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# **Power to the people – or privacy in peril?**

A linguistic-historical analysis of  
the meaning and boundaries of  
the Swedish principle of public  
access to official documents

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## Introduction

Recently, we have seen a very disconcerting development in the world regarding how information of different kinds is valued and used. As “truth” is being increasingly questioned, one possible remedy is the right of access to official documents. This is the subject studied in this article. Such access constitutes an important element in our democratic society by providing citizens and the media the means to control their government. In Sweden, this right of access might also bring about detrimental effects for privacy, or personal integrity, however, due to the stipulations of the constitutional law, the *Freedom of the Press Act*. As will be outlined below, the meanings attributed to various expressions related to the right of access are unclear, so too are the boundaries that regulate the creation of official documents that may be requested as per the *Freedom of the Press Act*. This uncertainty could carry implications for personal integrity. The meanings and creation of official documents are thus at the heart of this investigation. A more detailed explanation as to the relevance of this research topic follows below.

## Background

Sweden is renowned for its openness, often exemplified through one of its constitutional laws, the *Freedom of the Press Act*, the first version of which was published in 1766.<sup>1</sup> From then on, content regarding the possibility to request documents has been present. In 2016, 250 years of the Act was celebrated, making it the world’s first of its type.<sup>2</sup> The *current* version of the Act grants everyone access to documents that are “official” in the absence of secrecy regulation.<sup>3</sup> The possibility to request the release of official docu-

<sup>1</sup> *Kongl. Maj:ts Nådige Förordning, Angående Skrif- och Tryck-friheten*. Gifwen Stockholm i Råd-Cammaren then 2. Decembr. 1766, § 6.

<sup>2</sup> Björkstrand, Gustav & Mustonen, Juha. Introduction: Anders Chydenius’ Legacy Today in *The world’s first Freedom of Information Act: Anders Chydenius’ legacy today*, Mustonen, Juha ed., Kokkola: Anders Chydenius Foundation, 2006, p. 4

<sup>3</sup> The *Freedom of the Press Act* states that “[e]very Swedish citizen shall be entitled to have free access to official documents” (SFS 1949:105 *Tryckfrihetsförordning*, ch. 2, art. 1). The General provisions of the Act state that “[e]xcept as otherwise laid down in this Act or elsewhere in law, foreign nationals are equated with Swedish citizens” (SFS 1949: 105, ch. 14, art. 5). Professor in public law Alf Bohlin had found no exceptions for foreigners, Bohlin, Alf, *Offentlighetsprincipen*. Stockholm: Norstedts Juridik, 2010, p. 19.

ments is of fundamental importance for democracy.<sup>4</sup> Under the heading *The principle of public access to official documents* on the English version of the web page of the Government Offices of Sweden is the following:

**The principle of public access to official documents**

In order to guarantee an open society with access to information about the work of the *Riksdag* (Swedish parliament), Government and government agencies, the principle of public access to official documents has been incorporated into one of the fundamental laws, the Freedom of the Press Act.

The openness gives the Swedish people the right to study public documents, a right which may be exercised when they so wish.<sup>5</sup>

Providing “the Swedish people the right to study public documents”, what the Government Offices refer to as “the principle of public access to official documents”, thus has the possibility to ensure that correct information is provided the public so that it may hold its politicians and public authorities accountable. It is undisputable that the principle of public access contributes to openness and a democratic society.

However, in addition to protocols and similar documents, the stipulations of the *Freedom of the Press Act* are such that large amounts of documents with *personal data* are also created and are possible to request and be read in the absence of secrecy regulation. It should be stressed here, that special register laws often contain detailed information on the kinds of personal data that may be collected, and extensive secrecy regulation prevents the release of many official documents containing personal data. Nevertheless, it might difficult for an individual to understand when information on her has been collected and that it will appear in an official document, as

<sup>4</sup> See for instance the Council of Europe, which stated that “parliamentary democracy can function adequately only if the people in general and their elected representatives are fully informed”. The council furthermore referred to the Swedish *Freedom of the Press Act* as it wrote that “freedom of information has operated successfully in Sweden for more than two centuries”. Council of Europe. *Recommendation 854 (1979), Access by the public to government records and freedom of information*, 1979, p. 1.

<sup>5</sup> Swedish Government Offices. *The Swedish Principle of Public Access to Official Documents*, <https://www.government.se/how-sweden-is-governed/the-principle-of-public-access-to-official-documents/> [2019-02-10]. The Swedish version reads [Regeringskansliet. *Offentlighetsprincipen*]: ”Offentlighetsprincipen är central i den svenska rättsordningen. Den innebär att allmänheten, ofta enskilda individer och företrädare för media, har rätt till insyn i och tillgång till information om statens och kommunernas verksamhet.” <https://www.regeringen.se/sa-styrs-sverige/det-demokratiska-systemet-i-sverige/offentlighetsprincipen/> [2019-02-10].

well as the conditions under which these official documents might be released. One important reason for not knowing about the collection of personal data is that the processing often occurs without the consent of the individuals,<sup>6</sup> and furthermore the stipulations of the Act make it difficult to realise when a document is “official”. If a document fulfils the following criteria it is deemed “official” and thereby free to be read in the absence of secrecy regulation: that is it a “document” by definition of the law, that the document has been “received” or “composed” by a “public authority”, and that it is “held” by a public authority.<sup>7</sup> The Act expressly forbids the investigation into who is requesting the release of information in accordance with the Act.<sup>8</sup> Even if the identity of the person requesting the release is known, the individual about which the information concerns is not informed when personal data about them is released and they have no power over its subsequent use. Large amounts of personal data, frequently of a sensitive nature,<sup>9</sup> may thus be collected and stored in accordance with the *Freedom of the Press Act* without the knowledge of the individual. Furthermore, transfers of personal data between public authorities may be carried out by referring to the Act, and such transfers of information between public authorities are not necessarily clearly communicated to the individual.<sup>10</sup> To sum up, in addition to being of utmost importance for openness and democracy, the Act also effects the way personal data are handled in ways that could have negative effects on privacy.

## Towards a purpose and research questions

The extent to which public authorities will “receive” and “draw up” documents depends on the various tasks the authority will undertake. Knowing

<sup>6</sup> SOU 2016:41 *Hur står det till med den personliga integriteten?*, pp. 79, 322. ”Oftast har de enskilda inget inflytande över myndigheternas hantering – den görs i regel utan deras samtycke.”

<sup>7</sup> SFS 1949:105 ch. 2, §§ 3–8. In straightforward cases, the explanation of criteria is found directly in the law. In more complex situations, the release of documents must await legal processes that determine whether all criteria are met, see Bohlin, 2010 and Magnusson Sjöberg, Cecilia. *Rättsinformatik: inblickar i e-samhället, e-handel och e-förvaltning*. Lund: Studentlitteratur, 2011, for examples of court proceedings in relation to the criteria of the *Freedom of the Press Act*.

