

# Access to Information in the Nordic Countries

A comparison of the laws of Sweden, Finland, Denmark,  
Norway and Iceland and international rules

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Oluf Jørgensen

NORDICOM's activities are based on broad and extensive network of contacts and collaboration with members of the research community, media companies, politicians, regulators, teachers, librarians, and so forth, around the world. The activities at Nordicom are characterized by three main working areas.

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In yearbooks, newsletters and survey articles the Clearinghouse has an ambition to broaden and contextualize knowledge about children, young people and media literacy. The Clearinghouse seeks to bring together and make available insights concerning children's and young people's relations with mass media from a variety of perspectives.

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## Foreword

It is my hope that this book *Access to Information in the Nordic Countries* will increase our general knowledge of the rules of free access to public records. Hopefully, too, it will stimulate a debate on how public control of authorities should be exercised and on citizens' participation in democratic processes.

Several authorities and individuals in the five Nordic countries have been contacted and have spent time answering questions at meetings or by telephone or e-mail.

In particular, a Nordic network has contributed insights into right-of-access rules as well as valuable advice:

Per Hultengård, Managing Director of the Swedish Newspaper Publishers' Association, Olli Mäenpää, Professor of Administrative Law, University of Helsinki, Nils E. Øy, Secretary-General of the Association of Norwegian Editors until September 2013, and Páll Þórhallsson, Head of the Legislative Department, Prime Minister's Office, Iceland.

Eva Ersbøll, Senior Research Associate, the Danish Institute for Human Rights, has provided competent legal counseling, and journalists Brigitte Alfter and Staffan Dahllöf have contributed qualified research assistance.

Many others have helped as well. I wish to express my thanks to everyone who has listened, read, asked and answered questions as well as contributed ideas, criticism, advice and support. You have made my work a pleasure.

Aarhus, August 2014

*Oluf Jørgensen*



## 1. The scope

Freedom of information, openness and transparency are words that are freely used in public discourse. Public bodies and politicians are referred to as 'open' if they give information and are willing to enter into dialogue with the outside world. Politicians demonstrate openness when they make themselves available for interviews, attend public meetings and take part in discussions. There is typically a high degree of openness in the Nordic countries.

The word 'transparency' is much used in an international context, with varying meanings. The word can have a broad meaning, in line with 'openness', or it can indicate a more specific requirement for authorities. 'Transparency' can also refer to clear and easily understood information.

In 'Access to information in the Nordic countries' the term 'access' has a more specific meaning than 'openness' and 'transparency'. 'Access' refers to the right to have access to authentic information about the activities of public bodies, their researches and bases for decisions etc., without the information being mediated or controlled by some authority or by politicians.<sup>1</sup>

In the legal literature a distinction is made between access to meetings and access to official documents. Access to meetings concerns the right to attend meetings, for example legal proceedings or the meetings of political bodies. Access to documents concerns the right of access to written documentation.

Access to meetings was the original form of openness. For example, it is well-documented that the roots of the Althing (Iceland's Parliament) go back to 930 AD, starting with an annual gathering at Tingvellir, at which all free men not subject to punishment could meet. The inspiration for the Althing came from Norway, where gatherings at meeting places were known as far back as 800 AD. Access to meetings is still important, and today it includes the right to attend court proceedings, parliamentary meetings and meeting of other decision-making political bodies.

Access to official documents came much later than access to meetings. With the development of the comprehensive and bureaucratic organisation of public administration and powers, access to documents became important for monitoring the exercise of power and creating the basis for a qualified debate.

Secrecy is the opposite of openness. When there is no right of access information can be kept secret, and in some cases information should be kept

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1. The explanation of the word is inspired by Tim Knudsen, *Offentlighed i det offentlige*, 2003, Aarhus University Press; and by the European Parliament paper 'Openness, transparency and access to documents and information in the EU', 2013.

secret. ‘Access to information in the Nordic countries’ deals with the rights of access for everyone to the official documents and data.<sup>2</sup>

## 2. The legal basis

### *Nordic rules*

For many years the Nordic countries have cooperated to develop regulations under the regime of the Nordic Council. Laws on access to information have not been part of this cooperation and, despite the close relations between the Nordic countries, there are many important differences between their provisions on access to information.

As the first country in the world, in 1766 Sweden introduced public access to official documents as part of its law on freedom of the press (*tryckfrihetsförordningen*). The other Nordic countries, like the rest of the world, followed a couple of hundred years later. Finland adopted a law on access to information in 1951, Denmark and Norway in 1970, and Iceland in 1996.

Provisions in the constitutions of Finland, Norway and Sweden emphasise that access to information is of fundamental importance for democracy. In Denmark and Iceland access to information on administrative authority is not based on the constitution, though a new constitution is being prepared in Iceland.

The basic rules on public access in Sweden are still to be found in its law on press freedom, while restrictions on access are contained in the law on access to information and secrecy (*offentlighets- och sekretesslagen*). The most recent major revision of the law was in 2009. The Finnish law on access to information (*offentlighetslag*) was thoroughly revised in 1999, the Norwegian law (*offentleglova*) in 2006, the Icelandic *upplýsingalög* in 2012, and the Danish *offentlighedslov* in 2013.

### *UN Conventions*

In 1966 the UN adopted the International Covenant on Civil and Political Rights, which is binding on the many States that have ratified it. The Convention is interpreted by the UN Human Rights Committee which, in a General Comment in 2011 stated that the right of access to information is an important part of freedom of information and freedom of expression.<sup>3</sup> The General Comment gives general guidelines on which bodies should be covered by the right of public access. The Human Rights Committee stated that the right should apply to:

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2. For a more comprehensive publication in Danish see Olof Jørgensen, ‘Offentlighed i Norden’, 2014, *Nordicom Information No 3/2014*, University of Gothenburg. Links to laws and rules are available at: [www.dmjx.dk/offentlighed-i-norden](http://www.dmjx.dk/offentlighed-i-norden).

