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Sweden 240 Years On
Alive and Well or Death by Thousand Cuts?

1. Historical Background

Sweden's first Freedom of the Press Act was introduced in 1766 and became fundamental law in its entirety. The Act contained far more than mere general principles referring to the right to produce and disseminate printed matter and other information without prior censorship or other obstacles and the right to have claims related to freedom of expression offences examined before a court of law and it included inter alia the rule on the public nature of official documents and the exceptions associated therewith.

At that time there was probably no other country in the word that could offer its citizens anything like such a far- reaching right to take stock of what government agencies were doing and with it the possibility of monitoring the way in which they exercised their powers. Since then the principle of public access – apart from a few brief periods of recidivism to more traditionally secretive approaches – has applied in Sweden.

These fundamental provisions have always formed part of the Freedom of the Press Act, which is one element in the Swedish constitution.

The reasons for these regulations, which must be described as being well ahead of their time, are to be found in Sweden's political system, which was then very different from its prevailing European counterparts.

In the new constitution 1809 the basic principles relating to the Freedom of the Press Act are laid down in a key article of the Instrument of Government. A new Freedom of the Press Act was adopted in 1812. This Act remained in force with numerous amendments up to and including 1949.

2. Fundamental Liberties And Rights

The second chapter of the 1974 Instrument of Government contains a specification of fundamental liberties and rights. The two rights that are mentioned first are freedom of expression and freedom of information. The wording of the first paragraph begins as follows:

All citizens are guaranteed the following in their relations with the public administration

1. Freedom of expression: the freedom to communicate information and to express ideas, opinions and emotions,

2. Freedom of information: the freedom to obtain and receive information and otherwise acquaint themselves with the utterances of others

More detailed constitutional provisions about freedom of expression and information can today be found in the 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression. The Freedom of the Press Act stipulates that all laws concerning professional or official secrecy are to be promulgated in one specific act. This act is called the Secrecy Act. In other words, in principle this is to contain an exhaustive catalogue of all the exceptions to the main rules, which say that public employees have freedom of expression about matters relating to the professional duties

and every individual has the right of access to information which is kept at a public authority.

3. The Principle of Individual Responsibility

The principle of individual responsibility made an early appearance in the Freedom of the Press Act. This was o particular significance in the case of the daily press and other periodical publications, where in many cases several different contributors were involved. A *single* individual was registered as responsible editor and was liable for any offences. Other persons – journalist's technical staff, outside contributors and sources, were immune from liability and could therefore remain anonymous. A professional press ethic developed whereby a paper's staff respected a desire for anonymity. By this means evolved a right to anonymity, codified in the 1949 Freedom of the Press Act from its inception.

4. Sound Radio and TV

In the case of sound radio, which started up in the mid-1920s and later TV there was at first no special regulation in law. The various provisions of the Penal Code applied, in accordance with general principles to all who took part; there were no rules of law about immunity from liability for sources or a right to remain anonymous. There was no general right to transmit programmes; instead such activities presupposed a license. In practical terms there was a monopoly.

Special laws for sound radio and TV were introduced in 1966. These were not fundamental laws. The licensing requirement was retained. The monopoly situation was balanced by an obligation on the part of broadcasting corporation to observe objectivity and partiality, an obligation which had no equivalent in the Freedom of the Press Act. The rules were otherwise largely based on the same principles as the Freedom of the Press Act.

The question of rules of fundamental law for media other than print media was looked into on several occasions started in 1970 The focus initially was on radio and television, but attention was later directed also towards other technical apparatus. One much

debated question was whether the Freedom of the Press Act should be reworked to embrace also these other media, or whether they should be regulated in a special fundamental law, to apply alongside the Freedom of the Press Act. This latter view prevailed and a new fundamental law, the Fundamental Law on Freedom of Expression, was adopted in 1991.

5. The Freedom to Produce and Disseminate Information

Under both the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, constitutional protection means that the public institutions are debarred from intervening against abuses of freedom of expression or complicity therein other than in those cases and in the manner laid down in these two fundamental Laws. Each of these fundamental laws applies exclusivity within its own field. The Parliament may not by means of ordinary law restrict the freedom for the press or the freedom of expression arising out any of these fundamental laws.

Some demarcation difficulties arise in this connection. The basic rule is that the fundamental laws regulate only such use of words or pictures as falls within the freedom of expression field.

