

The Swedish Approach to Public Access to Documents

For more than two centuries Swedish citizens have enjoyed the right of access to official documents. Sweden believes that this right is vital in a modern democracy: **Democracy requires public participation in informed discussions on matters of common public interest. It also demands that citizens have the means to exercise control over the administration in order to promote its efficiency and deter corruption. A democracy must therefore ensure openness within the public administration and guarantee the right of public access to official information.**

The connection between democracy and access to official information has been regarded as self-evident in Sweden and several other countries for a long time. This connection is obvious when we look at developments in those European states which have recently been under transition: often very early in the legislative processes the issue of access to information is confronted and dealt with as part of the work of building the administrative structures that are to serve democratic decision-making. Several other European countries have also introduced rules on public access to information during the last decades, and more are to follow. Sweden has always encouraged this process, and has actively taken part in international co-operation on this issue. One example is the discussions within the Council of Europe, which is currently taking initiatives stressing the importance of public access to documents in modern democracy. The Aarhus Convention is another example of international co-operation which Sweden has encouraged.

Sweden warmly welcomes this pan-European trend towards increased openness within administrations—a trend which has also been evident in the developments within the European Union institutions. Sweden was one of the countries that advocated the insertion of a rule on access to documents in the EC Treaty, which resulted in the new article 255.

The aim of this fact sheet is to explain Sweden's views on public access to documents of the European Parliament, the Council and the Commission. The fact sheet also describes the Swedish rules on public access to official documents.

Public access to documents of the European Parliament, the Council and the Commission

Sweden believes that openness enables citizens to participate more closely in the decision-making process and enhances the accountability and efficiency of public institutions. It is therefore important that the European Union adopt clear rules on public access to documents held by the EU institutions. During its presidency of the EU, Sweden will put a lot of time and effort into the process of making the EU institutions more open.

Openness within the EU institutions was put on the agenda in the early 1990s. The need for greater openness in the work of the institutions was stressed at the European Councils held in Birmingham and Edinburgh in 1992, and in Copenhagen in 1993. When the Maastricht Treaty was adopted, a declaration was appended to the Treaty:

DECLARATION (No. 17)

on the right of access to information

The [Intergovernmental] Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration.

The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

Article 1 of the EU Treaty now reads: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."

The Treaty of Amsterdam introduced a new Article 255 in the EC Treaty. Article 255 grants citizens and residents of the Union the right of access to documents of the European Parliament, the Council and the Commission. The Council shall, together with the European Parliament in accordance with the procedure referred to in Article 251 of the EC Treaty, adopt rules under Article 255 before 1 May 2001.

The Commission has put forward a proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament,

Council and Commission documents. Sweden welcomes the Commission proposal, the purpose of which is to increase the openness of these institutions.

The proposal includes positive elements such as the fact that incoming documents falls within the scope of the proposal, the duty to set up registers of documents and the right of partial access to documents.

However, Sweden takes the view that the Commission proposal does not fulfil the requirements of a clear, well-balanced system of access to documents, nor does it leave less room for arbitrariness than the existing rules.

In the following the Swedish Government's main concerns over the Commission proposal are presented.

– *There must be a clear presumption of a right of access*

It must be clearly expressed that a right of access is the main principle. Any restrictions must be set out in very precise terms. The proposal does not fulfil these requirements. Some of the exceptions from the right of access are unacceptable, such as protection of efficiency (Sweden believes that access rights will make the institutions more efficient) and the protection of the stability of the Community legal order.

– *All documents held by the institutions should be covered by the rules*

Sweden believes that sensitive documents should be afforded protection through clear and precise secrecy provisions. However, all documents should fall within the scope of the legal act. Therefore, Sweden does not want a priori exemptions of categories of documents, pertaining to certain areas of European co-operation, from the scope of the legal act.

– *The Act must not affect national legislation*

The single aim of the new rules is to increase openness of the EU institutions. Rights of access to information enjoyed by citizens under national laws must not be affected. Therefore, Sweden does not want any confusion as regards the addressees of the obligations, namely the institutions. The best way to avoid uncertainties would be if the rules were adopted in the form of a decision directed to the institutions and not a regulation. In any case, the text of the legal act must in itself be crystal clear on this point. The principle of loyalty is enough to prevent Member States from acting in contradiction to these rules.