<sup>8</sup> SFS 1949:105 ch. 2, 14 §. Exception is made for instances when the public authority must examine whether secrecy regulation is in place.

<sup>9</sup> SOU 2016:41 pp. 79, 322.

<sup>10</sup> See e.g. discussion on transfer of information between public authorities in 2016:41 pp. 79–80.

how one's personal data are handled is at the very core of the new European General Data Protection Regulation<sup>11</sup> in force from May 2018. In this respect, the question of establishing the boundaries which determine the possible scope of official documents that might be created is therefore an interesting one. Are there any limitations in place which may, for instance, put limits on what public authorities may “receive” or “draw up”? In addition to this question on boundaries, I am interested in how the right of access/the principle of public access to official documents is understood, i.e. the meaning it is attributed.

The object of analysis for my research in this investigation is the phenomenon that official documents come into existence and are possible to request. In the current language, this is referred to as the right of access to official or to public documents, the principle of public access to official documents, the principle of public access etc. The word “access” leads thoughts to the possibility of requesting and examining of official documents. To be clear, despite the common expression, I am equally interested in how the official documents *come into being* in the first place. To establish the meaning and boundaries of the right of access phenomenon, I explore expressions such as “the principle of public access to official documents” (Swedish: “*offentlighetsprincipen*”) or “public access to documents” (Swedish: “*handlingsoffentlighet*”).<sup>12</sup> Is it possible that different expressions are used in different situations? Can we discern any development over time in the meaning attributed to these expressions? Can arguments be found which indicate that limits are in place for the creation of official documents? These are among the topics of interest in this study. As will have emerged from this presentation, I take the view in this study that *language* is an interesting tool to use to increase our understanding of the right of access to official documents. I will expand on the tool of analysis, linguistic-historical analysis, shortly, but for now I shall present the purpose of this investigation

<sup>11</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>12</sup> See e.g. the quote from the Government Offices of Sweden and *Personal data protection: information on the Personal Data Act*. Stockholm: Ministry of Justice, 4<sup>th</sup> revised edition, 2006, p. 13. The Swedish term “*offentlighetsprincipen*” may also be understood as having a wider scope that includes the right to attend court proceedings etc. See Bohlin 2010, p. 17. I will return to the different meanings in the section Previous research below.

as: *to identify the meaning and boundaries of the right of access to official documents through a linguistic-historical analysis.*

To establish the meaning and boundaries of this right, I pose three research questions. As indicated in the quotation from the Government Offices of Sweden, the “Swedish people” are the beneficiaries of the principle of public access. Under the title *Benefits for the citizens*, I analyse the use of expressions and their meaning related to the right of access in relation to its effects for citizens. As also mentioned, not only citizens, but also public authorities, may benefit from the right of access to official documents in Sweden. What expressions and meanings are used in this case? Are the expressions the same as when the effects for citizens were discussed? This will be analysed under the heading *Or benefits for the public authorities?* Lastly, in *Boundaries of the principle of public access to official documents*, I analyse discussions regarding what might constitute limits on the activities of the public authorities, such limits in turn providing boundaries for what official documents might be created.

### Investigation period and source material

The last three decades (1987–2017) have been chosen as the investigation period. This period is of great interest for several reasons. At the end of the 1980’s, digitalisation was still in its infancy and the transfer of data a great deal more burdensome and costlier than today. The period is one of strong technological development, and because of the effect of this on privacy matters, it is interesting to explore.<sup>13</sup> The three decades also saw the implementation of European-wide data protection legislation during the late 1990s, as well as preparations for a second implementation in 2018. In part, this legislation was an answer to the possibly detrimental impact on privacy of the technological development, and the implementation of such protective measures constitute another important theme of the period. As for the

<sup>13</sup> Recent analyses regarding how the activities of Swedish public authorities became increasingly digital include Edquist, Samuel. Ethical destruction? Privacy concerns regarding Swedish social services records. Jonason, Patricia & Rosengren, Anna (eds.) *The Right of Access to Information and the Right to Privacy. A Democratic Balancing Act*. Huddinge: Södertörns högskola, 2017, pp. 11–39; Friberg von Sydow, Rikard. Medical Records – the Different Data Carriers Used in Sweden from the End of the 19th Century Until Today and Their Impact on Confidentiality, Integrity and Availability. Jonason, Patricia & Rosengren, Anna (eds.) *The Right of Access to Information and the Right to Privacy. A Democratic Balancing Act*. Huddinge: Södertörns högskola, 2017, pp. 41–60.

Swedish context, it has been pointed out that privacy issues were high on the agenda in Sweden for decades – until, approximately, the start of this investigation period.<sup>14</sup> Yet, this is precisely when privacy really became under threat, it has been argued.<sup>15</sup>

The material chosen to answer the research questions is Swedish government reports. Sweden has a long tradition of processing topics on a national level through committees made up of a wide range of political representatives as well as disciplinary experts to prepare forthcoming legislation. More specifically, the reports are a kind of preparatory work and include deliberations in relation to new legislation. Therefore, they may be referred to in legal proceedings when interpretations are required,<sup>16</sup> making the material one of great interest.

The government reports chosen for the study all deal with personal integrity in official documents.<sup>17</sup> In choosing the material, I have been particularly interested in identifying such government reports that deal with large public databases with personal data. The reason for this is that reports dealing with such databases are likely to contain arguments on the need to balance, on the one hand, the right of access and, on the other, the right to privacy. Twelve government reports published 1987–2017 on personal integrity and public databases have been analysed.<sup>18</sup>

1. SOU 1987:31 *Integritetsskyddet i informationssamhället. Personregistrering och användning av personnummer* (Protection of integrity in the information society. Registration of personal data and the use of the personal number).
2. SOU 1988:64 *Integritetsskyddet i informationssamhället. Offentlighetsprincipens tillämpning på upptagningar för automatisk databehandling* (Protection of integrity in the information society. On the application of principle of public access to official documents on electronic registration).

<sup>14</sup> Olsson, Anders R. *Privatliv och internet – som olja och vatten?* Stockholm: Teldok, 2000, p. 18.

<sup>15</sup> Olsson 2000, p. 18.

<sup>16</sup> Edquist, Samuel. *Arkiven, bevarandet och kulturarvet*. Stockholm: Riksarkivet, 2014, p. 10.

<sup>17</sup> I have thus not identified government reports dealing with “the principle of public access to official documents” per se.

<sup>18</sup> Translation of the titles within brackets by the author.