3. Human Rights Committee, 2011, General comment No 34. p. 18

‘All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.’ The Committee also added a functional criterion, stating that: ‘The designation of such bodies may also include other entities when such entities are carrying out public functions’.

The 1998 Aarhus Convention on Access to Information in Environmental Matters is of fundamental importance for access to information about the environment. The Convention, which was sponsored by the United Nations Economic Commission for Europe (UNECE) has been ratified by nearly all European States, including the Nordic countries and the EU.<sup>4</sup>

The UN Convention Against Corruption of 2003 focuses, among other things, on access to information about economic aid, public procurement and contracts. The Convention reinforces requirements for access to information where preventing and combatting corruption are particularly important.

### *Conventions of the Council of Europe*

In the European Convention on Human Rights (ECHR) Article 10 provides for freedom of expression as well as the right to impart and receive information; Article 8 on the right to the protection of private life is also relevant to the right of access to information.

The European Court of Human Rights (ECtHR) has not found that Article 10 provides the basis for a general right of access to information, but in several judgments since 2006 the ECtHR has ruled that Article 10 gives news media, researchers and NGOs a right of access to information about social circumstances if their purpose is to ensure the quality of democratic control and public debate.<sup>5</sup>

Article 8 ECHR, on the right to respect for private life, sets a limit to access to sensitive personal information. However, the protection of private life makes demands on public access to certain information. According to several decisions of the ECtHR, public authorities have a duty to take measures to ensure access to information about risks that can affect the lives and health of people. In its case law the ECtHR has given further support to the Aarhus Convention’s requirement for access to information that is relevant to the environment and health.<sup>6</sup>

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4. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), signed in Aarhus, Denmark on 25 June 1998.

5. *Matky v Czech Republic*, 10 July 2006; *Társaság a Szabadságjogokért v Hungary*, 14 July 2009; *Kenedi v Hungary*, 26 August 2009; *Youth Initiative for Human Rights v Serbia*, 25 June 2013; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria*, 28 November 2013.

6. *Guerra and others v Italy*, 9 February 1998; and *Vilnes and others v Norway*, 5 December 2013.

The first international convention dealing exclusively with access to official documents was drawn up by the Council of Europe. The Convention was signed by 12 countries at Tromsø in 2009, and by a further 2 countries in 2010.<sup>7</sup> The Tromsø Convention enters into force when 10 countries have ratified it, but by June 2014 only 6 countries had done so, including Norway and Sweden. When ratifying the Convention a country can declare that it will not be bound by certain parts of it.

### *EU rules*

The Nordic countries have differing relations to the EU. Denmark, Finland and Sweden are Member States of the EU, while Iceland and Norway are not members of the EU but participate in the European Economic Area (EEA), known in short as the ‘single market’.

In 2009 the Lisbon Treaty made the fundamental rights formulated in the Charter of Fundamental Rights in 2000 legally binding. Accordingly the EU may not give weaker protection to human rights than the ECHR.<sup>8</sup>

An EU Regulation on access to the documents of the EU institutions was adopted in 2001. Under the Regulation and the Charter, the right of access to information of the EU institution applies to Union citizens and persons resident in a Member State.<sup>9</sup> By the Charter’s reference to Article 10 ECHR, people from non-Member States also have access to information if their purpose is to contribute to informing the public about social circumstances.

The EU Directive on the protection of personal data applies to the EEA as well as the EU Member States. The Directive allows some scope for national laws, and does not restrict the right to access to information under national laws on freedom of information.<sup>10</sup> A Regulation on the protection of personal data applies to the EU’s own institutions.

The EU Directive on public sector information (PSI) also applies to the EEA. The purpose of the PSI Directive is to promote the re-use of data held in the public sector for commercial and general purposes. The idea behind the Directive is that authorities should promote the re-use of data by making

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7. European Convention on Access to Official Documents, signed on 18 June 2009 in Tromsø, Norway.

8. Treaty on European Union (TEU), Article 6(1) states that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (2000/C 364/01). Article 11 of the Charter corresponds to Article 10 ECHR, and Article 7 of the Charter corresponds to Article 8 ECHR.

9. Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In 2008 the EU Commission published proposals to amend the Regulation (COM(2008) 229 final), but the negotiations are ongoing.

10. Directive 95/46/EC and Regulation (EC) No 45/2001. In 2012 the EU Commission published a proposal for a regulation that would have direct effect in the Member States, IP/12/46 25/01/2012.

documents and data available in digital formats.<sup>11</sup>

The EU Directive on public access to environmental information, which is based on the Aarhus Convention, also applies to the EEA. A Regulation on environmental information applies to the EU institutions. The EU's ratification of the Aarhus Convention means that the EU cannot overrule the Convention by adopting special rules on confidentiality about environmental information in directives or regulations, for example on trading in emission quotas or the marketing of chemicals. Other directives, including the Directive on industrial emissions, supplement the requirements of the Directive on public access to environmental information with regard to access to information during deliberations.<sup>12</sup>

### 3. Authorities and tasks

The rules on public access in the Nordic countries cover state, regional and municipal authorities. They apply equally to the political leadership and the administration. The administrative functions of parliament and the courts are not covered by the public access rules in Denmark or Iceland, so these two countries do not live up to the interpretations of the UN Human Rights Committee or the Tromsø Convention.

Public-private forms of organisation and the outsourcing of public tasks present a challenge to legislators to prevent the weakening of public access. This grey area has grown in recent decades. Some tasks are undertaken by companies that are wholly or partly owned by a public authority and often have a monopolistic position. Other tasks are carried out under an agreement with a public authority or on some other basis. An authority will typically supervise performance of the task and have overall responsibility. Many of the tasks in this grey area are wholly or partly paid for by a public authority.<sup>13</sup>

#### *Semi-public entities*

There are important differences between the rules of the Nordic countries on access to information about publicly-owned companies. Companies that are more than 50 % owned are covered by the rules in Iceland and Norway. In

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11. Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information, as amended by Directive 2013/37/EU.