– *The institutions must have the final say when someone applies for access to an incoming document*

Sweden welcomes the inclusion of incoming documents. However, the 'originator control' as set out in the proposal is unacceptable. Sweden believes that there is just as much public interest in access to information influencing the decision-making process of the institutions as there is to documents produced by the institutions.

– *The exemption for internal documents is too wide*

Sweden agrees that documents that have not yet been finalised cannot always be made public, but a document that has been sent out to someone cannot retain the status of being internal.

– *All documents should be registered*

Sweden welcomes the duty to set up registers, but the rules must clearly express that the registers should contain information about all documents held, including secret documents.

– *Partial access to a document should be given when only parts of the document are covered by exceptions*

As confirmed by the practice of the Court of First Instance, the existing practice of refusing to release documents which contain secret information only to a limited extent has led to absurd consequences. Sweden therefore welcomes the insertion of a rule on partial access.

The principle of public access to official documents in Sweden

The fundamental rules on public access to official documents are found in one of Sweden's constitutional laws—the *Freedom of Press Act*. In principle, all Swedish citizens and aliens are entitled to read the documents held by public authorities. However, this right is restricted in two ways.

Firstly, the public only enjoy the right to read such documents that are regarded as *official documents*. Not all documents of a public authority are in fact considered to be official documents. Thus, for example, a draft of a decision, a written communication or the like in a matter is not an official document if the draft is not used when the matter is finally determined.

Secondly, a number of official documents are *secret*. This means that the public is not entitled to read the documents and the public authorities are forbidden to make them public.

Chapter 2 of the Freedom of Press Act states what is meant by the term 'official document'. This chapter also includes fundamental rules concerning which official documents may be kept secret. Furthermore, the chapter contains provisions on how the public gains access to official documents that are not secret.

What is an official document?

A *document* is a presentation in writing or images but also a recording that one can read, listen to or comprehend in another way only by means of technical aids. The word 'document' consequently refers not only to paper and writing or images but also, for example, to a tape recording or an EDP (Electronic Data Processing) recording. One can say that a document is an object which contains information of some kind.

A document is *official* if it is

1. *held* by a public authority, and
2. according to special rules regarded as having been *received* or *drawn up* by a public authority.

Public authority

The Freedom of Press Act does not state what is meant by public authority. One may say that public authorities are the bodies included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities. However, companies, associations and foundations are not public authorities even if the state or a municipality wholly owns or controls them. Nor are the Riksdag, the county council or municipal assemblies public authorities, but the Freedom of Press Act expressly equates these decision-making bodies with public authorities.

Held by a public authority

It is often easy to conclude that a document consisting of paper with writing is 'held' by a certain public authority. In other instances it is more difficult to say where a document is held. This applies for example to information stored on a computer. The computer itself with the EDP record may be found at one public authority, while another public authority has access to the information on its own computer screens or may obtain printouts from the EDP record directly on its own equipment—the public authority has a direct computer link-up.

There are special rules in the Freedom of Press Act dealing with these types of documents whereby an EDP recording is generally considered to be held both by the public authority where the recording is itself located and also by a public authority having a computer terminal link-up. Furthermore, it is considered that an EDP record is held by a public authority if it can obtain printouts of the recording from another that takes care of the recording on its behalf, for example, another public authority or service office. Thus the public authority does not need to have so-called direct access to the record.

If a public authority has the sole function of technically processing or storing the EDP record on behalf of another public authority or on behalf of an individual, such a record is not considered to be an official document held by the public authority that only has a technical function in this respect.

Received by a public authority

A document has been received by a public authority when the document has arrived at the authority or is in the hands of a competent official, for example the civil servant dealing with the matter to which the document refers. The document need not be registered in order to be an official document.

The Freedom of Press Act also contains special rules concerning letters and other messages which are not addressed to the public authority directly but to one of the officers of the authority. If such a message relates to the authority's activities, it is an official document even though it has been addressed to a specific person at the authority. There is one exception to this rule. For example, a municipal councillor or a trade union representative on the board of an authority can receive letters concerning issues that the municipality or authority is engaged with, but without the letter becoming an official document, provided he/she received the letter exclusively in his/her capacity as a politician or union representative.

Drawn up by a public authority

The Freedom of Press Act contains many rules relating to when a document is considered to have been drawn up by a public authority. The principle may be said to be that a document which is created at a public authority is an official document when it obtains its final form. A document is considered to be drawn up when an authority sends it out (dispatches it). A document which is not dispatched is drawn up when the matter to which it relates is finally settled by the authority. If the document does not belong to a specific matter, it is drawn up when it has been finally checked or has otherwise received its final form.