3. *SOU 1991:21 Personregistrering inom arbetslivs-, forsknings- och massmediområdena* (Registration of personal data in the areas of work life, research and mass media etc.).
4. *SOU 1993:10 En ny datalag. Slutbetänkande* (A new data law. Final report).
5. *SOU 1993:83 Statistik och integritet. Skydd för uppgifter till den statliga statistiken m.m. (Statistics and integrity. Protection of data for the state statistics etc.)*.
6. *SOU 1994:65 Statistik och integritet. Lag om personregister för officiell statistik m.m. (Statistics and integrity. Law on personal data registers for official statistics etc.)*.
7. *SOU 1997:39 Integritet, offentlighet, informationsteknik. Del 1 och 2* (Integrity, publicity, information technology. Part 1 and 2.).
8. *SOU 2003:99 Ny sekretesslag* (New Secrecy Law.).
9. *SOU 2007:22 Skyddet för den personliga integriteten kartläggning och analys. Del 1 och 2* (The protection of the personal integrity. Survey and analysis. Part 1 and 2.).
10. *SOU 2008:3 Skyddet för den personliga integriteten. Del 1 och 2* (The protection of the personal integrity. Part 1 and 2.).
11. *SOU 2016:41 Hur står det till med den personliga integriteten?* (What is the situation with personal integrity?).
12. *SOU 2017:52 Så stärker vi den personliga integriteten* (This is how we strengthen the personal integrity).

In total, the source material is just over 5,000 pages. A few words on the methodology applied to the material follow in the next section.

## Methodology and theoretical framework

Large volumes of empirical data are no problem when systematic analyses can be made using, for instance, automatic identification of certain words or phrases. In the case of this study, however, the research is of a qualitative nature, the purpose of which is to explore and increase our understanding of important phenomena. Using *word count* was not an option, as varying expressions may be used to denote the same idea. Important arguments

would therefore have been overlooked if the analysis had been limited to the study of certain words and expressions. At the same time, it is not possible to study such a large amount of material in depth. Sections specifically discussing “the principle of public access to official documents”, or discussing large public databases with personal data and the transfer of personal data between public authorities have been of great interest for this study.

I have approached the material as a historian, striving to detect not only straightforward arguments and descriptions, but also implicit meanings,<sup>19</sup> which numerous readings and studying the material for a long time may reveal.<sup>20</sup> It should also be mentioned that the research questions – for the most part – have not been explicitly addressed in the source material. The government reports tend to contain detailed information on the background and the directives that form the assignment the committees are to carry out, as well as about the various surveys and deliberations of the committees. To a large extent, this kind of information is of less relevance to this investigation, however. Instead, the focus in this article is on the answers to the research questions and the more implicit meaning that may be detected through the close and repeated reading of the material.

As previously mentioned, I apply what I call a linguistic-historical analysis to the source material. This method finds its inspiration in the theoretical framework described in the works of German historian Reinhart Koselleck, and in that of British historian Quentin Skinner, among others.<sup>21</sup> Although differences in approaches of these theorists may be found, common ground relate to their view on the relationship between text and context, between language and reality. First and foremost, there is such a thing as a relationship between the context/the reality on the one hand, and the text/the language on the other, for both Koselleck and Skinner. Furthermore, this relationship is mutual, meaning that changes in the context may

<sup>19</sup> Cf. Tosh, John. *Historisk teori och metod*. Lund: Studentlitteratur, 2000, pp. 123–124.

<sup>20</sup> See also Jarrick, Arne & Söderberg, Johan. *Praktisk historieteori*. Stockholm: Stockholm University. Ekonomisk-historiska institutionen, 2003, pp. 9–11.

<sup>21</sup> See for instance Koselleck, Reinhart. Einleitung. *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*. Bd 1, A-D. Stuttgart 1972, s. XIII–XXVII; Koselleck, Reinhart. *Futures Past. On the Semantics of Historical Time*. New York: Columbia University Press, 2004; Skinner, Quentin. Meaning and Understanding the History of Ideas. *History and Theory* vol. 8:1 1969, pp. 3–53; Skinner, Quentin. *Visions of Politics*. Volume 1. Regarding Method. Cambridge: Cambridge University Press, 2002.

affect the text, just as linguistic change may have an impact on reality.<sup>22</sup> This view of a relationship between text and context is included in the “linguistic-historical analysis” applied in this study to establish the meaning of expressions related to, in this case, the right of access to official document. Why such an analysis might be interesting for a source material like government reports will be discussed next.

<sup>22</sup> See also Rosengren, Anna. *Åldrandet och språket. En språkhistorisk analys av hög ålder och åldrande i Sverige cirka 1875–1975*. Huddinge: Södertörns högskola, 2011, pp. 36–39. In the dissertation, I lay out the arguments for using the term *linguistic-historical analysis* instead of *history of concepts* or *conceptual history*, which have been used in relation to Koselleck and Skinner.



## Previous research

As previously mentioned, government reports often constitute an early phase in the legislation process and they may be referred to when clarification is needed concerning the intent behind a law. Alongside bills, government reports therefore constitute a kind of preparatory work. In the same way as laws, preparatory work is a kind of legal text and the government reports will be regarded as such in this article.

As has been pointed out by researchers studying law from a linguistic perspective, there is an inherent dilemma in the legal profession. On the one hand, legal practitioners rely on the language as their primary tool through which laws are written and interpreted, and sentences proclaimed.<sup>23</sup> There has thus to be a belief in language being stable and having the capacity to be applied with equality. On the other hand, it has also been pointed out that language is “inherently indeterminate”, although the “linguistic nature is not often realised or appreciated”.<sup>24</sup> And, as pointed out by Deborah Cao, research expert in legal translation and legal language among others, this “linguistic uncertainty [...] inherent in language” applies also to the “legal system”.<sup>25</sup> This dilemma and “linguistic uncertainty” inherent in the legal profession makes legal texts particularly interesting to study.

Another interesting issue related to language and the law is related to legal language being culturally dependent. “Each society has different cultural, social and linguistic structures developed separately”, and so “[l]egal concepts, legal norms and application of laws differ in each individual society reflecting the differences in that society”, Cao writes.<sup>26</sup> The cultural aspect of the legal language is also stressed by Heikki S. M. Mattila, researcher of comparative legal linguistics. Mattila stresses the importance of historical development and states that since law is “a product of history, all law is considerably culture-specific”.<sup>27</sup> This, in turn, is of great import-

<sup>23</sup> See for instance Cao, Deborah. *Translating Law*. Clevedon: Multilingual Matters, 2007, p. 13; Tiersma, Peter M. & Solan, Lawrence M. Introduction. *The Oxford handbook of language and law*, Tiersma, Peter M. & Solan, Lawrence M. (eds.) Oxford: Oxford University Press, 2012 a), p. 6.

<sup>24</sup> Cao 2007, p. 19.

<sup>25</sup> Cao 2007, p. 19.

<sup>26</sup> Cao 2007, p. 24.

