decide whether or not to report such suspicions, will be discussed below.

17 "The policy of providing materials to the Attorney General in accordance with Section 14(c)", at p. 3 (internal opinion issued by Atty. Tzipora Schlezinger, August 4, 2002) (opinion held in the Legal Department's archive).

In this context, we should note that occasionally, materials and information raising a suspicion that a criminal act has been committed are indeed submitted to the State Comptroller's Office in a context that is not a part of the audit of an audited institution (i.e. in situations in which the condition implicit in the phrase "[i]f the audit work gives rise …" has not been met). For example, ordinary citizens – sometimes anonymously – write to the State Comptroller's Office to describe their suspicions regarding the possible commission of criminal acts. Despite the understandable policy of not encouraging the State Comptroller's Office to serve as a conduit for delivering materials relating to possible criminal acts to the Police, and because of the need to behave responsibly vis-à-vis the public, such information is brought to the Attorney General's attention – but this is done outside of the channel of communications described in Section 14(c) (and outside of the parallel practice described in Section 43(d) of the law).[18] When letters dealing with such suspicions are referred to the Attorney General, the State Comptroller makes it clear that the State Comptroller's Office has no information about the materials' reliability and that the materials are submitted to the Attorney General to do with as he sees fit. Clearly, the use of this non-statutory channel means that the Attorney General is not required to inform the State Comptroller of how the matter is handled within six months of notification (as he is required to do with regard to information that is provided pursuant to Section 14(c)).

B. "…a suspicion…"

What sort of concern will qualify as a "suspicion" that a criminal act has been committed as that term is used in Section 14(c) of the State Comptroller Law?[19] What is the level of evidence required to form the basis for the auditors' suspicion that a criminal act has been committed, so as to justify notification of the Attorney General? The statutory language does not provide a definitive answer to this question, and does not make clear whether the level of evidence must equal that which is sufficient for issuing an indictment pursuant to Section 62(a) of the Criminal Procedure Law.[20]

18 The State Comptroller's Office refers to such notifications as "notifications not based on Section 14(c) of the Law."

19 The threshold set by the Polish law is "reasonable suspicion," whereas in Hungary the threshold is described as "grounds to suspect." See, respectively, Supreme Audit Office Act (Pln), and Act LXVI on the State Audit Office of Hungary of 2011 (section 30).

20 Section 62(a) of the Criminal Procedure Law [Consolidated Version], 1982, (hereafter: "the Criminal Procedure Law"), provides as follows: "If the prosecutor to whom the investigation materials were sent sees that the evidence suffices to indict an individual, the prosecutor will indict that person, unless the prosecutor is of the opinion that there is no public interest in holding a trial."

The question of the strength of evidence needed to justify a notification of the investigating authorities (e.g. the Attorney General) is an issue for SAIs in many countries. A study published in 1999 showed that there are three approaches generally taken by SAIs when encountering a suspicion that a criminal act has been committed.[21] The author's findings were as follows:

> "SAI action on suspected fraud generally falls into three categories, each with its own strength and weakness. One course of action calls for immediate referral of questionable activity to the appropriate legal authority. Immediate referral puts potential criminal matters squarely in the hands of those best qualified to pursue them – trained investigators. However, matters that initially appear suspicious may have reasonable explanations, and this course of action could involve legal authorities unnecessarily.
>
> "A second approach – making referrals for investigation only after fraud indicators are clearly identified and confirmed through extended audit steps – resolves the issue of involving legal authorities in matters that are not criminal. However, this approach risks losing time, revealing the potential investigation to those involved, and perhaps tainting the evidence.
>
> "In the third course of action, the SAI investigates the matter to confirm an illegal act. The advantages of this approach – timeliness and confidentiality – are achieved because the initial investigation remains within the SAI's control. However, the investigation itself can be successful only if the SAI has the authority, resources, and expertise necessary to carry out the investigation."[22]

The difficulties attendant to each of the methods described above are a cause of concern for the SAIs of many countries. One concern is that the slow, convoluted manner in which suspicions are reported to enforcement authorities effectively allows the audited institutions to conceal, eliminate or obliterate the evidence pointing to the criminal act. To confront this difficulty, some SAIs have established audit units specializing in gathering forensic evidence and identifying and investigating indications of criminal acts. Other SAIs have created mechanisms that involve the investigating authorities immediately after a suspicion arises that a crime might have been committed.[23]

Regarding this issue, Shmuel Hollander, who served as Deputy Legal Adviser to the State Comptroller[24] during the 1970's, wrote as follows: "It is not sufficient that there is merely a

21 Magnus Borge, *The Role of Supreme Audit Institutions (SAIs) in Combating Corruption*, 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa (1999). These three approaches are also relevant to the question of when law enforcement should be contacted, an issue that we will discuss below.

22 *Ibid*, at p. 18.

23 *Ibid*.

24 Hereafter, unless otherwise indicated, all mentions of the Legal Adviser or a Deputy Legal Adviser will refer to those holding or who held that position within the State Comptroller's Office.

theoretical possibility of a criminal act, but it is also doubtful if the audit personnel can be asked to provide the Attorney General with the full scope of evidence required for the conviction of a crime, which is a quantity of evidence likely to persuade the court of the defendant's guilt beyond a rational doubt. This is a threshold that the audit cannot and must not be asked to meet."[25] Given this dilemma, Hollander proposed adopting the following yardstick: "If there is 'the beginning of evidence,' i.e. certain reasonable level of evidence regarding the matter that a crime may have been committed, the Comptroller will notify the Attorney General."[26] Yosef Sapiria, who served as the Legal Adviser during the 1980's, suggested the following test: "By law, it is not the Comptroller's function to produce irrefutable proof of a criminal act; it is sufficient if the audit's findings indicate suspect circumstances and, in the Comptroller's opinion, raise a suspicion warranting the Attorney General's attention."[27] Despite a certain difference between them, we feel that Hollander's and Sapiria's formulations are appropriate, and that the criteria created by the word "suspicion" as set out in Section 14(c) should be understood as requiring that the level of evidence needed to establish a "suspicion" is less than that required of a prosecutor when issuing an indictment. This is because a police investigation will, presumably, take place after the audit materials are submitted to the Attorney General, and the police have many more means available to them for gathering evidence than are available to the State Comptroller's Office.[28]

25 Hollander, *supra* note 5, at p. 21. The term "rational doubt" was probably meant to refer to the equivalent phrase "beyond a reasonable doubt," which is the term used in Section 34V(a) of the Israel Penal Code, 1977 (hereafter: "the Penal Code"), to establish the level of evidentiary proof required for a criminal conviction. There have been situations in which the State Attorney's office felt that the State Comptroller notified the Attorney General of material that was insufficiently "ripe" for notification pursuant to Section 14(c), and the Comptroller's Office was consequently told, in light of this, to complete the audit examination. See a letter dated May 11, 1984, from the Legal Adviser, captioned "Applying Section 14(c) of the State Comptroller Law": "While, until today, I worried that the Attorney General and police were dissatisfied with us for not bringing enough cases to their attention, the truth of the matter is that the two notifications in question indicate that, in the opinion of the State Attorney, we are submitting matters that are not 'ripe' and do not warrant the use of Section 14(c). One of Dr. Ben-Or's [at that time, a senior deputy State Attorney] letters includes a request that we complete the examination to determine whether or not the claim was baseless – a task that I feel is not within our remit."