12. Directive 2003/4/EC of 28 January 2003 on public access to environmental information. Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention applies to the EU institutions. Directive 2010/75/EU of 24 November 2010 on industrial emissions.

13. In the legal literature various designations are used for the grey area such as quasi-government, para-governmental organisation, semi-state entities, indirect public administration, mixed administration, public administration outside the scope of the authorities and semi-public.

Denmark a company must be more than 75 % publicly owned to be covered. In Denmark, Iceland and Norway, with slightly varying criteria, there can be an exception for companies that operate in a market where there is strong competition. In Sweden companies where the State has dominant ownership are not covered, while companies that are owned by municipal and regional authorities are covered, without special exceptions. Finland does not have rules ensuring access to information about companies owned by public authorities.

Generally, other bodies governed by private law are not covered by the rules on access to information in Finland or Iceland.

In Sweden trusts etc. are covered if municipal or regional authorities appoint more than half the members of their governing body, and a number of bodies are covered by being specifically named in the Annex to the law on access to information and secrecy.

The laws on access to information in Denmark and Norway cover certain private law bodies, typically semi-public institutions in Denmark and Norway. The Norwegian criteria focus on the appointment of board members by public authorities. The Danish criteria also concern regulation, supervision and control, and the law also covers Local Government Denmark (*Kommunernes Landsforening*) and Danish Regions (*Danske Regioner*).

### *Outsourced tasks*

The Finnish law on access to information covers documents originated by or received by a company that carries out tasks pursuant to an agreement with a public authority. The Icelandic law provides that outsourced public tasks are covered by the rules on public access.

In Sweden, outsourced tasks are only covered if they are specifically named in the Annex to the law on access to information and secrecy. In Denmark and Norway the rules on public access apply to outsourced tasks, where entities take legally binding decisions in specific cases. Denmark has supplemented this with a 'soft' rule requiring authorities to obtain information from undertakings that perform outsourced tasks.

### *Support for establishing companies in less developed countries*

In Iceland, state aid for less developed countries is administered by ordinary authorities that are subject to the law on access to information.

Denmark, Finland, Norway and Sweden have established special bodies to administer state aid for the establishment of companies in less developed countries. Swedfund is covered by the general Swedish rules on access to information. In Norway the law on access to information applies to Norfund's general guidelines and to positive decisions on aid, while other documents



relating to aid are generally excluded. Finfund's guarantees to Finnish undertakings are not covered by the rules on access to information. In Denmark, information about the Danish Investment Fund for Developing Countries and its commercial activities relating to approvals, descriptions and evaluations of projects are generally not subject to the law on access to information.

Under the Tromsø Convention, bodies should be subject to the rules on access to information if they exercise administrative authority. This also applies to decisions relating to state aid for establishments in developing countries, and thus Denmark and Finland do not meet the requirements of the Convention.

### *Environmental information*

The Aarhus Convention and the EU Directive on public access to environmental information cover environmental information in a broad sense. The rules apply to a long list of types of information, including the status of environmental factors and health, possible effect of various factors on the environment and health, and administrative and regulatory measures that can affect the environment and health.

The international requirements for access to environmental information apply to:

1. Public authorities,
2. Bodies authorised to act on behalf of a public authority, and
3. Bodies with public responsibilities or that provide public services in relation to the environment under the control of a public authority.

According to the Court of Justice of the European Union (CJEU), this third category covers any body that carries out public environmental functions and subject to the control of a public authority.<sup>14</sup> What matters is whether a public authority has decisive influence, for example where there is a requirement for prior permission, power to give directions, power to appoint board members or by providing financing. The criterion applies to utilities companies for electricity, water, district heating and waste disposal, regardless of whether the tasks are carried out on a commercial basis outside the public sector.

There are significant differences in the scopes and ways in which the Nordic countries have implemented the Aarhus Convention and the EU Directive. The Danish and Icelandic laws on environmental information use the same criteria as the Convention and the Directive. Norway has gone further than the Convention and the Directive and has provided for a right to environmental and product information from private undertakings.

In Finland and Sweden access to environmental information is covered by

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14. Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*.

then general rules on access to information. Sweden has supplemented this with a special law on environmental information for certain private law bodies. The Annex to the law on access to information and secrecy only covers some bodies and tasks and does not provide a special right to environmental information. In Finland the law on access to information covers the performance of public tasks by bodies that are outside the core of public sector bodies, but a lot of environmental information is not covered by the concept of public authority.

#### 4. Documents and registers

The Nordic rules on access to information cover documents originated by or received by a public authority or other body covered by the rules. The rules are in line with the Tromsø Convention and cover documents relating to the tasks of the public body. E-mails and other documents relating to the private lives of employees or politicians or to other functions are not covered. The right of access covers documents in any technological form.

In Finland, Norway and Sweden documents in draft form are not covered by the rules on public access. In Finland and Sweden internal memoranda that are only used for preparatory purposes are also not covered. In Denmark and Iceland all documents, including those in draft form, are covered in principle, but there are broad exceptions that protect working and decision-making processes. The Tromsø Convention, which uses the term 'official document', does not make it clear whether all documents are covered, regardless of whether or not they are final.

##### *Registration*

The right of access to authentic documents requires them to be registered and archived with unchanged content and form. The registration of documents and data serves several purposes: administrative effectiveness, archiving for future reference, research and public information.

In Sweden, the requirement for systematic registration covers all documents covered by the rules on public access. The register should state: the date of receipt or date of origination, the serial number or other identifier of the document, a short description of the content, and information about the sender and recipient.

In Finland the requirement for registration applies to the opening of a case, requests for clarification and opinions, documents received, the internal planning of an initiative, decisions made in dealing with a case, and the conclusion of the case with related documents. The register must state: the date of

receipt of the document and the start of the case, the nature of the case, and who has initiated it.