<sup>27</sup> Mattila, Heikki E. S. Legal Vocabulary. *The Oxford handbook of language and law*, Tiersma, Peter M. & Solan, Lawrence M. (eds.) Oxford: Oxford University Press, 2012, p. 28. The cultural influence is stressed also in Tiersma, Peter M. A history of the languages

ance for our understanding of the legal system. Lawrence M. Solan and Peter M. Tiersma, who have both extensively explored the relationship between language and law, further claim that

Some of this learning [related to linguistics] has profound implications for how legal systems perform. Our understanding of the rule of law has at its core the notion that rules and norms can be expressed in language, and that therefore we can govern ourselves according to principles, rather than the personal preferences of individuals. This is the source of the maxim “the rule of law, and not the rule of men,” and it is crucially language-dependent.<sup>28</sup>

Connected to the culture-specific nature of the various legal systems in place in the world, are problems which may arise when a concept from one legal system needs to be translated into another system in which previously it had no place. Susan Šarčević, professor of legal law and legal English, states that legal texts have no “single agreed meaning independent of local context but usually derive their meaning from a particular legal system”.<sup>29</sup> Peter Tiersma discusses this in relation to translation of EU law which, in most cases, is written in English or French “and then translated into the other official languages using the existing legal terminology of those languages”. Some legal terms will not have the same meaning as in the original EU text, and so “a law or regulation, intended to be uniform throughout the EU, may acquire subtle differences in meaning via the process of translation”.<sup>30</sup> This difficult transition of a legal concept from one culturally-bound system to another indicates that the question of language and meaning is an interesting one to keep in mind in the analysis of legal texts.

The meaning of the right of access has been approached in research from various perspectives. Johan Hirschfeldt, former president of Svea Court of Appeal, has made an analysis of “the principle of public access to official documents” from the publication of the *Freedom of the Press Act* in 1766 to the last decades of the 20<sup>th</sup> century.<sup>31</sup> The expression “the principle of public

of law. *The Oxford handbook of language and law*, Tiersma, Peter M. & Solan, Lawrence M. (eds.) Oxford: Oxford University Press, 2012, pp. 13–26.

<sup>28</sup> Tiersma & Solan 2012 a), p. 3.

<sup>29</sup> Šarčević, Susan. Challenges to the legal translation. *The Oxford handbook of language and law*, Tiersma, Peter M. & Solan, Lawrence M. (eds.) Oxford: Oxford University Press, 2012, p. 193.

<sup>30</sup> Tiersma 2012, p. 25. See also Šarčević 2012, p. 194.

<sup>31</sup> Hirschfeldt, Johan. 1766 års tryckfrihetsförordning och offentlighetsprincipens utveckling. *Förvaltningsrättslig tidskrift* 61(1–2), p. 2.

access to official documents” (“offentlighetsprincipen”) did not make its appearance until the beginning of the 20<sup>th</sup> century, Hirschfeldt notes.<sup>32</sup> The *idea*, however, has been present ever since 1766, the “birth of our principle of public access to official documents, expressed as the right to print official documents”.<sup>33</sup> Emphasis is thus put on the right to print official documents in this definition which, until recent times, has been the most fundamental meaning of the principle, according to Hirschfeldt.<sup>34</sup> The meaning of the expression “the principle of public access to official documents” (“offentlighetsprincipen”) is also a topic that I have briefly studied in a previous article making use of two of the government reports included in this investigation. I showed that the expression had two different meanings – a broader one dealing with a general possibility to control and get insight into the government and public authorities, and a narrower one dealing with the right of access to official documents – and that the different meanings could exist within one and the same report.<sup>35</sup> In current language, the expression is often used without a definition being provided, as if its meaning was clear and identical for everyone. The conclusion drawn from the analysis, however, is that the meaning is *not* stable, and that we must refrain from taking its meaning for granted. It might also be noted that historian Lars Ilshammar has carried out an analysis on legislation related to personal data for a period spanning 1969 to 1999, making use of government reports among others.<sup>36</sup> Ilshammar reflected that central concepts might undergo change during such an extended period, but did not use any linguistic tools to deal with this.<sup>37</sup> It appears, therefore, that the application of a linguistic-historical method to legal texts from the last decades might contribute to our understanding of the idea of the right of access to official documents.

<sup>32</sup> Hirschfeldt 1998, p. 3.

<sup>33</sup> Hirschfeldt 1998, p. 5, “föds vår offentlighetsprincip, uttryckt som en rätt att trycka av allmänna handlingar.”

<sup>34</sup> Hirschfeldt 1998, p. 10.

<sup>35</sup> Rosengren, Anna. Offentlighetsprincipen i teori och praktik. *Arkiv, samhälle och forskning*, 2017:1, pp. 43–45.

<sup>36</sup> Ilshammar, Lars. *Offentlighetens nya rum: teknik och politik i Sverige 1969-1999*. Diss. Örebro: Örebro University, 2002.

<sup>37</sup> Ilshammar 2002, pp. 61–62.



## Empirical investigation

In this section, the results from the empirical investigation of twelve Swedish government reports are presented. The presentation is made in accordance with the three research questions regarding effects for citizens, effects for public authorities, and, lastly, on the boundaries of the right of access/the principle of public access to official documents.

### Benefits for the citizens

The title for this section was chosen because a recurring theme is how the principle of public access to official documents provides benefits for citizens, an example of which we saw in the text from the Government Offices of Sweden in the introduction. Arguments of this kind were found in four of the twelve reports. In three, it was emphasized how the principle provided some kind of “power to the people” by granting them access to official documents, in turn providing them the possibility to control public authorities. In all four reports, “the principle of public access to official documents” (Swedish: “offentlighetsprincipen”) was described as providing these effects.

The first example from 1987 is found in the report *Protection of integrity in the information society. Registration of personal data and the use of the personal number*.<sup>38</sup> The authors reported that personal data were increasingly being registered electronically by public authorities, and the right of access to official documents in accordance with the *Freedom of the Press Act* – which had been written at a time when only paper documents existed – was to be thoroughly investigated.<sup>39</sup> The authors were to investigate if the personal integrity was under threat, and to “investigate problems linked to the application of the principle of public access to official documents” in electronic format.<sup>40</sup> Interestingly, they were *also* to “consider measures to strengthen the principle of public access to official documents concerning its real purpose to provide the citizens possibilities to control and gain

<sup>38</sup> SOU 1987:31 *Integritetsskyddet i informationssamhället. Personregistrering och användning av personnummer*.

<sup>39</sup> SOU 1987:31 p. 17.