26 *Ibid.*

27 Letter from the Legal Adviser, dated May 11, 1984, to the Attorney General, captioned "Section 14(c) of the State Comptroller Law," (held in the Legal Department's archive).

28 Hollander, *supra* note 5, at p. 20.

C. "…that a criminal act has been committed…"

The phrase "criminal act" is hardly commonplace statutory language. Even when this law was passed, it was not routinely used in Israeli legislation.[29] It would seem then that the phrase means not only a "criminal act," but also a "criminal omission" given the use of the broad word "act," currently appearing in Section 18(b) of the Israeli Penal Code 1977 (hereafter: the "Penal Code").[30] Given the above, it would seem appropriate to interpret the phrase "criminal act" as parallel to the word "**crime**"[31], as it is commonly used in the general part of the Penal Code and in criminal legislation generally, and which is defined in Section 1 of the Interpretation Order [New Version] as "an act, attempt, or omission, warranting a penalty."[32] Furthermore, the word "crime" includes three levels of severity – felony, misdemeanor, and transgression.[33] We will refer below to the question of whether or not the State Comptroller must notify the Attorney General regarding the suspicion of any act that could be included in the word "crime" – even crimes at the level of a transgression.

D. "…the Comptroller shall notify the Attorney General of the matter…"

As noted above, the relevant phrase in the original 1949 formulation of the section read as follows: "the Comptroller may […] notify […] the Attorney General of the matter."[34] In 1958,

29 Hollander addressed this in his essay, *supra* note 5, at p. 17: "Here, the legislature used a unique expression that is not in customary use in other pieces of legislation."

30 Section 18(b) of the Penal Code provides that – in the absence of a specific provision in the statute providing otherwise – the word "act" includes an omission. See also, Yoram Rabin and Yaniv Vaki, CRIMINAL LAW (in Hebrew), Vol. 1, pp. 206-239 (third edition, 2014).

31 Indeed, Section 43(d) of the State Comptroller Law, enacted later than Section 14(c), uses the word "crime" rather than "act."

32 Whereas the word "penalty" is defined in Section 1 of the Interpretations Order [New Version] as a "fine, imprisonment, or any other penalty."

33 The division into three levels of severity is set out in Section 24 of the Penal Law. This is an issue that other countries have approached with varying levels of specificity, but primarily in terms of defining the areas regarding which the SAI has authority to take action with respect to criminal matters. For example, in India, the SAI's authority to deal with criminal issues is limited to fraud and corruption. See STANDING ORDER ON ROLE OF AUDIT IN RELATION TO CASES OF FRAUD AND CORRUPTION (Ind). Other countries have established that the SAI can intervene in a specified group of criminal matters ("misdemeanor, criminal offense, crime"); these countries include, Japan, Poland, Germany, Greece, and Slovenia. Still other systems expand the SAI's authority to intervene in illegal acts that are not necessarily criminal - e.g. Hungary ("illegal acts"), Serbia ("damage to public property"), and the United States ("serious wrongdoing in federal programs or operations").

34 *Supra* note 6.

this language was replaced by the phrase "will notify the Attorney General of the matter."[35] Thus, the legislature replaced a term denoting choice with one denoting an obligation.[36] In any event, the current phrase – "will notify" – must be understood properly in order to be applied, and there appear to be two possible interpretations of the term:[37]

One approach is to view the statutory language introduced by the amendment ("will notify") as removing any possibility of an exercise of discretion – as language that places the State Comptroller under an absolute obligation to notify the Attorney General of **any** suspicion that a criminal act may have been committed, even if the suspicion itself is slight or if the circumstances are such that the chances of an indictment are minimal, or if the situation is such that proceedings outside of the criminal justice system would seem to be more appropriate. Going beyond the statutory language, this approach (i.e., of not allowing the Comptroller the ability to not report a suspicion) would seem to be justified in light of the fact that in the Israeli system it is the Attorney General who decides when to initiate a criminal investigation; the State Comptroller must not encroach on the Attorney General's authority or make decisions that are part of the Attorney General's mandate. Furthermore, the Attorney General has the discretion to establish, from time to time, a specifically stringent or lenient policy with respect to the initiation of proceedings regarding certain crimes or in the presence of certain circumstances, and the State Comptroller will not necessarily be aware of that policy.

The **other** interpretation is one that grants the State Comptroller a certain amount of discretion in implementing the notification power. If he applies this interpretation, the State Comptroller may take certain matters into consideration before notifying the Attorney General of a suspected criminal act – such as the chances that an investigation will not

35 *Supra* note 7. Many countries have established a mechanism through which the SAI must notify the Attorney General of corruption or criminal acts. A report by the Economic Institute of the World Bank, concerning the importance of SAIs with regard to the fight against corruption, notes that the following countries impose an obligation on their SAIs to report acts of corruption or of crimes that they discover: the United States, the Philippines, Bhutan, Indonesia, Malaysia, Spain, Romania, Moldova, China, Estonia, Lithuania, Germany, the Netherlands, Sweden, India, the United Kingdom, South Africa, the Czech Republic, and Slovakia. See Kenneth M. Dye & Rick Stepenhurst, *The Importance of State Audit Institutions in Curbing Corruption*, THE ECONOMIC INSTITUTE OF THE WORLD BANK 14 (1998).

36 Different countries have different statutory formulations concerning the scope of the discretion that the SAI can exercise with respect to the notification of the enforcement authorities. Some – like Japan – have used the formulation "it must notify"; the law in Serbia includes the phrase "required to submit without delay". In other countries, the language establishing the duty to report is less definitive - e.g., Poland's and Hungary's laws both use the term "shall notify". By contrast, other countries describe the SAI's authority in terms of exercising judgment; e.g. in Germany, there is an obligation to notify the senior audit personnel of suspicions about criminal acts so that they may "decide on the next step to be taken." The answer we received from the SAI in the United States (the Government Accountability Office, referred to hereafter as the GAO) to our question concerning this issue (described in note 1 above), indicates that in the United States, the matter of notifying the authorities is not deemed to be obligatory, but is instead a matter the SAI's policy.