The long-running debate on child pornography produced the result that this kind of crime, which consists primarily of the portrayal of children in pornographic pictures and was dealt with in both the Freedom of the Press act and the Fundamental Law on Freedom of Expression, was removed from fundamental law with effect from 1 January 1999. This crime is now regulated only under the Penal Code. The very possession of such pictures has now been criminalised.

6. Ban on Censorship

An express ban on censorship – the central feature of legislation on the freedom of expression – will be found in both the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The ban is directed at public authorities and other public bodies. This is set out explicitly in the text of the Fundamental Law on Freedom of Expression but is regarded as applying also under the Freedom of the Press Act. The

fundamental laws do not in general preclude the person liable for the publication of an item from inviting a public authority, for example to scrutinise the item prior to publication. The only exception to the ban on censorship under the laws is that provisions may be issued concerning the scrutiny and approval of moving pictures in films and video recording and in other technical recordings intended for public showing.

7. Official Documents

A document is an object that contains information of some kind, it conveys information. In the Freedom of the Press Act a document is defined as a representation in writing, any pictorial representation or any record that can be read, listened to or otherwise comprehended only by means of technical aids. This can, for instance, be a printed pamphlet, a handwritten letter, a drawing, a photograph, a sound or video cassette, a CD-disc, an e-mail or information stored electronically in a database.

A document is defined as a *public document* if it

1) is in the keeping of a public authority
2) can be regarded as having been received by or drawn up at the public authority.

Documents are regarded as being in the keeping of a public authority if they are quite simply in premises belonging to the authority and also in certain other cases when they are available to the authority or an appropriate official at the authority. Where electronically registered documents are concerned, it is the availability that is decisive. Relatively detailed regulations have been laid down to determine which electronic documents are to be considered available to and therefore in the keeping of a public authority.

Deciding whether a document sent to an authority is to be considered as having been received there and is therefore a public document is usually quite simple. A document is regarded as having been received from the moment it arrives at the premises of the authority or is available to the appropriate official. If, therefore, a document dealing with the activities of a public authority is sent to a private address, it becomes a public document once it has reached the hands of the appropriate official, who must then ensure that it reaches the authority without delay and where it must be treated like any

other document submitted. The rule that applies to the majority of public documents is that they must be registered as soon as they have been received or drawn up. However, registration has no determinative function in itself: if an authority desires for some reason to avoid a document becoming public or to delay the moment at which this takes place, it cannot achieve this end by failing to register it correctly.

The regulations are more complicated on the subject of when a document produced within an authority is considered to have been completed and therefore a public document. If a document is to be dispatched, or, in other words, sent to an individual or individuals outside the authority, it is considered to have been drawn up at the moment it is dispatched. Documents that are not intended for dispatch generally become public on their completion. These regulations are intended to provide the authorities and their officials with the time needed for their work in preparing a case and drawing up the documents. Drafts, written presentations and other working papers never become public documents, unless they are filed on termination of the case. Documents of this kind have to be filed if they contain factual information, otherwise they can be discarded. Registers and journals in which information is noted progressively and continuously are public documents from the moment they are prepared so that information can be recorded.

8. Exceptions

Exceptions from the principle of the public nature of official document that is, cases in which official documents shall be kept secret must be scrupulously identified in a special act of law –the Secrecy Act. The Freedom o the Press Act lists the interests governing secrecy. Secrecy is not permitted other than in accordance with these principles. The secrecy must be required to fulfil specific objectives specified in the Constitution. These objectives are:

- the security of the realm or its relationship to another state or an international organisation
- Sweden’s central financial, monetary or foreign exchange policy
- the activities of authorities involving inspection, monitoring or some other form of supervision

- the prevention or prosecution of criminal activities
- public economic interests
- the integrity of the personal or financial circumstances of an individual
- the protection of a species of animal or plant

9. The Secrecy Act

The Secrecy Act is arranged so that separate chapters are devoted to the secrecy regulation required to fulfil each of the seven different objectives just meant.

10. Considering Whether an Official Document May be Disclosed

The matter is considered in the first instance by the official responsible for the care of the document, for example, a registrar or a person reporting on a matter. In doubtful cases, the official should refer the matter to the authority if this would not delay determination of the matter. Further, if the official refuses to provide the document or supplies it subject to a reservation the matter must be referred to the authority on the request of the applicant. The applicant shall be advised that he may make such a request and that a decision by the authority must be made in order for it to be possible to appeal against a decision. 'The
Authority' can be a more senior official or, for example, the authority's board.