<sup>40</sup> SOU 1987:31 p. 17 “utreda de problem som är förenade med offentlighetsprincipens tillämpning” on documents in electronic format (the authors used the expression “ADB-upptagningar”, common at the time). Translations of the empirical material by the author unless otherwise stated.

insight into the activities of the public authorities”.<sup>41</sup> In this quotation, the authors thus described the “real” purpose of the principle as fundamentally providing citizens power by granting them the possibility to “control and gain insight”. The same committee reiterated the purpose almost verbatim in a report published the following year, in 1988.<sup>42</sup> This power afforded the people is clearly apparent in the next example from 1993. This report, *A new data law*, discussed the proposal for a data protection law at EU level and how it might be implemented in Sweden.<sup>43</sup> The authors encountered considerable difficulties as they tried to reconcile the principle of public access with the EU proposal aiming at protecting the personal data of citizens. While discussing the Swedish principle, the authors stated that

The principle of public access to official documents means that the activities of the state and the municipalities are open to access to the public to the largest extent possible. This is considered a prerequisite for allowing the citizens to verify that the public authorities complete their tasks.<sup>44</sup>

Again, the argument that citizens have the power to control public authorities is clearly stated in the second sentence in the quote. In the last example of benefits of the principle of public access, the agency of the citizens was less visible, however. *What is the situation with personal integrity?*, a government report from 2016, presented a large investigation of the risks and legal protective framework in different sectors of society.<sup>45</sup> Under the heading “The principle of public access to official documents”, the authors wrote that the principle “states that all exercise of public authority is to be

<sup>41</sup> SOU 1987:31 p. 124 “överväga åtgärder för att stärka offentlighetsprincipen när det gäller dess egentliga syfte att ge medborgarna möjligheter till kontroll och insyn i myndigheternas verksamhet.”

<sup>42</sup> SOU 1998:64 *Integritetsskyddet i informationssamhället. Offentlighetsprincipens tillämpning på upptagningar för automatisk databehandling*, p. 69 “strengthen the principle of public access to official documents for its real purposes, according to the instructions, namely, to provide the citizens possibilities to control and get insight into the activities of the public authorities” (“stärka offentlighetsprincipen för dess enligt direktiven egentliga syften, nämligen att ge medborgarna möjligheter till kontroll och insyn i myndigheternas verksamhet”).

<sup>43</sup> SOU 1993:10 *En ny datalag. Slutbetänkande*.

<sup>44</sup> SOU 1993:10 p. 85 “Offentlighetsprincipen innebär att verksamheten hos staten och kommunerna i största möjliga utsträckning är öppen för insyn från allmänheten. Detta anses vara en förutsättning för att medborgarna skall kunna kontrollera hur myndigheterna fullgör sina uppgifter.”

<sup>45</sup> SOU 2016:41 *Hur står det till med den personliga integriteten? – en kartläggning av Integritetskommittén*.

transparent and that everyone who so wishes has the right of access to the official documents of public authorities”.<sup>46</sup> The agency by the citizens, with respect to exercising power over the authorities, was thus not clearly indicated in this example.

### Or benefits for the public authorities?

In the examples above, it is clear that citizens could exercise control over the public authorities in accordance with the right of access to official documents as stated in the constitutional law the *Freedom of the Press Act* and that the exercise of public authority should be transparent. In this section, examples will be given of reports that capture the fact that benefits of the right of access might be extended to also cover public authorities.

The first example is provided in a report from 1993, *Statistics and integrity. Protection of data for the state statistics etc.*<sup>47</sup> The topic for the one-person committee behind the report was the use of personal data in state statistics, as manifested for instance in large public registers.<sup>48</sup> The reference to the principle of public access being a right for citizens was made as the author discussed the “dramatic increase” in the “information flows in our society”. The reason for this increase, according to the author, was that “the public authorities have referred to the rules of release [of official documents] from another public authority in the Freedom of the Press Act, although these rules actually regulate the right of information of the individual”.<sup>49</sup> This “– almost entirely – unregulated transfer of data between public authorities” was seen as constituting considerable risk for the personal integrity of individuals.<sup>50</sup> The same line of argument was presented in a report published a decade later in 2003. This report, *New Secrecy Law*, contained an investigation of the relation between “the principle of public access to official documents and IT”, as well as a proposal for a new secrecy

<sup>46</sup> SOU 2016:41 p. 60 “[offentlighetsprincipen] stadgar att all myndighetsutövning ska vara transparent och att den som så önskar har rätt att ta del av myndigheters offentliga handlingar”.

<sup>47</sup> SOU 1993:83 *Statistik och integritet. Skydd för uppgifter till den statliga statistiken m.m.*

<sup>48</sup> SOU 1993:83 p. 11.

<sup>49</sup> SOU 1993:83 p. 50 “Allmänt kan konstateras att informationsflödena i samhället ökat dramatiskt under senare decennier som en följd av att myndigheterna åberopat reglerna om utlämnande från annan myndighet i tryckfrihetsförordningen medan dessa regler egentligen reglerar den enskildes rätt till information.”

<sup>50</sup> SOU 1993:83 pp. 50–51 “– i stort sett – oreglerat uppgiftsflöde mellan myndigheter”.

law, the effect of which was to limit the release of official documents.<sup>51</sup> In a section dealing with secrecy between public authorities, the authors dealt with the topic of such authorities benefiting from regulations in the *Freedom of the Press Act*. As a point of departure, they stated that “[t]he constitutionally founded principle of public access to official documents does not include a right for public authorities – only for individuals – to access official documents”.<sup>52</sup> The authors then went on to try and explain how this legal right for individuals had come to be exercised also by public authorities, and wrote that “[i]t has nevertheless been believed that the principle of public access to official documents is to be applied also between public authorities”.<sup>53</sup> The reason stated for this, in turn, was that “for a long time, it has been regarded as a self-evident principle that all public authorities are obliged to cooperate and help each other to the extent that this is possible”.<sup>54</sup> These two reports thus clearly described how a legal right for the individual had become a right in practice for public authorities, despite the constitutional law assigning the right only to individuals.

With this in mind, it is interesting to note the way the transfer of personal data to research databases was described in the report from 1993, dealing with the topic of state statistics. In a section dealing with how data were gathered to serve the needs of statistics and research, the author wrote that “[i]n our country, research is facilitated by the regulation in the *Freedom of the Press Act* on public access to documents”.<sup>55</sup> This neutral way of describing how data for research purposes were gathered through the right of access had also been mentioned in two reports published shortly before this one. They were written by the same committee and the same expression was used: “In Sweden, research is also facilitated by the regulation on public

<sup>51</sup> SOU 2003:99 *Ny sekretesslag*, section “Till statsrådet och chefen för Justitiedepartementet” and p. 70, “offentlighetsprincipen och IT”.

<sup>52</sup> SOU 2003:99 p. 222 “Den grundlagsfästa offentlighetsprincipen innefattar inte någon rätt för myndigheter utan endast för enskilda att ta del av allmänna handlingar.”

<sup>53</sup> SOU 2003:99 p. 222 “Det har ändå ansetts att offentlighetsprincipen skall tillämpas även myndigheter emellan.”

<sup>54</sup> SOU 2003:99 p. 222 “[...] sedan länge ansetts vara en självklar princip att alla myndigheter är skyldiga att samarbeta och bistå varandra i den utsträckning som det kan ske”. See also Bohlin who traces the notion that public authorities are to “take one another by the hand” to the Swedish constitution of 1809. Bohlin 2010, p. 215.

<sup>55</sup> SOU 1993:83 p. 23 “I vårt land underlättas forskningen av tryckfrihetsförordningens bestämmelser om handlingsoffentlighet.”

access to documents for information at the public authorities”.<sup>56</sup> Reference was thus not made to the *Freedom of the Press Act* in these two last examples. We note that it was not made clear in these instances that the possibility for public authorities to gather data for research was through the means of a right attributed to individuals.