37 The two approaches were set out in the legal opinion by Atty. Tzipora Schlezinger, *supra* note 17, at p. 3.

actually be initiated (as well as the chances the matter will not come to trial or that a conviction will not be achieved); the severity or triviality of the crime (the option of not notifying the Attorney General of *de minimis* issues);[38] the amount of time that has passed since the possibly criminal act was committed; and the issue of whether the statute of limitations applies to the act in question; the damage that may be caused by the notification itself;[39] the fact that the Police are already investigating the matter; the definite knowledge that the provision of the possibly incriminating materials to the Attorney General will not result in any operative measure being taken.[40] The justification for this interpretation lies in the independence of the State Comptroller and the broad scope of the discretion that the statute allows the State Comptroller regarding the fulfillment of his function. It would be inappropriate for the State Comptroller to function mechanically in this context and to ignore relevant circumstances in implementing the statutory reporting mechanism. It is well-known that Israel's law enforcement system is seriously overworked, and if it is clear there is no justification for starting an investigation into a particular case (for any of a variety of possible reasons), the State Comptroller must avoid burdening the system with pointless notifications and submissions. An even worse outcome than the absence of notification is one in which an individual who is suspected of wrongdoing will view the Attorney General's decision not to initiate an investigation or to indict as a "victory" and proof of his innocence. Sometimes, when serious findings are published in the State Comptroller's report, it is preferable for the Comptroller's Office to refrain from making a separate section 14(c) notification. In this way, the Office avoids a result in which the report itself is overshadowed by the Attorney General's decision not to initiate an investigation, or not to issue an indictment regarding the subject of the notification.

In practice, the State Comptroller has always interpreted the "will notify" statutory language as granting the Comptroller's Office a certain amount of leeway in the exercise of this power, allowing him to consider several relevant factors before notifying the Attorney General of the suspicion that has arisen: the chances of an investigation being initiated; the

38 The *de minimis* defense is set out in Section 34Q of the Israeli Penal Code, according to which no person will bear criminal responsibility for an act if, given the nature of the act, its circumstances, outcomes, and the public interest – it of minor importance. For more on the *de minimis* defense, see Rabin and Vaki, CRIMINAL LAW (in Hebrew), Vol. 2, *supra* note 30, at p. 939 *et seq*.

39 For example, the potential harm arising from the disclosure of a whistle-blower's identity; in addition to the harm that could arise from the exposure itself, such an event might lessen the public's trust in the institution of the State Comptroller.

40 For example, the delivery of materials about the suspicion over the commission of a criminal act, for which people are generally not brought to trial.

severity of the suspected criminal act;[41] the passage of time since the commission of the act; and the public interest in the prosecution of the suspected criminal act.[42] Moreover, this approach has generally reflected the opinion of the Attorneys General themselves.[43]

Thus, the practice for many years has been that although the State Comptroller theoretically notifies the Attorney General of every suspicion arising during audit work concerning the commission of criminal acts, he does exercise **discretion before making such notifications,** in that he considers factors such as those listed above, along with various other relevant elements. It is our opinion that this approach, enshrined in many years of practice, reflects an appropriate, balanced interpretation of the rule established in Section 14(c) of the State Comptroller Law.

Submission of the final report instead of notification pursuant to Section 14(c) of the law: It has also been suggested that when a final report raises a clear suspicion that a criminal act has been committed, the obligation imposed by Section 14(c) has been satisfied when the final report itself is submitted to the Attorney General. For example, in a letter sent to State Comptroller Nebenzahl in May of 1973, Attorney General Shamgar stated that,

41 For example, internal correspondence of the Office of the State Comptroller indicates that the Office does not generally notify the Attorney General of technical income tax violations (letter dated November 15, 1965, from the Director of the Local Government Audit Department, to Bentzion Yagid, captioned "File 445 'Submitting Findings to the Attorney General'", held in the Legal Department's archive).

42 Since at least the 1960's, there has also been a policy of not notifying the Attorney General regarding a suspected act that has taken place in the recent past and was corrected immediately (letter dated August 5, 1966, from the Legal Adviser to the Director of the Local Government Audit Department, captioned "The Yarkon River Tributary Drainage Authority: Income Tax Deduction" - held in the Legal Department's archive); or when the State Comptroller does not have "an initial sense" that there is likely to be a criminal investigation (letter dated November 15, 1967, from the Legal Adviser to the Director of the Planning and Reporting Unit, held in the Legal Department's archive). In general, the position taken at the State Comptroller's Office is that a certain level of judgment must be exercised in choosing which matters to bring to the attention of the Attorney General. In cases in which there is no realistic chance that other significant evidence leading to a possible conviction will be brought to light, the Legal Adviser wrote in 1998, the public's faith in the criminal justice system could be adversely impacted if there is no consequent prosecution or penalty. (Atty. Bass's opinion, "48th Annual Report: Government Contracts with Egged," dated September 1, 1998, held in the Legal Department's archive).

43 For example, in a meeting held on November 29, 1966 in the State Comptroller's office, attended by the Attorney General and the State Attorney, the Attorney General asked "to be notified of an incident only when the State Comptroller has an initial sense that the matter warrants a criminal investigation in terms of the public interest." However, there have been Attorneys General who took a different approach. See, e.g., a letter dated December 22, 2014, from the Attorney General's assistant, Adi Menachem, captioned "The State Comptroller's Authority According to Section 14(c) of the State Comptroller Law 1958" (held in the Legal Department's archive). In the letter, Menachem criticizes the State Comptroller's Office, as follows: "We should like to point out that, in accordance with Section 14(c) of the law, when the State Comptroller is of the opinion that the audit work has given rise to a suspicion regarding the commission of a criminal act, the State Comptroller is bound by the obligation to notify the Attorney General. The wording of the law is quite clear, in our opinion […] Clearly, the Attorney General is empowered to examine, of his own initiative and as he sees fit, the matter in the report that gives rise to a suspicion regarding the commission of a criminal act. However, this does not and cannot replace the exercise of the State Comptroller's authority, as required pursuant to Section 14(c), to notify the Attorney General whenever the State Comptroller is suspicious regarding a possible criminal act."

after reading the Comptroller's final annual report, he had understood the need to initiate criminal or disciplinary investigations or proceedings regarding certain matters that were mentioned in the report, even though they had not been specifically brought to the Attorney General's attention pursuant to Section 14(c).[44] The summary of an internal meeting held in the State Comptroller's office on November 15, 2006, mentions, among other things, an instruction given that if the report has been completed and the suspicion about criminal acts is evident in the report itself, no separate notification to the Attorney General should be made, and the State Comptroller should only submit the final report to the Attorney General.[45] This view that the final audit report should be allowed to "speak for itself" has continued to be supported throughout the years at the State Comptroller's office.

The timing of the notification sent to the Attorney General: Section 14(c) provides that the State Comptroller will notify the Attorney General when the work on the preparation of an audit gives rise to a suspicion that a criminal act has been committed. However, the section does not specify the chronological stage of the audit work at which the Attorney General should to be notified that a suspicion has arisen. Should notification take place shortly after State Comptroller's Office personnel determine that the findings being assembled give rise to the suspicion? Or should the notification be given at a more advanced stage of the audit? Or when the audit report is complete?