If an authority has rejected a request to obtain a document or if it has supplied an official document subject to a reservation, the applicant is generally entitled to appeal against the decision. Appeals are usually presented to an administrative court of appeal. A decision of such a court may be appealed against to the Supreme Administrative Court. If the party whose application has been rejected is a state authority, the appeal is presented to the Government instead of to an administrative court of appeal

11. Freedom of Expression and Public Employees

The Instrument of Government guarantees freedom of expression for all citizens in their relationships with the public administration. Freedom of expression and the right to publish information may only be restricted by legislation and on grounds relating to the

security of the realm, national self-sufficiency, public order and security, the reputation of individuals, the sanctity of private life and the prevention and prosecution of crime.

Individuals employed by the state or in local government enjoy the same freedom of expression as any other citizen. Their employers are one aspect of “the public administration” and therefore prohibited from limiting their freedom of expression to any greater degree than the restrictions imposed by law on grounds listed in the Instrument of Government. The most significant statutory restriction of the freedom of expression of public officials is the professional secrecy to which they are enjoined with regard to information that is subject to secrecy according to the Secrecy Act.

In other words, public employers, such as the Director General of an authority, are not entitled to ‘gag’ their employees with regard to information or conditions within the authority about which its administration is uncomfortable and which it does not want to see spread any further.

12. The Legal Right of Public Employees to Publish Information

The freedom enshrined in the Freedom of the Press Act to communicate information and intelligence for publication in print goes even further than freedom of expression in general. In fact the act grants a great degree of impunity to breaches of professional secrecy if they take the form of providing someone who can be considered to be the author or publisher of printed material with information intended for publication. Only a limited number of cases of breach of professional secrecy, of which an exhaustive list is provided in the act, are regarded as being so serious that those who commit them intentionally may be punished, even if this was for the purpose of publication in contact with a journalist or someone else who can be considered to be the author or publisher of printed material. All other aspects of professional secrecy, or in other words those not listed in the act, are overridden by the right to publish information. Anyone who during contacts with a journalist or some other representative of the media discloses information subject to the secrecy laid down in such a provision, is not therefore in breach of professional secrecy if the information is provided for the purpose of publication. This far-reaching freedom to publish information is of great significance not least for those employed by the state or local government and also in enabling the media to acquire information concerning more sensitive areas of official administration.

The Freedom of the Press Act and the Fundamental Law on Freedom of Expression stipulate that no authority or any other public agency may seek to identify someone who has divulged information and wishes to remain anonymous. Heads of authorities who attempt to identify employees who leak information to the media are in other words committing a crime.

13. The Parliamentary Ombudsman and the Chancellor of Justice

A complaint to the JO (Justitieombudsmannen) - or to the Parliamentary Ombudsmen(Riksdagens ombudsmän) which is the official name of the Institution - can be made by anybody who feels that he or she or someone else has been treated wrongly or unjustly by a public authority or an official employed by the civil service or local government.

An Ombudsman is an individual elected by the Riksdag to ensure that courts of law and other agencies as well as the public officials they employ comply with laws and statutes and fulfil their obligations in all other respects. Many of the complaints to the Ombudsman deal with questions related to the access to document and the freedom of expression.

The Chancellor of Justice is a non-political civil servant appointed by the Government. One of his duties is to ensure that the limits of the freedom of the press and other media are not transgressed and to act as the only public prosecutor in cases regarding offences against the freedom of the press and other media.

CURRENT DEVELOPMENTS AND TENDENCIES IN SWEDISH FOI LEGISLATION AND PRACTICE

14. Is the FOI Threatened by a Thousand Cuts?

The exceptions from the constitutional principle on right to access public documents are numerous. Thus the Secrecy Act is comprehensive, detailed and difficult to survey. Furthermore, there are new exceptions, added to the list very often. When Parliament decides an amendment to the Secrecy Act, it is usually asserted that the new curtailment of the FOI is necessary to protect a very important interest, e.g. the integrity of

individuals or the security of the country. It has proved rather easy to gain support among MP:s for amendments of this kind. The development has been criticized by defenders of the culture of openness, among them representatives of the media, who sometimes argue that there are not counter powers within the political system strong enough to guard the general interest of an extensive freedom of information. Although every single extension of secrecy may cause only a limited damage, what will be the total effect of several such extensions, and do the legislators pay regard to this total effect? Is secrecy continuously increasing and in the long run undermining
right to access public information?