## Boundaries of the principle of public access to official documents

Having presented arguments found in the reports on benefits for the citizens and benefits in practice for public authorities, I will now turn to the last research question on the boundaries of the principle of public access.

The earliest example from 1987 is found in a presentation on personal data and use of the personal number. The authors recognized that the “principle of public access to official documents has many irreplaceable benefits”, but they also pointed out the need to “consider the integrity problems that the regulations regarding the publicity of official documents may entail”.<sup>57</sup> To do so, the authors emphasized the need for the data controllers at the public authorities to “fulfil the demands that the data law already poses on them”, and cautioned the authorities not to accept “unnecessarily unrestrained register content because the data controller finds that the information might be nice to have”.<sup>58</sup> In this case, the authors thus indicated that the opinion and decisions of individual civil servants might have an impact on the amount of data registered. In a report published the following year, in 1988, another argument was presented which dealt with the needs of the public authorities. The topic under investigation was the so called “mass releases” (Swedish: “*massuttag*”) in accordance with the right of access. Should it really be a “task for the public authorities to accommodate requests for mass releases of, for instance, a purely commercial nature” was

<sup>56</sup> SOU 1991:21 *Personregistrering inom arbetslivs-, forsknings- och massmedieområdena*, p. 65; SOU 1993:10 pp. 194–195: “I Sverige underlättas forskningen också av bestämmelserna om handlingsoffentlighet för uppgifter hos myndigheter.”

<sup>57</sup> SOU 1987:31 p. 115 “[o]ffentlighetsprincipen har många och omistliga fördelar”; “ta hänsyn till de integritetsproblem som bestämmelserna om allmänna handlingars offentlighet kan medföra”.

<sup>58</sup> SOU 1987:31 p. 115 “leva upp till de krav som datalagen redan ställer på dem”; “onödigt vidlyftigt registerinnehåll som den registeransvarige tycker kan vara bra att ha”.

a question discussed.<sup>59</sup> The authors replied no, and argued that the public authority should be required to release masses of official documents only if such releases could be considered being made for the sake of “the needs of the public authority itself”.<sup>60</sup> Here, we thus discern the *needs* of the public authority as putting limits on the activities of the public authorities, thereby affecting the official documents that might be created. Two more reports from the end of the investigation period contained arguments related to necessity. In the report from 2016, the argument was raised in a section dealing with E-government. The authors stated that public authorities handle “large quantities of data about individuals” who often have “no influence over the handling of the public authorities – it is often made without their consent”.<sup>61</sup> Therefore, it was claimed, authorities had “a special responsibility [...] to ensure that data are handled only when it is really necessary for the administration to be able to carry out its tasks”.<sup>62</sup> Again, necessity was the requirement that was brought forward as the boundary of the principle of public access. How this necessity was to be ascertained was not discussed, however. With minor changes, the same argument was included in the subsequent report, published in 2017.<sup>63</sup>

If it might be regarded as difficult to establish when handling of data was “necessary” in the examples above, the third line of argument in the reports is more clear-cut: that laws and ordinances constitute the framework ultimately forming the boundaries for the principle of public access. This argument was found in the report from 1993 with the proposal for a new data protection law. The Swedish legislation in force at the time was held up against the EU proposal in the section “Release of personal data”.<sup>64</sup> The authors discussed article 6 of the EU proposal, which stated that “personal data must be [...] collected for specified, explicit and legitimate purposes and used in a way compatible with those purposes”, which were to be

<sup>59</sup> SOU 1988:64 p. 105 “uppgift för myndigheterna att tillgodose önskemål om massuttag av t. ex. rent kommersiell natur”.

<sup>60</sup> SOU 1988:64 p. 108 “för myndighetens egna behov”. The authors suggested an amendment to the *Freedom of the Press Act* to this effect.

<sup>61</sup> SOU 2016:41 p. 79 “stort antal uppgifter om enskilda”, “inget inflytande över myndigheternas hantering – den görs i regel utan deras samtycke”.

<sup>62</sup> SOU 2016:41 p. 79 “vilar ett särskilt ansvar på det allmänna att se till att uppgifter bara hanteras när det verkligen är nödvändigt för att förvaltningen ska kunna utföra sitt uppdrag”.

<sup>63</sup> SOU 2017:52 p. 58 “vilar därför ett särskilt ansvar på myndigheterna att se till att uppgifter bara hanteras när det är nödvändigt”.

<sup>64</sup> SOU 1993:10 p. 85 ff. “Utlämnande av personuppgifter”.

defined as narrowly as possible, they added.<sup>65</sup> In relation to the discussion on the purpose for the collection of data, the following reasoning regarding the principle of public access was presented:

Regarding the activities of the public authorities, who are to apply the principle of public access to official documents, their tasks are normally regulated in a relatively strict way in laws and ordinances. Specifically, the instructions of the public authorities usually indicate the tasks of the public authorities. One might say that the activities that the public authorities are to engage in, in ways specified in laws and ordinances, constitute the ultimate boundary for the processing of personal data.<sup>66</sup>

According to these authors, the laws and ordinances passed by the Swedish parliament and the Swedish government thus formed the limit for the activities of the authorities. From this, the authors went on to say that authorities could “collect personal data only if the data are to be processed in the activities that the authority is required (*“ålagd”*) to carry out”.<sup>67</sup> Laws and ordinances thus *required* the public authorities to carry out certain tasks, the authors argued. Collection of data was allowed if in accordance with these required tasks, and the boundary for creating official documents in this example was therefore linked to laws and ordinances. The report from 2016 also contained arguments on limitations related to legal regulations. In relation to E-government, the authors stated that “[a]n elaborate framework can contribute to the protection of the personal integrity, through pointing out the limits for what the authorities may and may not do with the data”.<sup>68</sup>

<sup>65</sup> SOU 1993:10 p. 88 “måste insamling av uppgifter ske för specificerade, uttryckliga och lagliga ändamål och de insamlade uppgifterna får endast användas endast på ett sätt som är förenligt med dessa ändamål”. English version in SOU 1993:10 *Bilagor*, p. 231. The emphasis of the authors of the government report that subsequent use was “only” admitted if in accordance with the original purposes had no correspondence in the EU proposal.

<sup>66</sup> SOU 1993:10 p. 88 “När det gäller verksamheten hos myndigheterna, som ju skall tillämpa offentlighetsprincipen, regleras deras uppgifter i allmänhet relativt noggrant i lagar och förordningar. Särskilt av myndigheternas instruktioner brukar det framgå vilka arbetsuppgifter som en myndighet har. Man kan säga att den verksamhet som myndigheterna skall ägna sig på sätt som den närmare preciseras i lagar och förordningar utgör den yttersta gräns för hur personuppgifter får behandlas.”