For certain kinds of documents other rules apply concerning when they are drawn up. Thus, for example, a diary, a journal or similar document that is kept on a continuing basis is considered to be drawn up as soon as the document is completed so as to be ready for use. Judgments and other decisions with their associated records are drawn up when the ruling or decision has been pronounced or dispatched. Other records and similar documents are generally drawn up when the authority has finally checked them or approved them by other means.

Preliminary outlines and drafts (for example, of a decision of an authority) and memoranda (notes) are not official documents if they have not been retained for filing. By 'memorandum' is meant an *aide-mémoire* or other notation made for the preparation of a case or matter and which has not introduced any new factual information.

What official documents may be kept secret?

The Freedom of Press Act lists the interests that may be protected by keeping official documents secret:

1. the security of the Realm or its relations with a foreign state or an international organisation;
2. the central financial policy, the monetary policy, or the foreign exchange policy of the Realm;
3. the inspection, control or other supervisory activities of a public authority;
4. the interest of preventing or prosecuting crime;

5. the public economic interest;
6. the protection of the personal integrity or economic circumstances of private subjects; or
7. the preservation of animal or plant species.

Official documents may not be kept secret in order to protect interests other than those listed above. Which documents are secret shall be carefully stated in a special statute: that is, the Secrecy Act. However, it is permitted to include provisions concerning secrecy in other enactments provided that the Secrecy Act makes reference to them. In other words, the Secrecy Act shall indicate all the instances when official documents are secret. The Government may not decide on which documents are secret; this is an exclusive right of the Riksdag. However, in a number of provisions of the Secrecy Act, the Government is given the right to make supplementary regulations. The Government's regulations are contained in the *Secrecy Ordinance* (Swedish Code of Statutes 1980:657 reprinted in 1998:1333).

How can the public gain access to official documents?

A person who wishes to obtain an official document should refer to the public authority keeping the document. The person has the right to read the document at that place (provided the document is not secret). If the document cannot be read or be comprehended in any way without using technical aids, the authority shall make such equipment available, for example a tape-recorder in the case of a tape-recording. A document may also be transcribed, photographed or recorded. If a document is secret in part, those parts of the document that are not secret shall be made available in transcript or by a copy. Exceptions to the rules described here regarding having sight of the document at the place have, *inter alia*, been made where this 'causes serious difficulty'.

Those wishing to obtain official documents are also entitled to obtain a transcript or a copy of the document for a fixed fee. Exceptions are made to this rule in the case of, *inter alia*, EDP records. The authorities need not provide these in any form other than a printout.

Those who wish to obtain official documents need not describe the document precisely, for example state its date or registration number. But on the other hand,

authorities are not liable to make extensive inquiries in order to obtain the document for the applicant when he or she cannot provide the authority with further details of the document.

A request to obtain an official document shall be dealt with speedily by the authority. A civil servant currently working with the document need not release it immediately but unnecessary delay is not permitted.

One reason for some delay in the provision of an official document may be that the authority must consider whether the information contained in the document is secret or not, according to one of the provisions of the Secrecy Act. Sometimes it is an authority other than the one where the document is held that must determine the issue of secrecy. In that event, the request for the provision of the document should be submitted at once to the authority that will decide on the matter.

An authority may not require a person who wishes to obtain an official document to identify himself or herself or state what the document will be used for. However, if the request relates to a document falling under one of the provisions of the Secrecy Act, the authority must sometimes know who wishes to obtain it and what it will be used for. Otherwise, the authority might not be able to make a decision concerning whether the document may be made available. In that event the applicant may either say who he or she is and state what the document will be used for (for example, research) or relinquish any possibility of obtaining it.

An authority has, under certain circumstances, the possibility to provide a document subject to conditions, so-called *reservations*, restricting the applicant's right to use the information contained within the document. The authority may, for example, forbid the applicant to publish the information or to use it for purposes other than research.

If an authority has rejected a request to obtain a document or if it has supplied an official document subject to reservations, the applicant is, under the Freedom of Press Act, generally entitled to request that the matter be reviewed by a court. The Secrecy Act contains provisions concerning when reservations may be imposed and the court to which appeals should be addressed.

The decision of an authority to provide an official document cannot be appealed against.



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