Lately, two studies have been accomplished to investigate what effects the many changes in the Secrecy Act have had to the extent of secrecy. One of the studies was carried through by the Swedish Union of Journalists and the other one by a committee of politicians and experts, whose task it was to draft a new secrecy act.

The Union of Journalists scrutinized all changes of the Secrecy Act between July 1, 1992 and July 1 2002, totally 194 changes. According to the scientific method of this study, 112 changes were defined as neutral, 74 as resulting in increasing secrecy and 8 as resulting in decreasing secrecy, thus more of openness. The conclusion of the report was that the system of regulations giving the Swedish principle of access to public information concrete shape is continuously undermined and weakened. The effect of the provisions of openness diminishes and those provisions run the risk of being transformed into beautiful but fairly meaningless phrases in the Freedom of the Press Act. The most important single factor causing this change is, according to the report, the new attitude to protection of personal data, which has developed in the 1990:s and resulted in the creation of the Personal Data Act.

The Committee for drafting a new secrecy act scrutinized the changes of the Secrecy Act between July 1, 1998 and July 1, 2002, totally 89 changes. The scientific method differed to some extent from the method exercised in the study of the Union of Journalists. In the report of the committee, 61 of the changes were defined as neutral, 17 as resulting in increased secrecy, 5 as resulting in decreased secrecy and 6 as amendments to the list of non public bodies which have to apply, to some extent, the legislation on access to public documents. The committee, unlike the Union of Journalists, did not conclude that the total effect of the changes is an obvious development in direction of less openness and

more secrecy. The committee after discussing its own report and the one of the Union of Journalists, summarized:

> The studies reveal that the Secrecy Act is continually being changed. Apart from the purely editorial changes, new enterprises that require new secrecy regulations are arising all the time. The law itself is thus becoming more extensive. As new enterprises arise, there is an increase in the areas where the Secrecy Act is applicable. In that sense it can be said that there is an increase in secrecy. However, this is not the same thing as saying that we are moving towards a more closed society. When new enterprises arise, there is also an increase in the public sphere. After all, secrecy in a particular area of endeavour is rarely applicable in general, but only concerns certain information or the circumstances of that enterprise. Any information apart from this is available to the public.
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> However, our investigation did reveal changes that we considered to be clear extensions of secrecy. By an "extension of secrecy" we mean that existing transparency has been limited in some way, either by applying secrecy to an enterprise that was previously entirely public, or by tightening up the secrecy already applied to a particular enterprise. Those changes that we deem to be tightening up of secrecy have been implemented after problems have arisen in these enterprises due to information being in the public domain.
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> At the same time that secrecy is increased in certain areas, new enterprises continually arise to which the principle of public access to official records is applicable. Apart from few relaxations of secrecy that benefit all citizens, relaxations of secrecy have occurred in some cases for parties, or their equivalent, to entitle them to access to information that is necessary for them to be able to exercise their rights.
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> The Secrecy Act is very much a living statute that is continually changed. It is not always so easy to see what a change will entail for openness and transparency. The link between the constitution and the Secrecy Act is designed to function so that the legislator carefully weighs the interests of transparency against the interest of secrecy in every situation.

> In our opinion this legislative model is the one that is the most effective in order to prevent us from departing too far from the principle of access to official records. At the same time it is naturally important that developments in this area are closely monitored.

15. The Encounter With a Different Culture and Tradition in the European Union.

Since Sweden joined the European Union (EU) in 1995, the country has worked for more of openness in the work of the EU, to some extent in cooperation with other countries in Northern Europe such as Finland and the Netherlands. In 2001, when Sweden chaired the Council of Ministers, the EU decided an act concerning access to documents kept by the institutions of the union. Although there are many limitations and exceptions in the regulation, it meant a considerable step forward for FOI in the Union. An evaluation process is going on. A green paper was published by a committee of experts in April this year, and national authorities, NGO:s and concerned individuals were given the opportunity to comment on the statements and suggestions of the committee during a period of three months. In several comments and opinions the committee has been criticized for tending to move the balance between right to access to the records of the EU institutions and secrecy due to protection of personal data towards more of secrecy.

As a member of the EU, Sweden has had to implement in its domestic legislation EG regulations with a stronger protection of privacy, especially personal data, than has earlier been part of Swedish law. One of the main concerns in Sweden, when a membership of the EU was publicly discussed, was that the country would be obliged to give up its high level of openness in order to strengthen the rights promoting personal integrity, foremost protection of personal data. When negotiating its membership agreement, Sweden declared its right to continue to apply and to defend its constitutional regulation on FOI. This was not questioned by the EU and in Sweden that was interpreted as some sort of guaranty. This “guaranty” was regarded important in the debate before the referendum in 1994, which resulted in a rather narrow majority in favour of joining the EU.