<sup>67</sup> SOU 1993:10 p. 88 “samla in personuppgifter endast om uppgifterna skall behandlas i den verksamhet som myndigheten är ålagd att utföra”.

<sup>68</sup> SOU 2016:41 p. 84 “Ett genomtänkt regelverk kan bidra till att skydda den personliga integriteten, genom att tydligt peka ut ramar för vad myndigheterna får och ska göra med uppgifterna.”

From this sentence, one might conclude that the regulation was in place and adhered to. Judging from the final report published the year after, however, this was not the case. As one of the principal conclusions, the authors stated that “[t]he central problem here is thus not the absence of a framework, rather it is the lack of compliance [with the framework]”.<sup>69</sup> Regulations of various kinds were described as being in place to protect the personal integrity of individuals, but public authorities and commercial companies failed to comply, with diminished respect for the framework as the expected result.<sup>70</sup>

One last line of argument will be presented here, and we find it in a report from 1997 which contained a second proposal – which was to be implemented – for a new data protection law in Sweden. Just like the authors of the previous report on the same subject from 1993, the authors of the 1997 report discussed the compatibility between the EU articles and the Swedish legislation.<sup>71</sup> In 1993, the authors had reached the conclusion that “one can hardly claim that a public authority collects data in order to fulfil the principle of public access to official documents”.<sup>72</sup> The authors behind the 1993 report therefore argued that the “purpose of the processing of data cannot be defined as fulfilling the principle of public access to official documents”, and they declared that it was doubtful that “release in accordance with the principle of public access to official documents” was compatible with the EU proposal.<sup>73</sup> In summary, the authors saw no stipulation in the EU proposal that might allow the release of personal data in accordance with the principle of public access.<sup>74</sup> The authors of the 1997 report reached the opposite conclusion. In the section “The relation to the principle of public access to official documents”, the authors emphasized a change in

<sup>69</sup> SOU 2017:52 p. 56 “Det centrala problemet här är således inte avsaknaden av ett regelverk, utan snarare bristen på efterlevnad.”

<sup>70</sup> SOU 2017:52 p. 56.

<sup>71</sup> SOU 1997:39 *Integritet, offentlighet, informationsteknik*.

<sup>72</sup> SOU 1993:10 p. 88 “kan man inte gärna hävda att en myndighet samlar in uppgifter för att tillgodose offentlighetsprincipen”.

<sup>73</sup> SOU 1993:10 p. 88 “ändamålet med behandlingen av uppgifter inte kan bestämmas på det sättet att det skall tillgodose offentlighetsprincipen”; p. 87 “utlämnande enligt offentlighetsprincipen”. Legal grounds for collection of data were found in article 7, and the authors had a discussion regarding 7 c dealing with the necessity to collect data “to comply with an obligation imposed by national law or by community law”. According to the authors, “the principle of public access to official documents” could not be regarded as such a necessity in accordance with national law. They did not rule out, however, that an interpretation to the letter might allow for the principle as being regarded as a legal obligation (p. 87).

<sup>74</sup> SOU 1993:10 p. 88.

comparison to the 1993 report: the inclusion of point 72 in the preamble of the EU directive, stating that the directive “allows the principle of public access to official documents to be taken into account”.<sup>75</sup> The beginning of article 6 in the EU data protection law was unaltered compared to the proposal and stated that “personal data must be [...] collected for specified, explicit and legitimate purposes”, after which it said that the personal data must “not [be] further processed in a way incompatible with those purposes”.<sup>76</sup> The proposal had talked about “use” of personal data which had to be “compatible” with the purposes for which they had been collected, whereas the 1997 text stated that the further processing of the data must “not” be “incompatible” with the original purposes for which they were collected. Apart from adding uncertainty, the use of two negations in the 1997 text also made possible a wider scope of interpretation. The opinion reached by the 1997 authors was that “the release by a public authority of personal data in accordance with the principle of public access to official documents cannot be regarded as incompatible with the purposes for which the data were originally collected”.<sup>77</sup> As a clarification, they added that “[t]he principle of public access to official documents is expressed in the constitution and must be regarded as an integrated part of all activities of the administration that the public authorities carry out”.<sup>78</sup> Here, then, we have reached the fourth line of argument on the boundaries of the principle of public access to official documents being in this case – the principle of public access. The release of data in accordance with the principle of public access was interpreted as not being incompatible with the purpose of the collection of the data, meaning that the principle also constitutes the boundary for what may be collected.

<sup>75</sup> SOU 1997:39, chapter 9 “Förhållandet till offentlighetsprincipen; p. 214 “ta hänsyn till principen om allmänhetens rätt till tillgång till allmänna handlingar”. Translation in *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/46/EC)*.

<sup>76</sup> *Directive 95/46/EC* article 6.

<sup>77</sup> SOU 1997:39 p. 215 “myndighets utlämnande av personuppgifter med stöd av offentlighetsprincipen inte anses vara oförenligt med de ändamål för vilka uppgifterna ursprungligen samlades in”.

<sup>78</sup> SOU 1997:39 p. 215 “Offentlighetsprincipen framgår av grundlagen och får anses utgöra en integrerad del av all förvaltningsverksamhet som myndigheterna ägnar sig åt”.



## Conclusion and discussion

It is now time to draw conclusions from the results presented above in accordance with the theoretical framework, and to point at some of the new research questions that these conclusions give rise to. In the section on *benefits to the citizens*, we noted that the expression “the principle of public access to official documents” (“offentlighetsprincipen”) was used in all four examples found in the reports. However, the emphasis on the principle providing some kind of “power to the people” was considerably downplayed in the last example from 2016. In the examples from the late 1980s and early 1990s, the point was expressly made that citizens were in a position to control their public authorities through the access to official documents. The report from 2016, on the other hand, spoke of “exercise of public authority” being “transparent and that everyone who so wishes has the right of access to the official documents of public authorities”. To this might be added that the current description of “the principle of public access to official documents” of the Government Offices contains no reference to “control” of the Swedish people. Although the examples are too few to draw any conclusions from, the identified differences from a strong to a weaker agency on behalf of the citizens between the start and the end of the investigation period might be interesting to explore further. A development that has taken place during the same period is the introduction of what is often referred to as *new public management* (NPM) in government administration. With this management model, efficiency was to improve through the adaptation of management models from the private sector, and performance made possible to evaluate through predefined goals and performance measurements.<sup>79</sup> One of the results of introducing NPM might thus be described as the transfer from direct to indirect control, the latter effectuated through setting up goals and various kinds of evaluations. This is of course just one possible societal development among many others that might entail new ways of describing a phenomenon such as the principle of public access, but looking into this possibility of a possible connection might be an interesting research topic.

