



NEJVYŠŠÍ SPRÁVNÍ SOUD



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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy.

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Answers to Questionnaire: Sweden



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Sweden

(Questionnaire)

Part I

1. Is the central administrative supervision over providing information and protection of personal data carried out by one administrative authority or are there specialized authorities for each of these fields or is there an absence of such an authority in any of these areas? Does the chosen model cause any application problems?

There is no single authority in Sweden responsible for granting access to information. Requests for information are instead handled by the public authorities themselves. They are obliged to register all official documents in their possession. An individual who wishes to obtain an official document shall therefore turn to the public authority keeping the document.

A person whose request to obtain a document has been rejected is normally entitled to request that the matter is reviewed by a court, normally an administrative court of appeal. A decision of such a court may be appealed against to the Supreme Administrative Court. – Complaints can also be made to the Swedish Parliamentary Ombudsman.

The Swedish Data Protection Authority (Datainspektionen) supervises that the provisions of the Personal Data Act, the Data Act, the Debt recovery Act and the Credit Information Act are applied by authorities, companies, organizations and individuals. The Data Protection Authority provides information, issues directives and codes of statutes, handles complaints and carries out inspections. Decisions by the Swedish Data Protection Authority in accordance with the Personal Data Act may be appealed against to an administrative court of first instance. Leave to appeal is required to appeal to the administrative court of appeal and thus also to the Supreme Administrative Court. The protection of personal data is tried in the same manner as other interests that are protected by the The Public Access to Information and Secrecy Act.

This applied system could possibly, to some extent, lead to a lack of cohesion that is ultimately resolved by the administrative courts of appeal and the Supreme Administrative Court.

2. What types of information are excluded from providing? Is there one regime regarding all exclusions or is there any differentiation – e.g. absolute exclusion and relative exclusion?

In short, the right to access official documents is restricted in two ways. Firstly, not all documents are regarded as official. For example, a draft decision or a rough copy is not considered to be an official document. The other restriction of the right to access documents is

of course that some of the documents are classified as secret. The Freedom of the Press Act, which is part of the Constitution, includes fundamental rules on the grounds for secrecy. One of these grounds for secrecy is the protection of personal or economic data. More precise provisions regarding the extent to which official documents may be subject to secrecy are to be found in The Public Access to Information and Secrecy Act (Offentlighets- och sekretesslagen [2009:400]).

Chapter 2 of the Freedom of the Press Act defines the term ‘official document’. This chapter also includes fundamental rules concerning which official documents may be kept secret. An outline description of these rules in the Freedom of the Press Act is given here.

Official document

A “document” in the meaning of the Freedom of the Press Act is a presentation in writing or images but also a recording that one can read, listen to or comprehend in another way only by means of technical aids. The word ‘document’ consequently refers not only to paper and writing or images but also, for example, to a tape recording or a recording for automatic data processing. One can say that a document is an object which contains information of some kind.

A document is official if it is

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

Public authority

The Freedom of the Press Act does not state what is meant by ‘public authority’. One may say that public authorities are those bodies included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities. However, companies, associations and foundations are not public authorities even if the state or a municipality wholly owns or controls them. Nor are the Riksdag, the county council or municipal assemblies considered to be public authorities but the Freedom of the Press Act expressly equates these decision-making assemblies with public authorities. Moreover, the Public Access to Information and Secrecy Act also prescribes that the provisions of the Freedom of the Press Act regarding the right of access to documents also applies to other bodies, for example a company over which a municipality or county council exercises legal powers of control.

Held by a public authority

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

According to the Freedom of the Press Act, recordings shall be deemed to be held by the authority if the authority can read, listen to or in another way comprehend them with technical aids that the authority uses itself. Special rules apply regarding compilations of information from a recording for automatic data processing. Such compilations are only deemed to be held by the authority if the authority can extract them by means of routine kinds of measures. There is a further limitation that such compilations of information stored on computers are not deemed to be held by the authority if they contain personal data and the authority does not have the power according to law or ordinance to make the compilation available. The underlying purpose of this provision is to ensure that the public cannot, by referring to the principle of public access to information, request compilations of personal data that the authority cannot even itself produce having regard to the protection of personal privacy.

If a public authority has the sole function of technically processing or storing a recording for automatic data processing on behalf of another authority or on behalf of a private party, such a recording is not considered to be an official document held by the authority that only has technical functions in this respect.