The uncertainty regarding the proper timing for notifying the Attorney General stems primarily from the fact that immediate notification regarding a suspected criminal act might prevent the audit from continuing (because of the concern – described above - regarding possible obstruction of the police investigation), which would prevent the State Comptroller from fully formulating the audit's findings regarding those facts.[46] However, the Comptroller also needs to avoid a situation in which the findings find no expression anywhere – neither in a criminal proceeding, nor in the State Comptroller's own final report. Such a situation might occur if the audit itself is stopped because the matter was submitted to the Attorney General, and the Attorney General subsequently chooses not to order the opening of an investigation.

44 Attorney General Shamgar's letter, dated May 10, 1973, to State Comptroller Nebenzahl (held in the Legal Department's archive).

45 A summary of the discussion on November 15, 2006, is preserved in the archive of the Legal Department of the State Comptroller's Office.

46 In Japan and India, the audit is continued even if evidence of fraud or any other crime comes to light, and the SAI will emphasize the findings regarding the discovery in the audit report. In the United States, the audit will continue unhindered, but the GAO will coordinate with law enforcement authorities after noting the possible influence that the crime or fraud may have had on the investigation process (written answers provided by various states to the question, as described above, *supra* note 1).

We support the existing policy regarding the proper time for notifying the Attorney General of a suspicion that a criminal act has been committed, as reflected in a decision reached at the conclusion of the internal State Comptroller's Office discussion in 2006. This policy decision involved the categorization of different notifications into four types, each with its own method of notification. The **first situation** is one in which an incidental suspicion arises regarding criminal conduct when the report is still incomplete – in which case the report should be completed, and only then should the material be submitted to the Attorney General. The **second situation** is one in which a suspicion arises which is directly related to the issue at the heart of the report, before the report is complete – in which case it is necessary to examine the option of completing the report. In these situations, the Attorney General should be notified of the suspicion of the possible commission of a criminal act pursuant to Section 14(c) only if continuing the audit might harm the public interest. In exceptional cases, when there might be an attempt to obstruct the investigation, the possibility of holding an informal consultation with the Attorney General should be examined. The **third situation** is one in which the report has been completed and the suspicion arises from the report itself – in which case there will be no notification of the Attorney General based on Section 14(c); the public report will be submitted to the Attorney General who will decide if an indictment should be issued. Finally, there is a **fourth situation**, in which the report has been completed and a suspicion arises from information that has not been explicitly stated in the report and which cannot be inferred from the report – in which case, the information will be submitted to the Attorney General based on Section 14(c). In any case, this categorization is non-binding, and each case must be examined individually on its merits.[47]

Thus, as the statute does not specify the time frame, each case must be judged on its own merits; it is important to weigh the interest in timing for the notification preventing obstruction of a criminal investigation against the interest in publicizing the findings in the report. While the State Comptroller's reports do not deal with the criminal aspect of improper acts or omissions, the same factual foundations establishing criminality in such cases will also indicate administrative malfeasance, which may be of great public importance. It is therefore essential to include the findings in the audit reports, especially if there is doubt that the suspicions that have arisen will actually lead to a criminal trial. If the Attorney General is notified of the suspicion of the commission of a criminal act only at the end of the audit work, the continuation of the audit work concerning a criminal matter might disrupt, delay, or damage any future investigation. We therefore feel that whenever the audit work leads to a suspicion that there has been some type of criminal conduct, the State

47 Summary of the discussion of November 15, 2006, *supra* note 45. The summary of the discussion was translated into a draft of directives, but there is no reference to the draft having been completed or disseminated among the office's personnel.

Comptroller's Office personnel should inform the Legal Department, which will determine whether continuing the audit might disrupt a possible future criminal investigation. Based on current practice, whenever there is any doubt, the Legal Adviser undertakes an informal examination together with the Attorney General or with other investigative personnel, for the purpose of determining whether there is good reason for the audit to conclude its handling of the matter. If it is determined that the very fact that the State Comptroller personnel are examining the relevant matter might cause the audited body to attempt to conceal information or tamper with evidence – and that this would damage a future investigation – the Attorney General must be informed of this at an early stage, when these suspicions are first formed. However, we believe that if there is no cause to be concerned about possible obstruction, the process should be as follows: after the suspicion regarding a criminal act arises, the State Comptroller's Office should complete its audit work, and formulate the final report - which will include the findings relating to the relevant nexus of facts - and only then, after the report is published, the Office will notify the Attorney General. The Attorney General can then decide if it is necessary to take further action at the criminal level. This model ensures that the important findings are included in the State Comptroller's report; if the need arises and the relevant conditions are met, the findings will also be submitted for investigation, and the possibility of issuing an indictment will be examined.

E. "…and may do so if the audit work has given rise to a suspicion that a disciplinary infraction, proscribed by law, has been committed …"

As noted above, Section 14(c) was amended in 2007 to include a clause providing that the State Comptroller may notify the Attorney General that a suspicion has arisen – in the course of work on an audit – regarding the possibility that a disciplinary infraction, proscribed by law, had been committed.[48]

The explanation accompanying the draft amendment noted the following: "At times, the audit findings give rise to a suspicion that a disciplinary infraction has taken place; furthermore, the line between the criminal nature and the disciplinary nature of a specific behavior is often blurred. As a matter of policy, it is the State Comptroller's practice to bring

48 State Comptroller Law (Amendment No. 39), *supra* note 12. In other countries as well, the practice is to notify the competent authorities about a disciplinary infraction. For example, Section 31 of the law in Japan, *supra* note 14, makes separate reference to disciplinary infractions; Section 27(3) of the German law, *supra* note 14, includes a directive both for criminal and disciplinary matters. Nonetheless, the party that must be notified, i.e. the competent authority, is not necessarily a law enforcement body. The Japanese law, for example, provides that disciplinary infractions be reported to the entity in charge of the ministry where the infraction was discovered.

such matters to the Attorney General's attention, even if such notification is not mentioned in Section 14(c). The language of that section is distinguished from Section 43(d) of the law, relating to the Ombudsman; Section 43(d) states explicitly that even if the suspicion that has arisen relates [only] to a disciplinary infraction, the Ombudsman may notify the Attorney General."[49]

It should be noted that with regard to the notification of the Attorney General about disciplinary infractions, the statute uses the word "may," which makes the issue of notification a matter that is subject to the State Comptroller's discretion. Since the adoption of the 2007 amendment, the Comptroller's policy has been that the Attorney General should be notified of the suspicion of a disciplinary infraction only on rare occasions, for two reasons. First, the State Comptroller audit reports that include suspicions regarding disciplinary infractions outnumber, significantly, the reports that include suspicions concerning the commission of criminal acts. Thus, if the Attorney General were to be notified of each such disciplinary infraction, his office would be overwhelmed with such notifications. Second, since disciplinary infractions do not involve a police investigation of any sort (and there is therefore no need for the Attorney General to reach any decisions regarding their investigation), it is possible in appropriate cases to forward the final audit report directly to the Civil Service Commission[50] or to other institutions responsible for discipline in the particular case, and to allow that body or bodies to determine whether or not to take disciplinary action against the officials mentioned in the report.