The second section dealt with the fact that benefits granted to citizens could, in practice, be regarded as *benefits for the public authorities*. We note

<sup>79</sup> Forssell, Anders & Ivarsson Westerberg, Anders. *Administrationssamhället*. Lund: Studentlitteratur, 2014, pp. 202–204.

the following: in the examples regarding how public authorities made use of the right of access pertaining to citizens, the expression “the principle of public access to official documents” (“offentlighetsprincipen”) either was not used, or was used to underscore the view of the authors that the principle did not extend to public authorities. If we now combine the results from the first research question in section one, regarding *benefits for the citizens*, with that from the research question, regarding *public authorities benefiting* from the right of access, we find that the expression “the principle of public access to official documents” is used when the power of citizens was emphasized. When the reports contained discussions on the practical use of the very same right of access, this was done using expressions other than “the principle of public access to official documents”. One possible interpretation is that the authors were of the opinion that “the principle of public access to official documents” was simply not at hand in these examples. One might also argue, however, that “the principle of public access to official documents”, in the sense of official documents being released in line with the stipulations of the *Freedom of the Press Act*, was indeed also in play in the case of documents being released to public authorities. With such an interpretation, further research into the choice of expressions for the same principle of access, but with different beneficiaries, seems to be another topic warranting further investigation.

Turning now to the third section on the *boundaries* of the right of access, it is intriguing that several suggestions regarding possible limits to the right of access are discernible in the material. We can also conclude that most of the limitations suggested in the reports – the decisions of individual civil servants, the need of the public authority, as well as “the principle of public access to official documents” – are of such a character as to make it hard to understand and predict the possible boundaries for the creation of official documents in Sweden. Only the suggestion that laws and ordinances constitute the framework that sets limits to the activities of the public authorities would provide a – theoretical, at least – possibility to predict the limits for the creation of official documents. The message of the last report from 2017 is, therefore, more disconcerting, as it claims that the regulations in place are not being followed. Until the situation of non-compliance has been remedied, the theoretical possibility to know what is happening with one’s personal data stays, alas, theoretical.

The argument that “the principle of public access to official documents” might constitute the boundary is one of great interest. The two reports from 1993 and 1997 both discussed the EU proposal for a new law regarding

personal data, and both contained elaborate discussions on the relation between the EU text and the Swedish “principle of public access to official documents”. The reason that the discussion was of such an elaborate character, I suggest, is because the concept “collect” (personal data) had no clear equivalence in the Swedish principle of public access when it was introduced. In turn, this is due to two fundamental characteristics of the Swedish legal system in relation to the right of access. Firstly, the system is characterised by a stipulation – which appeared in the very first version of the Swedish *Freedom of the Press Act* in 1766 – to the effect that “when requested, [“documents, protocols”, “official correspondence” etc.] shall immediately be issued to anyone who applies for them”.<sup>80</sup> This stipulation thus deals with the release of official documents, and has been an element of the Swedish system of right of access for more than 250 years. Secondly, the official and accessible nature of documents is the default situation in the Swedish right of access,<sup>81</sup> not secrecy. This applies also for personal data. Both the focus on request and accessibility being the default situation deal with the *release* of official documents, i.e. the output from a kind of vast repository of official documents that have come into existence through the workings of the Swedish system of right of access to official documents. Before the EU proposal on personal data, the concept “collect”, dealing with the creation of official documents and the input into the repository, had not been much discussed in relation to the Swedish right of access. With the discussions on purposes for the collection of personal data in the EU text, the concept had to be reconciled with the Swedish principle of release of official documents, however. The fact that the concept had had no clear position in the Swedish principle of public access, I argue, is why the 1993 and the 1997 reports contained such elaborate discussions on “the principle of public access to official documents” and “collect”. In the section above on previous research, a quotation from Peter Tiersma informed us that “a law

<sup>80</sup> Translation from Hogg, Peter. *Ordinance Relating to Freedom of Writing and of the Press (1766). The world's first Freedom of Information Act: Anders Chydenius' legacy today*. Mustonen, Juha (ed.), Kokkola: Anders Chydenius Foundation, 2006, p. 13.

<sup>81</sup> SOU 2016:41, p. 61. The government report stated that “the principle of public access to official documents has publicity as a basis (and secrecy regulation to handle exceptions), whereas the main rule of the data protection directive is that personal data may not be disseminated (unless support for such dissemination is stipulated in the directive)” (“offentlighetsprincipen har offentlighet som utgångspunkt (och sekretessbestämmelser som reglerar undantagen), medan dataskyddsdirektivets huvudregel är att personuppgifter inte får spridas (om inte spridningen har stöd i någon av direktivets bestämmelser)”.

or regulation, intended to be uniform throughout the EU, may acquire subtle differences in meaning via the process of translation”. It is likely that this is what we have seen for the term “collect” as it was translated from the EU directive into Swedish law.

The analysis presented in this article has focused on the language used in relation to the right of access in twelve Swedish government reports published 1987–2017. I do not claim to say anything about possible *legal consequences* regarding the discussions referring to, for instance, the “need” of the public authorities or “the principle of public access to official documents” as constituting boundaries of the Swedish right of access. The fact that discussions on such boundaries can be traced in the government reports does give rise to questions on implications that this may have for ordinary citizens, however, in terms of what they might know about how their personal data are treated within the framework of the Swedish principle of right of access. Based on a literature study, I have previously identified seven factors as having a possible impact on the creation and release of Swedish official documents.<sup>82</sup> Because of the considerable number of factors and the difficulty to predict their impact on the creation and release of official documents in Sweden, I suggested the term “Black Box” to denote the workings of the Swedish principle of public access.<sup>83</sup> Both analyses thus imply that several factors might have an impact on the functioning of the principle of public access in Sweden, and it would be interesting to explore whether the findings might have any legal consequences.

From what has been said above, knowing how one’s personal data might be “collected” and included in documents deemed “official” is difficult. In turn, this is troubling, and the Swedish principle of access gives rise to questions related to the “rule of law”. The concept of rule of law has as one of its fundamental principles that rules should be clear and possible to comprehend. If, however, the effects of the *Freedom of the Press Act* on personal data are difficult or impossible to foresee, then it is hard to see that the criteria of rule of law have been met. At the beginning of the article,

<sup>82</sup> Rosengren, Anna. The Swedish Black Box. On the Principle of Public Access to Official Documents in Sweden. Jonason, Patricia & Rosengren, Anna (eds.) *The Right of Access to Information and the Right to Privacy. A Democratic Balancing Act*. Huddinge: Södertörns högskola, 2017, pp. 77–105. Except for “the principle of public access to official documents”, the suggested boundaries of this article correspond to factors identified in the Black Box article.

<sup>83</sup> Black Box is a term from open systems theory and used when a system is not directly observable, it is opaque.

Tiersma and Solan were cited: “Our understanding of the rule of law has at its core the notion that rules and norms can be expressed in language, and that therefore we can govern ourselves according to principles, rather than the personal preferences of individuals.” This analysis devoted to the Swedish principle of public access indicates, however, that language may very well be an issue that needs further discussion in relation to the rule of law. Hopefully, future research on this topic will help the Swedish right of access to provide “power to the people”, without the accompaniment of what may be referred to as “privacy in peril”.



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