Received by a public authority

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

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

Drawn up by a public authority

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

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

pronounced or dispatched. Other records and similar documents are generally drawn up when the authority has finally checked them or approved them by other means.

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

Official documents that may be kept secret

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

1. national security or Sweden's relations with a foreign state or an international organisation;
2. the central financial policy, the monetary policy, or the national foreign exchange policy;
3. the inspection, control or other supervisory activities of a public authority;
4. the interest of preventing or prosecuting crime;
5. the public economic interest;
6. the protection of the personal or economic circumstances of private subjects; or
7. the preservation of animal or plant species.

Official documents may not be kept secret in order to protect interests other than those listed above. The cases in which official documents are secret must be carefully specified in a special statute (the beforementioned Public Access to Information and Secrecy Act). However, it is permitted to include provisions concerning secrecy in other enactments provided that the Public Access to Information and Secrecy Act makes reference to them. In other words, the Public Access to Information and Secrecy Act must indicate all the instances when official documents are secret. The Government may not decide on which documents are secret; this is an exclusive right of the Riksdag. However, in a number of provisions of the Public Access to Information and Secrecy Act, the Government is empowered to make supplementary regulations. The Government's regulations are contained in the Public Access to Information and Secrecy Ordinance (Swedish Code of Statutes 2009:641).

3. Are there any types of subjects governed by private law that have duty to provide information? If the answer is affirmative, what kind of subjects and what kind of information?

The Public Access to Information and Secrecy Act stipulate that certain private companies and associations where public authorities have a decisive influence should be treated as public authorities in regards to free access to information. See further the answer to the above question regarding what is considered a public authority.

4. Are the salaries of the employees of the public sector subject to the right to free access to information as well? Does this cause any application problems regarding the personal data protection?

Information on salaries of employees in the public sector is generally considered public information that should be provided if such a request is made. There has as of yet been no notable problems in this regard pertaining to personal data protection.

5. Is the trade secret excluded from the free access to information?

In addition to the general rules on confidentiality, there are provisions that protect general economic interests as well as those of individual counterparties in a public procurement set out in Chapter 19, Article 3 and Chapter 31, Article 16 of the Public Access to Information and Secrecy Act.

Apart from restrictions in access to information, trade secrets are protected through the Act on the Protection of Trade Secrets, under intellectual property laws and various types of undertakings of confidentiality under contract law.

6. Are documents that are subject of intellectual property excluded from the free access to information?

Chapter 31, Article 23 of the Public Access to Information and Secrecy Act holds that secrecy applies in relation to information in a work protected by copyright concerning which it cannot be assumed that it lacks commercial interest, if it is not obvious that the information item can be disclosed without harm to the right-owner and

- 1) there are special reasons to assume that the work has not earlier been made public in the sense of the Act on Copyright in Literary and Artistic Works,
- 2) there are special reasons to assume that the work has been filed with the public authority without the consent of the right-owner, and
- 3) a disclosure of the information item would constitute an exploitation in the copyright sense.

For the purpose of the application of the first Paragraph, a work that has been made available under Chapter 2 of the Freedom of the Press Act or has been transmitted from one authority to another shall not thereby be deemed to have been made public.

7. Does the right to free access to information cover as well the parts of an administrative file that contain data related to individuals or are these data protected? In which areas of public administration does this cause problems ?

Right to free access to information does cover data related to individuals although some information could be confidential in accordance with provisions in the Public Access to Information and Secrecy Act or be protected by the Personal Data Act.

8. Are data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature (typically files of secret police departments from the times of anti-democratic past) excluded from the right to free access to information?

Such data could be confidential in accordance with the abovementioned acts but it is not generally excluded from the right to free access to information.

Part II

9. Public availability of decisions

9.1 Are there any sorts of decisions in your jurisdiction that are not published at all (e.g. decisions with classified status or other decisions with restricted access)? If so, please describe typical cases and give indicative statistic that can illustrate the frequency and relevance of such cases.

There are no particular types of decisions that are generally excluded from being published by the Supreme Administrative Court. Notably, the judgment, i.e. conclusion, of a decision can never be kept secret.

9.2 If a third person (not a party of respective case) wants to obtain your decision, what is the procedure? Online availability of decisions is to be discussed below, so kindly describe here only other options (e.g. whether it is possible to ask for a decision by snail-mail, whether any fees apply etc.)