In Denmark documents received and sent out must be registered and internal documents in their final form. The register must state: the date of receipt or dispatch and a short description of the subject matter of the document.

In Norway there is a requirement to register documents received and sent as well as internal documents that are not exempt from the obligation to allow public access. The register must state: the dates of the origin, dispatch and registration of the document, the case or document number, the sender and/or recipient, and a short description about the content or subject of the case.

In Iceland important documents must be registered, including decisions, the bases for decisions and minutes of meetings. The register must state: the case number, who sent and received the document, the dates of origination, receipt and registration, and information about the nature of the document, e.g. e-mail.

The volume of documentation and electronic processing presents a challenge to ensuring authenticity. The original version can disappear or be changed without trace unless security measures are introduced. The Nordic countries have differing requirements for this. The Finnish rules require all public authorities using electronic registers to take special security measures, including authorising employees, and automatic registration of who makes changes and when.

### *Search tools*

Access to registers with descriptions of documents is important for the effective exercise of the right of access. In Finland, Norway and Sweden the right of access applies to an authority's overview of all cases and documents. In Denmark and Iceland the right of access is limited to registers of documents concerning the individual case to which access is sought. Iceland is working towards giving access to an overview of all documents.

Since 2010 Norway has had a joint service for all State authorities' document registers: the Electronic Public Records.<sup>15</sup> The central entities of State undertakings and authorities, including departments and agencies, are covered by the Electronic Public Records. Public bodies other than State bodies do not have an obligation to publish document registers. Many communal and regional authorities do so, and in this case they must state the criteria on which their publication is based. Information may not be made public if it is subject to a duty of confidentiality, if it is sensitive personal information, information about salaries, other than the salaries of those in senior positions, birth registration numbers, personal registration numbers and similar information.

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15. The operation and development of the Electronic Public Records is under the Agency for Public Management and eGovernment (Difi). The legal basis for this is to be found in the Norway's Law on access to information (offentleglova).

The purpose of the Electronic Public Records is to improve the effectiveness of the rules on public access. Anyone can use the Electronic Public Records, without charge, to seek information across the boundaries of different authorities and to seek access to the content of documents. Among other things it is possible to archive searches and to receive automatic notification about the addition of new documents on a given case. A user can establish their own user profile and gather together their own information that is not accessible to the authorities.

## 5. Access in various forms

### *The rights of access*

As required by the Tromsø Convention, the Nordic countries' rules on access to information allow access for anyone. In Sweden the authorities may not disclose information about who has sought access. In the other Nordic countries the identity of a person seeking access is covered by the rules on public access if it is registered by the authorities.

There are three main forms of access:

1. Access to existing documents,
2. Data compilation, which allows data to be compiled in a new document, and
3. The obligation of the authorities to actively publish authentic documents.

Access can be by reading at the location of the document, copying, delivery or sending in electronic form. There is access in electronic form in Denmark, Finland, Iceland and Norway, but electronic access, which is of major practical importance, has not been ensured in Sweden.

### *Data compilation*

The digitalisation of public administration means that increasingly documents are being replaced by data which the authorities compile according to the needs of their administrative tasks. The traditional right of access does not require authorities to draw up new documents, even though this could be done by drawing data together. The right to compile data has been developed both to prevent a weakening of the right of access and to exploit IT for new kinds of access.

Denmark, Norway and Sweden have rules allowing data compilation. However, the practical significance of this is somewhat undermined in Sweden as electronic access is not guaranteed. In Finland and Iceland the right to compile data is not ensured by law.

Under the Aarhus Convention and the EU Directive on public access to environmental information, there must be a right to compile data on the environment. Electronic data compilation is also necessary to fulfil purposes of the EU Directive on the public sector information (PSI).

The Danish law on access to information reinforces the possibility of compiling data with access to descriptions of data which must state: 1) the kinds of data contained in a database, 2) the criteria for the collection and registration of the data, and 3) the formats used.

### *Obligation to make public*

Finland has rules requiring central government authorities to make public the fact that they are starting work on a reform of legislation. All authorities have an obligation to actively give information when they are working on plans and reports on important matters in the general interest, and they must publish alternatives and impact assessments. According to the Icelandic law on access to information, the authorities must publish information about important programmes.

Denmark, Norway and Sweden do not have general rules requiring the authorities to take the initiative to publish, but the Danish rules require certain authorities to draw up binding guidelines.

The Aarhus Convention and the EU Directive on public access to environmental information require action to be taken to publicise environmental information. The Danish and Norwegian legislation follows these requirements. Finland, Iceland and Sweden ensure publication of special environmental information but do not fully live up to the international requirements.

### *Direct access*

According to EU Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, as far as possible direct access should be given to documents via electronic directories. The Regulation states that it is particularly important for there to be direct access to documents prepared by or received by the EU's institutions as part of the legislative procedure, and to documents on the development of policies and strategies.

Technical solutions are being developed in Norway to allow direct access to documents in the Electronic Public Records. The expectations are that direct access can soon start, and be successively extended. For users this will mean quicker and easier access to documents, and the authorities will save on the resources required to deal with requests for access.

In its law on access to information in 2012 Iceland has started work towards the same goal as Norway.

## 6. Public or confidential information

### *Forms of regulation*

There are two kinds of restrictions on access: 1) rules that protect the content of information are discussed in this section; 2) rules that protect working and decision-making processes are discussed in section 7.

Rules that protect the content of information typically also apply to oral information and there will be identical rules on the duty of confidentiality and exceptions to access.

The Tromsø Convention contains an exhaustive list of the interests that can justify exceptions to the right of access. National exceptions must state the interests they protect and may not go beyond the scope of the Convention. The Convention allows for absolute exceptions to sensitive personal information. There is also a requirement for a concrete evaluation of potential harm and a weighing of the protected interests against the public interests.