F. "…the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled within six months of being notified."

As noted above, in 1996, Section 14(c) was amended to include, after its final words, the following language: "the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled, within six months of being notified."[51]

The explanatory notes for the draft of the amendment stated that "[g]iven past experience, we propose that, at the end of six months from the time that the State Comptroller, in the

49 Explanatory notes to the draft of Amendment 40 - State Comptroller Bill Law (Amendment No. 40) 2007, HH [*Hazaot Hok* - Proposed Laws] 169, 273.

50 The Civil Service Commission's Investigative Unit undertakes the investigation and gathers the evidence for the sake of holding a disciplinary hearing of civil servants working in government ministries (as noted, some civil servants are not bound to the Civil Service Commission, such as local government employees who are bound by the Local Government Law (Discipline) 5738-1978, and the investigative unit gathering evidence in those cases is not the Civil Service Commission's Investigative Unit).

51 State Comptroller Law (Amendment No. 30) 1996, *supra* note 9.

course of an audit, becomes aware of a suspicion regarding the commission of a criminal act and notifies the Attorney General of such, the Attorney General will inform the Comptroller and the State Audit Committee[52] of what was revealed during the examination of the matter and will also indicate – if a decision was reached to act on the Comptroller's initiative – which steps were taken."[53] This was the full explanation provided, although there was no indication of what specific "past experience" had shown that there was a need to amend the law.[54] In any event, the obvious objective of the amendment was to make it possible to follow the handling of matters that were the subject of notifications submitted to the Attorney General, thus ensuring that the matters were examined and handled appropriately.

Thus, according to the statute's current language, the Attorney General is required to inform the Comptroller and the Committee, on only one occasion, of the manner in which the subject of the notification was handled; this must be done within six months of being notified. The drawback of requiring only a single report, to be provided within the six-month time-frame, is that, generally speaking, no final decision on matter is ever made within such a short period; the reports provided by the Attorney General therefore tend to be very laconic. An answer stating that "[t]he Attorney General has decided not to open a criminal investigation" allows the State Comptroller to renew work on an audit that was halted earlier because of the submission of a notification to the Attorney General, and can therefore be important despite its brevity.[55] But a laconic answer of a different sort, such as "[t]he Attorney General has decided to submit the matter to the police for further handling" creates a problem for the State Comptroller, because this step could lead to various

52 The State Audit Committee is one of the Knesset's standing committee; its mandate is to discuss the reports submitted by the State Comptroller and his exercise of his powers pursuant to the State Comptroller Law. The Committee reviews the conclusions presented in the Comptroller's reports and provides recommendations for their implementation. The Committee can also summon representatives and officials of relevant audited institutions to appear before it.

53 Explanatory notes to the draft amendment of the State Comptroller Law (Amendment No. 33) (report to committee) 1996, HH 2493, 505.

54 For the sake of comparison, the laws of several countries make no provisions regarding reporting mechanisms, and in these countries, the reporting process may be regulated by internal working procedures or through a completely different approach. In India, *supra* note 33, the law provides that every institution receiving the report will establish a mechanism for documenting the reports and reporting progress in handling the matter, though without noting any set schedules; in Poland, *supra* note 19, the reporting mechanism is established in the law itself, but it does not specify reporting times. However, in answer to the question posed to it, the Polish office answered that the director of the office has determined that regional audit bureaus and the general prosecuting bureaus will have "coordinating officers" appointed who will provide more effective functioning and better monitoring of the development of the proceeding; by contrast, Hungary has established that the body receiving notification will announce its position on opening an investigation proceeding within 60 days and will, within 30 days of completing its handling of the proceeding, announce the final outcome of that process.

55 By contrast, former State Comptroller Justice (ret.) Goldberg noted that, in his opinion, the Attorney General's report of the handling of a matter submitted to him is unimportant. See Justice Goldberg's handwritten memorandum to the then Legal Adviser, Nurit Israeli, dated August 11, 2003 (held in the Legal Department's archive).

outcomes. One possibility would be a police examination and then a conclusion that no crime had been committed and that the file could be closed; another possible outcome would be an investigation (or an examination that develops into an investigation) which leads to the file being closed; and a third possibility would be an investigation that leads to an indictment and a trial. If the State Comptroller's Office does not know how the police examination or investigation has been concluded, it cannot obtain any information that could help it make an informed decision about whether to begin its own examination (or to continue the audit), regarding the matter about which the Attorney General was notified.[56]

Because the Attorney General reports on the handling of the suspicion that was reported to him by the Comptroller only once, six months after the notification is sent, the State Comptroller's Office does not have data about the number of cases in which an indictment was issued following notification of the Attorney General by the State Comptroller's Office. For the same reason, the Office does not have information regarding the number of officials in audited institutions who were consequently found guilty in criminal or disciplinary courts, with respect to matters that were the subject of Section 14(c) notifications.

3. Providing Audit Materials to the Attorney General's Office, the Police, the Court, or the Defendant

A. Providing Materials to the Attorney General's Office and to the Police, Following Notification Pursuant to Section 14(c) of the State Comptroller Law

Section 14(c) provides that the State Comptroller shall **notify** the Attorney General of a suspicion regarding the commission of criminal acts. It does not state that the Comptroller must also **provide** the Attorney General with the specific materials that gave rise to the suspicion. Nonetheless, since the notification process is meant to help the investigating parties examine the matter and to assist them in examining the possibility of prosecuting those who were involved, it is only a matter of common sense that the notification to the Attorney General should also include the basic audit documents that gave rise to the suspicion regarding a criminal act.

56 This is based on the presumption that once the Section 14(c) was utilized, the Comptroller did not examine the issue at the outset or, alternatively, an examination was commenced but then stopped because the Attorney General was being notified.

The State audit process is based on the State Comptroller's authority to access all materials held by the audited institutions, that the State Comptroller's Office needs in order to carry out the audit. This authority is established in Section 3 of the Basic Law: the State Comptroller, which also establishes the duty of audited bodies to provide the auditors with any information needed for the audit, including sensitive and classified materials. [57] Moreover, in order to encourage cooperation between the employees of the audited institutions with the State Comptroller's Office, the legislature (in the State Comptroller Law) established that State Comptroller personnel are bound by rules of confidentiality regarding any and all information of which they become aware in the course of their work.[58] The law further provides that reports, opinions, and documents prepared by the Comptroller, as well as declarations made to the Comptroller in his role as the Comptroller, cannot be used as evidence in legal proceedings.[59]

The arrangements described above would seem to indicate that, as a rule, no use may be made of the information that reaches the State Comptroller's Office, other than as part of the preparation of the audit reports. The goal of these arrangements is to encourage the audited bodies' cooperation with the auditors, so that the auditors can receive all the information that is essential to their work, without those bodies worrying that the information will be used for other purposes. The provision of materials to the governmental investigating authorities pursuant to Section 14(c) should therefore be viewed as an exception to the prohibition on providing information that was received for the purpose of an audit, for non-audit purposes.[60] This exception would be justified, presumably, by the public interest in helping the enforcement and investigating authorities to prosecute those who commit crimes.