When the European directive on protection of personal data was implemented in Sweden by means of a law, which came into force in 1998, the law included a provision that disclosure of personal data is not prohibited if disclosure is necessary to fulfil the constitutional regulation on right to access to public records. There have been, however, in practice a number of cases where the interests of openness and privacy have collided, and as I mentioned earlier, the Secrecy Act has been amended some times in direction of strengthening the protection of personal data.

There is an interesting case just now which illustrates the problems. The EU Commission has initiated legal proceedings against Sweden, accusing the country for breach of secrecy. According to a judgment of the Supreme Administrative Court and applying domestic constitutional regulation, the Swedish National Agency for Agriculture disclosed documents upon request of Greenpeace. The documents contained information about corn with modified genes. The documents had been transferred by the EU Commission, who had received them from a Dutch authority. The documents were classified as secret by the Authority in the Netherlands. The Commission had transferred them for opinions to some national authorities in member states under condition they were kept secret according to art. 25 of the EG Directive about organisms with modified genes. The directive says that a decision to classify an application for approval of new crops with modified genes as secret in the member state that has received the application should be respected in other member states who receive the application from the Commission in order to be able to take part in the process and decision of approval. We are waiting for the final outcome of this case with great interest.

16. The Rapid Development of Information Technology

Over the latest decades, the development of information technology has meant a tough challenge for the legislator to adapt, currently, the FOI regulation to new realities in the media landscape. The technical development is extremely rapid and more than once it has happened that the legislator has had difficulties to make the necessary amendments in due time.

Especially, to change the definition of the conception of “public document” has been of significant importance. Gradually, recordings of information on different kinds of electronic and magnetic media have been included in the conception of public document,

under the condition that a public body has the right and the technical equipment necessary to read or to listen to the information. The same now applies to information in a database. For that situation a new conception is introduced, "potential document". An authority keeps a potential public document, if 1) the information asked for is in a database, 2) the authority is connected to the database and 3) the authority disposes a computer programme which makes it possible to get the information in readable form by simple and routine activities. When these conditions are met, an authority has to disclose, upon request for a public document, information in a database which should not be kept secret.

17. The Ambition to Simplify the Secrecy Act

The Secrecy Act came into force in 1981. Already then, it was comprehensive and very detailed. Over the passed 27 years, it has been changed and amended more than 200 times. It is frequently criticized for being complicated and difficult to grasp and to apply. The legislator makes efforts to solve these problems. Four years ago, a draft new secrecy act was presented by the committee of parliamentarians and experts which I mentioned earlier.

The committee has tried to create a secrecy act which is more simple and easy to apply. Among the means to reach that objective are a more modern language, more and shorter chapters, shorter sections, cross-references and a system of subheadings. One effect is that the total volume of the draft act exceeds that of the already extensive Secrecy Act.

The draft act contains an interesting piece of news. That is a provision on balancing the general interest of access to certain information against the interest of secrecy in the specific case. According to that provision it should be allowed to disclose secret information to individuals, if the general interest of access to the information obviously outweighs the interest that the secrecy is there to protect.

Some specific parts of the suggestions in the draft act have been realised through amendments to the existing law. It is still an open question to what extent the draft act will come into force and replace the Secrecy Act.

18. Does Extreme Openness to Some Extent Counteract its Own Purpose?

In the public debate it has been argued that, due to the very far going openness, many civil servants are reluctant to document sensitive information, as they know that the document may be disclosed and even published and in any case filed. Is there a danger that one consequence of very far going FOI will be that citizens, journalists and scientists certainly have the right to inspect the archives but will find not much of real interest there?

Some people have answered YES to this question, among them a former director general of the National Audit Board. She had comprehensive experiences of the standards of archives in different countries from different international audit projects, one of them on the EU level. In her opinion the Swedish archives, compared to those in many other countries, contain little of substantial information that can elucidate what really happened during e.g. a political process concerning a sensitive matter. The reason is that politicians and civil servants involved in such a process prefer contacts by word of mouth, summarily or not at all documented, to written memoranda and other detailed documents. The main reason for this attitude is said to be a feeling of discomfort caused by the awareness that the right to access to the documents in the public archives is very far going.