The exceptions in the Nordic laws on access to information list the protected interests. The Danish law has a supplementary exception for private and public interests where, given their special nature, confidentiality is necessary. This does not fulfil the requirement in the Tromsø Convention to specify the protected interest.

The Swedish form for regulating public access is unique. The basic rules are contained in 18 sections of the law on freedom of the press. All the restrictions are gathered together in the law on access to information and secrecy, which has more than 400 sections. The Swedish rules restricting access to personal information are highly detailed. The rules restricting access to information about general tasks do not have the same level of detail. Rules on the protection of commercial information, state security and foreign policy issues are no more precise in Sweden than in the other Nordic countries.

Only Sweden has gathered all the restrictions on access to information in one legislative act. Finland has tidied up its special provision, but still has some restrictions in other legislative acts. Iceland has several special rules. Denmark and Norway have many restrictions in other legislative acts, and several of these contain generally expressed exceptions which are thus not in line with the Tromsø Convention.

The Swedish gathering together of restrictions in one legislative act makes it easier to get an overview, but this is somewhat spoiled by the fact that the law on access to information and secrecy contains differing criteria according to the authority in possession of the information (primary and secondary confidentiality).

The Finnish and Swedish rules uses a graduated scale of presumptions favouring openness or confidentiality and requiring a concrete evaluation. The exceptions in Denmark, Iceland and Norway typically also require a concrete evaluation but do not give corresponding guidelines.

The Danish law on access to information has general exceptions for certain kinds of cases: engagement in employment, information in diaries about meetings etc. and preparations for legislation, including responses to consultations, until the bill is put before Parliament. These general exceptions do not satisfy the requirements of the Tromsø Convention for a concrete evaluation of potential harm and a weighing of the protected interests against the public interest.

### *State security and foreign policy interests*

The Icelandic and Norwegian laws on access provide for information to be kept confidential when this is specifically necessary for state security. The Danish law on access to information allows information to be kept secret if it is significant for state security, without there being a requirement for a concrete assessment. Sweden has a broad definition of the exception, but keeping information secret requires an evaluation of the specific risk. The exception in the Finnish law has a broad definition of state security but, as with other exceptions, exceptions under this heading must be interpreted strictly.

The starting point of the rules in Denmark, Finland, Iceland and Sweden is that the rules give a basis for keeping information confidential on the basis of a concrete assessment if this is necessary to protect foreign policy interests. The Norwegian law has more nuanced rules that allow greater scope of public access.

There are signs that changes are being made to the international norms. There is no longer a general rule that a State has a right to veto the release of information from the State. The CJEU has ruled that individual Member States do not have a right to veto access to documents that are part of deliberations, and that exceptions must be justified by the regard for the special interests referred to in the EU Regulation.<sup>16</sup> Norwegian law complies with this as only serious foreign policy considerations can justify keeping confidential information exchanged in negotiations on the development of international norms.

### *Personal information*

Personal information can be divided into three categories: sensitive, social and general information. Information on health, sexual orientation, social problems, religious and political beliefs are examples of sensitive personal information. Social information concerns people as actors in society, for example information about holding leading positions in politics, religion, social organisations, commerce and suchlike. General personal information is an in-between category which covers matters such as employment, income, pensions, tax, education, exam results, shareholdings, housing, cars and suchlike.

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16. Case C-64/05 Sweden v Commission.

Under Article 8 ECHR, sensitive personal information must be kept confidential. Under Article 10 ECHR, social personal information must be publicly accessible in order to ensure democratic control and participation.

Like Article 8 ECHR, the EU Personal Data Directive requires sensitive personal information to be protected from public access. The Directive does not prevent the making public of general personal data if there are weighty social reasons for doing so. The case law of the CJEU gives both EU and national legislators the possibility of laying down rules on the systematic publication of general personal data as long as the rules are based on a proper weighing of the considerations.<sup>17</sup> The provisions of an EU Regulation on the obligation to make public agricultural support were overturned by the CJEU because they were not based on a clear weighing of the considerations. The provisions of a new Regulation, which requires the Member States to make public payments of agricultural support, including support paid to individuals above a minimum threshold, do comply with this requirement.<sup>18</sup>

The Tromsø Convention requires a concrete evaluation to be made of potential harm and a weighing of the protected interests against the public interests. National rules can lay down criteria that establish a presumption either for confidentiality or openness. The Convention also allows there to be absolute exceptions for sensitive personal data.

There are marked differences on the level of detail in the Nordic rules on the protection of private information. The Swedish law on access to information and secrecy only requires absolute secrecy about very few kinds of information. For other kinds of sensitive information there are clear presumptions of secrecy. The Swedish rules have a presumption of openness on general personal information.

In the Finnish law, private information is protected in principle. In Denmark, Iceland and Norway the rules on the protection of private life and personal matters are based on general assessments of the nature of the information and do not require concrete evaluations.

The boundaries between what is confidential and what is open vary in the Nordic countries. The Swedish rules give greater access to personal data than the rules in the other countries, for example on pensions, student support, school grades and education. Denmark is the only Nordic country in which a personal identity number is confidential under the law.

There are clear differences in the rules about access to information about employment and personal circumstances. Denmark is the only Nordic country in which the identity of applicants for public sector jobs is kept secret. Sweden

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17. See Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk*; and Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR v Land Hessen*.

18. Regulation (EU) No 1306/2013 of 17 December 2013 on the financing, management and monitoring of the common agricultural policy entered into force on 1 January 2014.



has an exception for applicants for senior public sector positions. In Finland and Sweden the right of access also applies to applications from the person who gets the job. In Iceland and Norway this right only applies to the other applicants. In Denmark applicants do not usually have a right to information about other applicants.

Finland, Norway and Sweden do not have restrictions on the right to information about official responses, other than in respect of sensitive information, such as illness. In Denmark and Iceland there is limited access to information about people in senior positions, and no right to information about the background to an official response. In Denmark this limited access is limited to two years, and in Iceland to four years.