Thus, the State Comptroller's Office has, over the years, developed a practice of providing the basic documents that gave rise to the suspicion of a criminal act at the same time that the notification is delivered to the Attorney General. A delivery of documents requires the personal in-principle approval of the State Comptroller (who makes the decision after receiving a recommendation from the Legal Adviser of the existence of "a suspicion that a

57 Section 3 of Basic Law: The State Comptroller, provides as follows: "A body subject to State Audit will, upon request, immediately provide the State Comptroller with information, documents, explanations, or any other material which the Comptroller deems necessary for audit purposes."

58 Section 23 of the State Comptroller Law: "The staff of the Comptroller's Office and all other persons assisting the Comptroller in carrying out his function, must maintain the confidentiality of any and all information obtained by them in the course of their work, and shall give a written undertaking to such effect upon starting work."

59 See section 30 of the State Comptroller Law, discussed below.

60 It should be noted that, in certain cases and in order to cooperate with enforcement agencies, audit documents are forwarded to the Police even when the Police investigation is initiated through another route and not pursuant to a Section 14(c) notification. A discussion of this exception is beyond the scope of this essay.

criminal act has been committed"), and approval regarding the specific documents that are being delivered.[61] In the letter addressed to the Attorney General, the State Comptroller's Office will note that its personnel will be available to provide the State Attorney and the Police with details regarding the foundations of their suspicions, and to present other documents and findings supporting their suspicions.

If the matter is forwarded to the Police, and the Police then ask the State Comptroller's Office for additional materials (beyond those that have already been provided), the practice has been to include (in the letter summarizing the provision of the materials) a comment indicating that the documents provided to the Police may not be relied upon as evidence, and can only serve as background material.[62] This means, essentially, that the Comptroller's Office tells the Police that if the documents are needed as evidence, the Police will need to obtain the originals from the audited body. In this way, the auditors from the State Comptroller's Office will not be summoned to criminal court to testify, and will not be asked to reveal documents that they received specifically for the purpose of the audit. The reason for following this practice is to avoid damaging future cooperation between audited institutions and state auditors, as such cooperation is crucial to the state audit work.

This practice was based on an agreement reached by the then-State Attorney Dorit Beinish and the then-Legal Adviser Mordechai Bass,[63] and in reliance on Section 30 of the State Comptroller Law, which provides as follows:

> (a) No reports, opinions or other documents issued or prepared by the Comptroller in the discharge of his functions shall serve as evidence in any legal or disciplinary proceeding.
>
> (b) A statement received in the course of the discharge of the Comptroller's functions shall not serve as evidence in a legal or disciplinary proceeding [...].

61 See Standing Order 54/2: "Audit After Discovery of Criminal Suspicion", p. 2, Section 5(b), dated April 13, 1954 (held in the Legal Department archive), formulated by the State Comptroller, which provides as follows: "Our office will assist the Police, both for public reasons and for audit reasons, to set an example […] The duty to maintain confidentiality, pursuant to Section 13(d) of the State Comptroller Law [currently Section 23 of the law] applies to the Police as well, and our personnel are prohibited from forwarding to the Police any information they obtain in the course of their work, except with the State Comptroller's explicit agreement (or that of the Director General or the Legal Adviser, when authorized to do so on behalf of the State Comptroller) […] It is inconceivable that severe damage could be done to our work because of consideration of the demands of the Police."

62 For the sake of comparison, the regulatory arrangement that used in India requires that the materials are delivered to enforcement agencies in a confidential manner, and that the use of the materials requires independent review of the material obtained from the audited institution: "The investigative agency should use information given by us as a lead and make their own examination of the primary/original records which are available with the audited entity/Department."

63 Letter dated December 22, 2003, from the Legal Adviser to the Attorney General, captioned "Application of Section 30(a) of the State Comptroller Law 1958 [Consolidated Version]" (letter held in the Legal Department's archive).

Thus, according to Section 30(b), information submitted during the audit pursuant to the statutory obligation to cooperate with auditors, and which includes non-public information, cannot be used as evidence. This arrangement provides a counterweight to the disclosure obligation incumbent on the audited bodies' personnel pursuant to Section 3 of the Basic Law: State Comptroller; the arrangement thus protects materials that are delivered to the audit staff, by limiting their use to the purpose of carrying out the audit.

In 2008, the status of materials delivered by the State Comptroller's Office to the Attorney General and the police was modified, to a certain degree. In a letter dated March 11, 2008, Yehoshua Lemberger, the Deputy State Attorney for Criminal Matters, informed the State Comptroller's Legal Adviser that "intelligence material" provided by the State Comptroller's Office would henceforth have the status of "investigation material," in appropriate cases. Thus, if an indictment was later issued regarding the matter that was the subject of the State Comptroller's Section 14(c) notification, the discoverability of such material would depend on the court's review of its contents and relevance, pursuant to Section 74 of the Criminal Procedure Law. Lemberger added that despite the change, the classification of the material as "investigation material" would not make it automatically admissible in terms of the rules of evidence.[64]

The Legal Adviser at the time, Nurit Israeli, responded to this development in a letter to the State Comptroller and the Director General of the State Comptroller's Office, in which she pointed out that materials delivered to the Attorney General by the State Comptroller's office would henceforth be potentially discoverable, if a defendant requested to see them. She also pointed out that such materials would, nevertheless, continue to be inadmissible in court proceedings pursuant to Section 30 of the law and "the relevant laws of evidence". However, she also remarked that it had now become possible that such materials could play a part in judicial proceedings "having been made 'acceptable' through incorporation into witness statements and the like – methods that had been sanctioned in the case law."[65] Thus, although the status of these materials was changed, as described in Lemberger's 2008 letter, and such materials came to be included within the category of potentially discoverable "investigation materials," the State Comptroller Law has clearly established that the materials are generally inadmissible as evidence in a court proceeding. However, it continues to be the practice that State Comptroller's Office personnel do not serve as witnesses in criminal proceedings.

64 Letter from Deputy State Attorney (Criminal Matters) Yehoshua Lemberger dated March 11, 2008, to the Legal Adviser (letter held in the Legal Department's archive).

65 Letter from the Legal Adviser, dated March 19, 2008, to the State Comptroller (letter held in the Legal Department's archive). The Legal Adviser referred, in this regard, specifically to CA 2910/94 *Yeffet v State of Israel* [1996], IsrSC 50(2) 221.