Options for a third party to receive a decision from the Supreme Administrative Court, other than online, is to make a request to the Court. The Court then tries if parts of the decision could be classified as secret. There is no right for the public to receive decisions by e-mail but if such a request is made, the Court tries to accommodate it, provided it is considered appropriate in the particular case. There is also a possibility to send decisions through regular mail.

If the decision is sent through regular mail, nine pages are free of charge. The tenth page costs 50 SEK and for any subsequent page the cost is 2 SEK. The same applies if the decision is to be sent through e-mail but needs to be scanned. If it is stored electronically on the other hand it can be sent free of charge.

A person also has a right to access a decision from the Court by coming to the Court's reception.

9.3 Is there any official collection of selected decisions of your instance (apart from online publication of decisions – see below)? If so, please describe in detail the procedure of its issue. In particular, please focus on the selection process of decisions that are to be published, the frequency of publication and the form of publication. Indicate, whether the collection is published directly by your instance, by some other public body or by an independent publisher. If the collection is published by an independent publisher, please describe the form of cooperation (i.e. whether the publisher has exclusive rights to publish the collection, whether the publisher does any editing of published decisions etc.) Are decisions that are chosen for the publication regarded more relevant by your instance or by general public?

The most important rulings issued by the Court are, apart from being published online, also published in book form once a year, the "Supreme Administrative Court yearbook". Furthermore there is a brochure with the important rulings that is published four times a year. The decisions in

these four brochures, together with some other important rulings, later on constitute the yearbook.

The Swedish National Courts Administration is the responsible publisher of the yearbook. The book and the brochures are printed by Wolters Kluwer. Neither of these do any editing of the decisions that are published.

The yearbook only contains decisions that are precedents that can provide guidance in how similar cases should be decided in the future. It is the Justices of the Supreme Administrative Court deciding a case that determine whether a particular decision should become part of the yearbook or not and in what form.

Editing is done by a yearbook editor, a retired Justice of the Supreme Administrative Court, on the basis of drafts provided by the legal administrative officers. As the yearbook contains the most important rulings it would generally be regarded as more relevant than decisions not being published in the yearbook.

10. Editing and anonymization of decisions

10.1 Do you anonymise published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of anonymization, whether there are any particular statutory or other rules governing anonymization (apart general privacy/data protection rules) and what data are anonymized.

Decisions are only ever published online or through the yearbook, where they are anonymised if they concern a private individual. If the party on the other hand is a company it is usually not anonymised. Furthermore, legal representatives of parties are generally not anonymised. In regards to online publishing it is the archivists at the Court that are in charge of anonymisation. The administrative legal officers and the yearbook editor are in charge of anonymisation of decisions in the yearbook and the brochures. It is mainly the Personal Data Act that governs the anonymisation practices.

10.2 If anonymisation practice changes, does it affect already published decisions (i.e. are past decisions subsequently anonymised/de-anonymised with every change of anonymisation rules)?

Changes in anonymisation practice would generally not affect already published decisions. If there is a change in statutory regulations however it could possibly affect already published decisions. The Court has as of yet not faced that particular situation.

10.3 Describe any subsequent problematic issues that you noted in your jurisdiction regarding the anonymisation (e.g. different practices of different supreme instances, strong public debates, impact of de-anonymisation of decisions by media etc.)

The Court has not noted any specific problematic issues in regards to anonymisation of published decisions.

10.4 Do you edit published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of editing, what information is added/removed in the process of editing (incl. metadata).

Published decisions are not edited apart from the anonymisation practice mentioned above.

10.5 Has the development of the right to be forgotten affected in any way the anonymisation or publication of your decisions? If not, is it a topic that is being considered in your jurisdiction with regards to the publication of court decisions?

The right to be forgotten appears to be more of relevance in regards to removal from search engines. Since the Court does not publish names of private individuals the right to be forgotten has not affected the procedure of publishing our decisions. As such it is not a topic that is discussed other than in terms of the Personal Data Act and the recently enacted Court Data Act.

11. Online publication of decisions

11.1 Are decisions of your instance available online? If so, please indicate whether all or only selected decisions are published online (if only selected decisions are published, please describe the procedure of their selection).

Rulings of the Supreme Administrative Court are available free of charge at the Court's website. Almost all decisions where leave to appeal has been granted and the Court thus tries the subject matter of the case are published. However, there are a few exceptions, such as when a decision would be of no interest to the general public or great difficulties would arise in the anonymisation procedure.