In Finland, Iceland, Norway and Sweden, but not in Denmark, there is access to information about everyone's taxable income and tax payments. There are differences in the practical availability in those countries where this information is available. It is most readily available in Norway, where the tax authorities allow access via the internet, and most difficult in Iceland where there is only access at the tax authorities and only for two weeks each year.

### *Information about commercial companies*

The Nordic rules on access to information have short general provisions on the protection of the commercial and production situations of companies. The right of access can be restricted on the basis of broadly expressed criteria.

In Finland and Sweden information can be withheld if its release would damage a company, and in Denmark if it has significant financial importance for an undertaking. Under the Icelandic law on access to information, information that is important to an undertaking's financial or commercial interests can be kept confidential if necessary.

The Norwegian protection of commercial information is based on a rule that emphasises the competitive significance of the information for the undertaking. The Norwegian guidelines to its law on access to information give a number of indications for setting the boundary between openness and secrecy about different kinds of information. Information that other undertakings could exploit must be protected, for example information about market analyses, business strategies, customer lists, production methods and product development, but not general information about an undertaking's financial status. Administrative decisions about import and export licences or subsidies are not normally protected. Information about circumstances that may be criticisable from society's perspective and about whether an undertaking has breached the law is generally not protected.

Other than in Denmark, in the Nordic countries there is access to information about undertakings' income and tax payments, regardless of their form of

ownership. In Denmark access to information about tax is restricted to limited companies and certain trusts and associations.

In public procurement, the Nordic countries have differing rules about access to information about tenders from undertakings. Finland, Norway and Sweden generally allow access to information, but at differing stages of the process. Sweden allows access from the moment the procuring authority opens the tenders or when it has chosen the supplier, at the latest. Norway has openness when the supplier has been chosen. Finland has access to information about other tenders when a contract has been entered into. Specific evaluations can lead to restrictions, but the rules express a clear presumption that the total amount of a tender should be made public. Denmark and Iceland do not have special rules on tenders, and applications for information are decided in accordance with the general rules on commercial information.

The EU has set up a public website with information on payments made by the EU in connection with contracts or carrying out other tasks. None of the Nordic countries publish corresponding information on payments by national authorities.

### *Environmental information*

The Aarhus Convention and the EU Directive on public access to environmental information provide for extensive access to environmental information. Exceptions under EU or national law may only protect the interests listed in the Convention and the Directive. Exceptions must be interpreted restrictively, and access can only be refused on the basis of an assessment of the interest in publication.

Access to information about emissions applies regardless of commercial interests, and the same applies to information about any factors that can affect environmental quality. The requirements regarding access to information about emissions apply to both direct and indirect effects on the environment, regardless of whether the effect is caused by a specific source or multiple sources. For other environmental information there must be a specific evaluation regardless of provisions on confidentiality in EU and national laws.

The Norwegian law on environmental information (*miljøinformasjonslov*) fulfils the requirements of the Aarhus Convention and the EU Directive, and it goes further by ensuring the right to information from private undertakings. The legislation in the other Nordic countries does not fully meet the international requirements for environmental information.

The Swedish law on access to information and secrecy provides for access to information on emissions. For other environmental information there must be a clear environmental interest in openness, and for certain general interests a clear environmental interest is not enough. Among other things this applies

to the protection of foreign policy interests or the prevention or investigation of crime.

The Finnish law on public access ensures that the protection of commercial interest cannot outweigh the public interest in environmental information. The law does not contain special rights for public access to environmental information in relation to the other exceptions, but generally exceptions must be interpreted restrictively.

Denmark and Iceland have special laws on environmental information. The Danish law has a general requirement for a specific evaluation of each case, with more weight on consideration for public access and a restrictive application of exceptions, other than for information related to environmental crimes. The Icelandic law does not require specific evaluation of each case, with more weight on consideration for public access and a restrictive application of exceptions.

## 7. Working processes and decision-making processes

### *Party political information*

The rules on access to information concern documents related to the tasks of public authorities or some other body that is subject to the rules on public access. The Tromsø Convention's title makes it clear that it concerns access to official documents. E-mails and other documents concerning private life or other functions fall outside its scope.

Politicians in leading positions typically have several roles. A minister is the leader of a ministry, a member of the government, and typically also a party politician. The rules on public access apply to the role as an administrative manager, as a member of the government, but not to the role as a party politician. Political leaders of municipal and regional authorities also have party political roles alongside their official roles.

It is clear that a politician's communications with their party fall outside the scope of access to information if it concerns the party organisation, for example planning for meetings or election campaigns. However, it is generally difficult to distinguish between the roles. A minister's communications will often be to do their role in the ministry or the government. If all communications about such cases were to be covered by the rules on public access, this would also apply to communications with other politicians about tactical considerations, testing political ideas and negotiating tactics. None of the Nordic laws contains criteria giving clear guidance on this important point.

As part of their responsibilities, civil servants must work impartially for the authority and serve its political leadership. This applies both to professional and political advice, and regardless of the nature of their employment and its

duration. Documents are official when they are drawn up by employees as part of their work for an authority and they must thus be covered by the rules on public access.

In Denmark an exception has been made in practice for special ministerial advisers. There are one to three special advisers in each Danish ministry who, as part of their employment, can perform party political work just like the minister, and this falls outside the rules on public access. This exception for special advisers also applies to information given to the media.

### *Internal or external*

The Nordic countries have very different rules for working processes and decision-making processes. In Finland, Norway and Sweden unfinished internal documents are not covered by the rules on public access.

Internal memoranda in final form are also not covered in Sweden, as long as they only have a preparatory purpose solely for the authority. In Finland internal memoranda are subject to public access if they have been sent for further consideration by more senior staff in the same authority.

The rules on public access in Denmark, Iceland and Norway allow exceptions for internal documents. In Denmark the exception generally covers all internal documents, while in Iceland and Norway it is limited to working documents drawn up for internal use during preparations.