B. Providing Further Materials, at the Defendant's Request, Pursuant to Section 74 of the Criminal Procedure Law

Section 74 of the Criminal Procedure Law grants a defendant the right to receive a copy and to review all investigation material held by the prosecution office and relating to the indictment issued against the defendant'.[66] A recent Israeli case – originally heard in the Tel Aviv District Court – dealt with, *inter alia,* the question of whether Comptroller Office materials, which were not provided to the Israel Police, should be considered "investigation materials" as the phrase is used in Section 74 of the Criminal Procedure Law. The case involved a civil servant who was prosecuted pursuant to a criminal indictment, as a result of a notification given by the State Comptroller to the Attorney General in accordance with Section 14(c) of the State Comptroller Law. The indictment referred to the civil servant's alleged commission of a crime at the institution where he worked, and was based on the materials that had been delivered to the Attorney General and the Police. The defendant filed a motion in the District Court, based on Section 74 of the Criminal Procedure Law, in which he asked the court to instruct the State Comptroller's Office to provide him with the materials that had not been delivered to the Police via the Section 14(c) channel.[67]

The Police had given the defendant all the investigation materials in the file, including copies of all documents the State Comptroller's Office had handed over to the investigating agencies, but the defendant wanted access to additional material. He asked the court to recognize all the materials that had served the State Comptroller's Office in its preparation of the audit reports – even those that were not in the investigation file – as "investigation materials," as defined in Section 74 of the Criminal Procedure Law, and to instruct the State Comptroller's Office to provide him with those materials as well. He wanted to receive notes of conversations held between State Comptroller's Office personnel and individuals at the audited institution, which – according to the defendant – were exculpatory in nature and could assist him in his defense. The primary goal was apparently to establish the foundation for a defense based on selective enforcement, unreasonable delay, and abuse of process.[68]

The State Comptroller's Office opposed the defendant's request, and provided several reasons, of which the most relevant was the dangerous precedent that would be set if the

66 Section 74 of the Criminal Procedure Law provides as follows: "Should an indictment regarding a crime or misdemeanor be issued, the defendant and his attorney as well as any person the attorney has authorized for such purpose, or, with the prosecutor's agreement, a person the defendant has authorized for such purpose, will be entitled at any reasonable time to inspect and copy the investigative materials and the list of all materials gathered or listed by the investigative authority relating to the prosecution's indictment."

67 CrimC (Tel Aviv) 66313-12-15, *Hevroni v. State of Israel* (Published in Nevo, December 15, 2016).

68 There was no organized list of all the materials provided by the auditors to the investigative agencies, but it is clear that many documents gathered during the audit were not related to the investigation of the defendant; these were not given to the Police, and instead remained with the State Comptroller's Office.

court ordered the hand-over of all the requested materials, and the consequent weakening of the Comptroller's ability to inspire trust among the personnel of audited institutions.[69] The District Court rejected the defendant's motion, primarily on procedural grounds, but also in recognition of the State Comptroller having a substantive interest in the outcome of the motion. The District Court rejected the request and determined that, given the circumstances as a whole, the proper normative setting for a deliberation of the particular was not Section 74 but rather Section 108 of the Criminal Procedure Law, which allows the court to order a witness to submit documents in his/her possession[70]. In rejecting the motion, the District Court relied on – *inter alia* – two procedural aspects of the request for investigation materials based on Section 74. One was that the Section 74 procedure through which the defendant had requested the materials did not allow for an unmediated hearing of the Comptroller's concerns, whereas a Section 108 procedure would allow the Comptroller's arguments to be heard openly. A second procedural consideration relied upon by the District Court was that Section 108 motions are heard by the same judicial panel hearing the main criminal case, whereas Section 74 motions are not.

The defendant appealed the District Court's decision to the Supreme Court where it was heard by Justice Menachem Mazuz.[71] Before the Supreme Court, the State Comptroller's Office continued to argue that materials that had not been provided pursuant to Section 14(c) should not be made available as investigation material, and should be requested in accordance with the Criminal Procedure Law Section 108 procedure that allowed for the production of specified documents held by subpoenaed witnesses.[72] The Legal Adviser to the State Comptroller submitted a letter to the Court in the framework of the appeal, presenting a detailed explanation of the State Comptroller's position regarding the production of materials held by the State Comptroller's Office in general, and regarding this case in particular.[73] He presented several grounds for opposition to the request for more information/material. First, he noted that the Comptroller's Office should not be required to hand over non-relevant material. Next, he argued that because of the necessary balancing

69 The *Hevroni* case, *supra* note 67, Section 4 of the court's decision.

70 Section 108 of the Criminal Procedure Law provides as follows: "The court may, on the basis of a litigant's request or of its own initiative, order a witness under subpoena, or any other person, to provide the court with the documents in his/her possession and which are specified in the subpoena or court order at the time specified in the subpoena or court order."

71 CrimApp 56/17 *Hevroni v. State of Israel* (published in Nevo, January 24, 2017).

72 *Ibid*, Paragraph 10 (Justice Mazuz). The State Comptroller's Office argued that the appropriate procedure would have been to make a request based on Section 108 rather than Section 74. Even so, the Office claimed, that a proper exercise of judicial discretion would have led, in reliance on the appropriate balancing required for Section 108 claims, to a ruling that the materials should not have been delivered to the defendant.

73 This document, presenting the State Comptroller's position, was submitted to the court; although the fact of its submission was acknowledged in the opinion, its text was not quoted. The document was nevertheless included in the court file and a copy remains in the Legal Department's archive.

of the defendant's interests and the interest of protecting the state audit process, no order should ever be issued requiring the production of the following types of materials, even if they contained possibly relevant information: notes revealing an intelligence source; notes of a conversation with an individual who had spoken on condition that his remarks remain confidential; and information provided by a complainant or whistle-blower who had requested confidentiality. Finally, he noted that the opinions of the investigating agencies or the Police, to the effect that the State Comptroller did hold relevant material, should not justify (by themselves) a requirement that any materials be handed over by the State Comptroller.

Justice Mazuz, writing for the Supreme Court, accepted the State Comptroller's position and held as follows: "I doubt that a procedure based on Section 74 is suitable for a situation in which the defendant asks for materials gathered in the course of an audit by the State Comptroller's Office, making the claim that these constitute 'investigation materials', unless the request is for the materials that have been submitted in accordance with Section 14(c) of the State Comptroller Law and which are in the hands of the police or the prosecution. I question the use of this procedure because of, *inter alia,* the prosecution's lack of knowledge about or lack of control over the materials held at the State Comptroller's Office, because the State Comptroller is not a part of the executive branch that is subordinate to the Attorney General's directives, and because of the limitation the State Comptroller has imposed on the submission of materials as noted."[74] Given the unique circumstances and the State Comptroller's position as explained above, it was decided to reject the appeal and to allow the appellant to start a procedure to request the materials based on Section 108 of the Criminal Procedure Law.

C. Request for Further Materials in Accordance with Section 108 of the Criminal Procedure Law

After the rejection of the Section 74 motion the same defendant went on to bring a motion based on Section 108 of the same Criminal Procedure Law, seeking further materials from the State Comptroller's Office.[75] In the request, the court was asked to instruct the State Comptroller's Office to make available, for the defendant's perusal, all examination materials in its possession that had been used in the preparation of the State Comptroller's report.

The State Comptroller's Office opposed this request as well, arguing that a balancing of interests was needed, and that the request for all the materials did not indicate that any

74 *Hevroni* case, *supra* note 71, para. 11, per Justice Mazuz.