11.2 Describe the form of online publication of your decisions. In particular, indicate whether your decisions are published through your own website or whether it is done through some different online service (e.g. through a common platform operated by a ministry of justice, by a judicial council etc.) Kindly add also sample screenshot(s) or link(s).

The decisions are published on the Court's website:

<http://www.hogstaforvaltningsdomstolen.se/Avgoranden/>

<http://www.hogstaforvaltningsdomstolen.se/Prejudikat/>

11.3 What are available file formats in which your decisions are available online? Apart enumerating particular file formats, kindly indicate whether your instance systematically sticks to any commonly accepted open data policy. Also, please indicate whether your instance publishes online only individual decisions or whether whole datasets are available to the public for further re-use. If datasets are available for further re-use but not publically, please describe to whom and under what conditions such datasets are made available.

The decisions are published individually in pdf-format. It is here worth mentioning that there are companies frequently requesting decisions from the Court and then publishing them on different legal databases.

12. Public availability of other documents

12.1 Are there published online personal information about members of your instance? In particular, please describe whether there are CVs available, in which length and form (e.g. on a court website) and eventually what information is regularly published (e.g. education, memberships, political beliefs, marital status etc.) Also, please indicate whether the publication of information about members of your instance is compulsory, whether the members of your instance are free to decide about the structure and content of such information and whether you noted any issues in that regards (e.g. there was a big debate in the Czech Republic over the publication of past membership of the judges in the communist party). Please add a sample link or a screenshot of how such personal information about a member of your instance looks like.

There is a brief presentation of the Justices of the Supreme Administrative Court on the Court's webpage. It varies how much information is provided as it is mainly up to the Justice what details are provided. The information mainly states what year they are born, when they became a Justice of the Supreme Administrative Court and when they got their law degree. In some instances it can provide information on other education, previous work experience and other undertakings. The Justices of the Court are also required to provide information on incidental employment.

Please see the link below.

<http://hogstaforvaltningsdomstolen.se/Justitierad/>

12.2 Which case-related documents other than decisions of your instance are published online (e.g. dissenting opinions, advocate general submissions, submissions of parties, records of chamber deliberations etc.)? Please, describe how these documents are published, i.e. where and in which format (e.g. on a website through a search form, in open data formats, etc.). If your instance publishes these documents in open formats, kindly provide a sample link to a particular dataset.

There are no case-related documents other than decisions that are published online. The Court does however publish information when leave to appeals are granted in cases and when requests for preliminary rulings are made to the CJEU. It is here worth mentioning that dissenting opinions are part of the decisions and are thus available to the public.

12.3 Are the members of your instance allowed to publically comment or annotate on their own decisions or other decisions of your instance? If so, please describe common forms in which this is done (e.g. in law journal articles, in public debates on case-law organized by the respective instance etc.)

Members of the Supreme Administrative Court are allowed to publicly comment or annotate on their own decisions and it does occur that they are contacted by journalists to comment on their

decisions in certain high-profile cases. It also happens that Justices of the Court write law journal articles or academic journal articles that concern decisions by the Court.

Part III

13. What trends, threats and challenges do you foresee to come in the field of freedom of information and protection of privacy during the next decade? What should be the role of supreme administrative jurisdictions in facing these trends, threats and challenges?

This kind of question seems to be too broad for answering it with concrete data. Therefore our aim is not to pursue you to fill it with some concrete and clear statement but what we intend is to know your opinion on what trends could or will influence this scope of decision-making of your jurisdiction. Your answer will serve as the basics for further discussion during the third part of the Colloquium and we hope that this “look into the future” will be pleasant and useful ending of the meeting.

We would very appreciate if the presidents of the Supreme Administrative Courts/Councils of States could provide us with answers to this question.

There is the ongoing challenge of finding the right balance between the right to access to information and to protect the privacy and personal integrity of individuals. It is fair to say that some observers maintain that Sweden traditionally has put too great emphasis on transparency to the detriment of privacy and personal integrity. Since the fundamental rules on public access to information are to be found in the Constitution, any shift of the balance would be a matter for the legislator.

Another debated aspect is the relation between fundamental rules on the freedom of the press and other media, on the one hand, and the right to privacy, on the other. This tension is particularly pronounced in the area of online databases and publications. Anyone in charge of such an online database or publication may receive a licence to publicize. Thus they receive the full protection of the Constitution and the Personal Data Act does not apply. As a result, large quantities of information may be collected and published, which potentially could violate the personal integrity and privacy of individuals.