In principle external documents are covered by the rules on public access, but there are various exceptions. In Sweden a draft letter or decision that has been sent out is not open to public access if it has been sent purely to obtain advice, while a written answer is open to public access. In Finland, drafts and other purely preparatory documents can be exchanged between an authority and a private operator carrying out some task for the authority without being made public.

The Norwegian law on public access allows exceptions to the right to public access for documents that an authority obtains from subordinate bodies for preparatory purposes, and there is a corresponding exception for information that one government department obtains from another department. There is also the possibility of excluding external advice on how a body should approach a case.

The Icelandic law has an exception for documents that are exchanged between municipal authorities and municipal organisations in connection with financial negotiations with the State. The Danish law has a similar exception which also covers negotiations on other political initiatives.

The rules governing internal and external communication are also significantly affected by questions of definition. In Swedish law an entity can be independent in some kinds of cases and part of a larger organisation in other

cases, depending on whether it has independent decision-making authority in the case in question. According to Norwegian law communal authorities are considered to be autonomous entities in cases where they have delegated the right to decide. In Denmark, Finland and Iceland, institutions are generally considered part of the authority to which they are subordinate, for example a municipality.

The highest levels of state administration are organised differently in the Nordic countries, and in some countries there are rules whereby in some cases documents are excluded as internal even though they are in fact external.

### *The highest levels of state administration and the government*

In Sweden the highest level of the state administration is considered as a unified authority (the Government Offices – *Regeringskansliet*). Documents exchanged within the Government Offices are not covered by the right to public access. On the other hand, documents from agencies, commissions, committees etc. that are part of deliberations are covered.

In Finland the government and government committees are regarded as a single authority, with the exception of the EU committee and the finance committee when dealing with certain independent tasks. The ministries are independent authorities and the Finnish law on access to information does not provide for special exceptions for documents passed from a government department to the government or a government committee. Shortly before government meetings, the agenda is published, with explanations of each of the points. The same applies to meeting of the finance committee, while other government committees issue press releases prior to meetings. When the Finnish government has held a meeting its decisions and the annexes for the individual issues are made publicly available. When the government or a ministry starts work on a reform of a law it must inform the public about its work, about the time-frame for the work, and who is responsible for preparing it.

In Denmark government ministries are formally independent authorities, also in relation to government business. The Danish law on public access makes a broad exception for documents exchanged between ministries or between a ministry and one of its subordinate bodies if there is reason to assume that a minister may need advice on the matter. The exception for providing advice to a minister does not apply to legally binding decisions on specific cases, contracts or supervision.

In Norway the government, government committees and ministries are considered as a single authority in relation to government business, while a ministry is regarded as an independent authority in relation to matters on which it has the authority to decide. Exchanges between ministries on government business can thus be excluded from public access as internal documents, and there is also a

possibility of excluding documents obtained from agencies and other subordinate bodies. The right of access applies to documents that are part of the deliberations of the Council of State (*Statsrådet*) in which the government together with the king decide on important matters. This right of access does not apply to cases where the government takes decisions without the king's involvement.

In Iceland the government ministries are formally independent authorities, also in relation to government business, but the law on public access makes an exception for documents that are drawn up for ministerial or government meetings. The agenda for government meetings must be made public after each meeting.

### *Parliaments and members of parliament*

All Nordic countries have a high degree of openness about the processing of draft laws in their parliaments.

The Danish law on public access makes an exception for documents that have been drawn up by civil servants and which have been passed by a minister to an individual member of parliament. The practice has been developed in Denmark whereby a minister typically enters into a binding political agreement before a bill is put before parliament. The exception makes it possible to keep confidential the basis for political agreements entered into between a minister and representatives for a party group. The exception also makes it possible to keep confidential the basis for political agreements to implement important elements in a law and other decisions.

Other Nordic countries do not have rules limiting public access to documents from ministries that form the basis of the decisions of members of parliament.

According to a Norwegian Parliamentary Report of 1997-98, the practice has been developed whereby it is possible to pass on certain documents to members of parliament without these documents being publicly accessible. It stated that a restricted distribution of an internal document drawn up by a civil servant does not mean the document loses its character as an internal document. The Report referred to information given to a spokesperson, group leader or committee group as examples of restricted distribution. The Report also referred to a practice whereby recommendations of parliamentary committees can be submitted to a minister without the recommendation and the response to it being covered by the law on access to information.

### *Local government political bodies*

In Sweden the agendas of meetings of local government political bodies must be made public prior to meetings. The same applies to documents are sent by administrative officials to the top political body. Documents sent by administra-

tive officials to local political committees are first subject to the law on public access when a matter has been decided.

In Finland agendas and annexes with the relevant documents must be made public before the meetings of all local government political bodies.

In Denmark the agendas of the meetings of local government political bodies must be made public before each meeting. There is also a right of access to information about the factual basis for a decision, but not to other aspects of the basis for a decision. The same applies to local government authorities in Iceland.

In Norway agendas, reports, including recommendations and annexes, must be made public when they are sent by administrative officials to local elected councils and committees.

### *Public information*

Certain information must be made public regardless of any exceptions for internal documents, government business etc.

In Finland investigations, statistics and reports describing the backgrounds, alternative solutions and consequences must be made public when a proposal etc. is complete. This applies before a decision is taken. The Finnish law on public access also contains a number of deadlines for when internal documents become public. Documents that are considered important for deliberations must be made public before the decision is made.

Under Swedish law there is a right of public access to internal information that forms part of the basis for a decision when the decision has been made. This applies to information about factual circumstances, professional assessments and the professional assumptions for decisions.

Under the Danish law on public access there is a right of access to internal information about the factual basis of a case. This right applies from the date of registration and includes information that helps illuminate the factual circumstances, including the methods and assumptions used in calculations. The Danish law has a special rule on access to internal professional assessments in their final form which form part of the basis for a published action plan or similar political initiative, but the bases for the most important decisions are excluded. The professional bases for draft laws, plans reports etc. that are published by ministers or the government are excluded, without a time limit.