75 The materials requested in this motion were those not originally submitted to the Police pursuant to Section 14(c).

effort to weigh opposing concerns had been carried out. The balancing, the State Comptroller pointed out, was of vital importance, given the Comptroller's need to ensure cooperation from audited institutions, in order to be able to do his audit work properly. The State Comptroller's Office should not, it was argued, serve as a conduit for providing the materials it received from audited institutions for the purpose of their audit.[76]

The District Court essentially accepted the State Comptroller's position regarding this motion. After pointing out the interests that needed to be balanced – the State Comptroller's constitutional status and the importance of its ability to conduct audits, on the one hand; and the defendant's interest in receiving the requested materials and their relevance to his case, on the other hand – the Court (Judge Margolin Yehidi) found that there were no materials that had not already been handed over to the investigating authorities that were of relevance to the issues involved in the case, such that delivery to the defendant was justified. Judge Margolin Yehidi noted specifically that the relevance of the material was limited, in light of the fact that no material provided by the State Comptroller's Office would be admissible as evidence in a criminal prosecution, given the statutory limitations prescribed in the State Comptroller Law.[77]

Given the limited relevance of the materials that the defendant had requested, and after balancing this with the State Comptroller Office's protected interests noted above, the judge ruled as follows:

1. Regarding the raw materials submitted by the audited institutions, it was necessary to contact the individuals who submitted them rather than request them from the State Comptroller.

2. As for notes of conversations between State Comptroller Office personnel and individuals within the audited body, Judge Yehidi wrote that she was not convinced of the basis for the claim that these notes referred to the issues relevant to the criminal accusation.

76 A response was submitted to the court file and a copy is held in the Legal Department's archive. See AAA 8282/02 *Haaretz Newspaper Publishing Co. v State Comptroller's Office*, IsrSC 58(1) 465, 476-477 (2003): "The State Comptroller's refusal to fulfill the petitioners' request is not the end of the matter, because the information the State Comptroller possesses comes from the audited institutions. Why should the petitioners therefore not contact those institutions holding the information directly and ask them for whatever it is that they are seeking from the State Comptroller? It is the petitioners' right to draw water directly from the spring and contact those institutions and ask them for the materials they seek from the State Comptroller. Why do they insist instead on drinking water from the pipe that brings the water from the source?" See also, at p. 477 of the opinion: "It would be odd and unnatural were we to interpret the law as obligating the State Comptroller's Office to provide a third party with material it received itself pursuant to the obligation the law imposes on the audited institutions. Indeed, the Comptroller received information from the audited institutions for the sake of the audit alone; and from this arises the obligation imposed on State Comptroller's Office personnel (per the provisions of Section 23 of the State Comptroller Law) to keep in strictest confidence any information they obtain in the course of their work and to give a written undertaking to such effect upon starting work."

77 CrimC 66313-12-15 *State of Israel v. Hevroni* (as yet unpublished, February 21, 2017).

To the contrary, she had learned that all notes relating to the specific affair in question had actually been delivered to the defendant for his review; the remaining notes (those that had not been handed over) did not fall within the scope of materials covered by the proceeding.

3. "Finally, balancing the relationship and the connection claimed for the requested materials, the level of which is limited, touching as it does at most on broader circles rather than on the core of issues in dispute, on the one hand, and the force of the protected interest in the context of gathering materials by the State Comptroller Office, on the other hand […] I have concluded that it would be inappropriate to instruct the State Comptroller's Office to make additional materials available in the context of the request before me."

In summary, the Israeli statutes and case law indicate that materials held by the State Comptroller's office but not submitted to the investigating agencies are not included within the range of materials that must be provided to a defendant pursuant to Section 74 of the Criminal Procedure Law. As for requests based on Section 108 of the Criminal Procedure Law, it seems that documents may be produced only if it is proven that, given the circumstances of the case, they are relevant to the defense,[78] and that the defendant's interest in receiving the materials outweighs the interest in protecting the state audit process. In other words, while Section 108 gives the court authority to override the obligation imposed on State Comptroller's Office personnel to maintain the confidentiality of materials provided to them in the course of their audit work, the section does not override the rule established by the legislature, in Section 30 of the State Comptroller Law, that such materials will not be admissible as evidence in court.

Thus, these decisions (the District Court and Supreme Court decisions regarding the Section 74 motion, and the District Court's decision regarding the Section 108 motion) provide a good example of the ways in which the courts have determined a proper balancing between the public interest inherent in protecting materials held by the State Comptroller's Office – on the one hand - and the personal (and public) interest in guaranteeing a defendant access to materials relevant to his defense, on the other hand. Proper consideration of the public interest of the functioning of the Israel's supreme auditing institution is indeed important.

78 Taking into consideration the fact that any such documents would be inadmissible as evidence.

Conclusion

The Basic Law: The State Comptroller, authorizes Israel's State Comptroller to examine the legality of acts of an audited body – as well as its integrity, good governance, effectiveness, and efficiency, and any other aspect that the State Comptroller sees fit to examine. Section 14(c) of the State Comptroller Law provides that when audit findings raise a suspicion regarding the possible commission of a criminal act, the State Comptroller must notify the Attorney General and thus give him the opportunity to examine the possibility of prosecuting the relevant position holder in the audited institution. Similar mechanisms may be found in the legal systems of other countries, which prescribe various procedures to be followed when the supreme audit institution uncovers facts indicating a possibility that criminal acts have been committed; in many countries, the SAI is required to forward the matter to agencies charged with prosecuting crimes, or to facilitate investigation and possible prosecution in some other way. In some countries, the SAI itself exists in the form of an auditing tribunal and has its own independent authority to prosecute various defendants for specified crimes or types of crimes.

The International Organization of Supreme Audit Institutions (INTOSAI) has taken the position that SAIs must be aware that the main function of a supreme audit institution is to critique and examine the functioning of government institutions. According to INTOSAI's published position on the matter, a supreme audit institution is not a substitute for law enforcement or prosecution agencies. Thus, even if a particular SAI is granted considerable latitude with respect to the handling of suspected criminal activity, it should use its authority only to help those institutions that are actually charged with prosecuting or investigating crimes.[79]

In this essay, we have analyzed various issues regarding the interpretation and implementation of section 14(c), as well as legal disputes that have arisen relating to some of the consequences of the section's application."

We have attempted to set out the proper balance between the public's interest in enabling the State Comptroller's Office to issue audit reports that present its findings, on the one hand, and – on the other hand – the interest of investigating and prosecuting enforcement agencies in being able to conduct investigations without obstructions and interference, and in ensuring that those who commit crimes face the appropriate legal consequences. We hope that the insights presented in this essay will enhance the crucial cooperation between the State Comptroller's Office and the enforcement authorities, so as to ensure good and proper governance.

79 The International Organization of Supreme Audit Institutions, *INTOSAI: 50 Years (1953-2003)* 147 (2004).