The Norwegian law on public access does not provide for a right of access to information about the bases for internal decisions of state authorities. This exception, which covers both the factual basis and the professional assumptions for a decision, is without a time limit.

The Icelandic law provides for a right to information on the factual circumstances of a case. The right does not apply to the exception of government documents. The Icelandic exception for working documents expires after eight years.

### *Additional public access*

The rules on public access are minimum rules and authorities can choose to give additional information in order to strengthen democratic control and participation. The authorities can also reduce the costs. Extra resources are needed to deal with cases if authorities are to be sure that they do not reveal more information than they are obliged to. In such a case all information must be carefully evaluated in relation to all the possibilities for exceptions.

Denmark, Iceland and Norway have rules which oblige authorities to evaluate public documents that can be exempted from publication. This obligation applies to all documents and information that are not subject to the duty of confidentiality.

Finland and Sweden do not have provisions on additional publication. This difference between the western and eastern Nordic regions must be seen in the context that in Finland and Sweden the protection of the process is not provided by exceptions to the law, but by certain documents of a preparatory nature falling wholly outside the scope of the laws on public access.

The duty of confidentiality sets a limit to additional openness, but there is typically no such duty in connection with the exceptions that are intended to protect working processes and decision-making processes. An authority that favours openness and wants to save resources in dealing with cases can easily do so, making it more convenient for itself and the public.

Where there is a duty of confidentiality to protect the general interest, the responsible authority can surrender the right and choose to give additional information. An authority can restrict what it keeps confidential to what is strictly necessary, for example in relation to military or foreign policy matters.

The rules giving a right of access to information take precedence over rules on personal data. If openness depends on giving additional information, the rules on the protection of personal data are significant, but general personal data may be given if there is a proper interest in making information public and is not outweighed by the interest that is protected. Sensitive personal information must be kept confidential, and the duty of confidentiality can only be set aside with the agreement of the person concerned.

### *International rules*

The Tromsø Convention allows for exceptions to restrict access to deliberations about the handling of a case as well as draft documents, but not final documents that form part of the basis for decisions, plans, legislative proposals etc. The Convention encourages States to set time limits to protection.

The Tromsø Convention and other international rules list the considerations that can justify the protection of information. Exceptions that lead to keeping secret important elements of the basis for decisions require specific justification.



This requirement for specific justification is got round by broad exceptions that protect deliberations.

Exceptions that are intended to protect deliberations become, in reality, protection of information when exceptions cover final documents and documents that form the bases for decisions, without time limits. Broad exceptions that limit access to deliberations at the highest levels of the administration in Denmark, Iceland and Norway do not comply with the Convention.

The Tromsø Convention's exception for the protection of processes is limited to deliberations within or between public authorities. The Danish exception for exchanges of documents between ministries and members of parliament does not relate to an exchange between public authorities and for this reason alone it is not in line with the Convention. This exception is contrary to fundamental democratic considerations as it means that some member of parliament have access to information which other members do not have.

EU law puts a special emphasis on the right of access to information on the preparation of legislation. The extensive secrecy about political deliberations in Denmark is also out of line with EU law. The EU Regulation on access to the documents of the EU institutions and the Charter of Fundamental Rights apply to the EU's own institutions. The Charter also applies to the Member States when they implement EU law, and the Charter's treaty status and minimum requirements for freedom of information mean that national legislative processes for implementing EU rules must also live up to the CJEU's requirements for openness.

## 8. Procedures and reviews

### *Quickness*

In Finland and Sweden access is generally given immediately, though some delay may be inevitable if there is a need to review a lot of material. The Finnish law on public access has maximum time limits that are normally two weeks, but one month in comprehensive and complex cases.

In Norway normal applications are dealt with immediately, and at the latest within three days. The Norwegian law on public access gives a right to appeal when a decision takes more than five days.

In Denmark decisions must be made within one or two days for individual applications. There must be a special reason for a delay of more than seven working days. There are no time limits, but even the most comprehensive applications should be dealt with within 40 working days. In Iceland decisions must be made as soon as possible, and there must be special justification for delays of more than seven days.

There are time limits in the Aarhus Convention and the EU Directive on public access to environmental information. In Finland these limits are halved. The

special laws on environmental information in Denmark, Iceland and Norway apply the time limits of the international rules. At the same time environmental information is covered by the general rules and under general legal principles rules that give an applicant better rights must be applied. This means that access to environmental information must generally be given immediately or as soon as possible. The deadlines in the rules on environmental information are maximum limits. Environmental information from public bodies in Sweden is covered by the law on freedom of the press and the law on access to information and secrecy, which do not have maximum time limits.

### *Review systems*

In Finland and Sweden a refusal of access can be referred to the administrative courts. In Norway a refusal of access can be referred to the ordinary administrative appeal body for the area, and in Denmark an appeal can be made directly to the highest ordinary appeal body for the area. Iceland has a special appeal board for freedom of information, and all refusals can be referred directly to it.

In Sweden the decisions of the Government Offices cannot be reviewed either by the courts or the Parliamentary Ombudsman. Denmark too has no appeal body for the highest level of the state administration, but decisions can be reviewed by the Parliamentary Ombudsman and the ordinary courts. The situation in Norway is similar to that in Denmark, but the Ombudsman cannot act if a decision has been taken by the Council of State. In Finland the decisions of the highest level of the state administration can be referred directly to the Supreme Administrative Court, and in Iceland to the special appeal board for freedom of information. In Finland and Iceland an Ombudsman can also deal with decisions of the highest level of the state administration.

The Tromsø Convention requires there to be expeditious review by an independent body. This requirement is not met in Sweden, where no review of the decisions of the highest level of the state administration is possible, and Sweden made a declaration about this when ratifying the Convention. It is questionable whether this requirement is met in Denmark and Norway, where the reports of an Ombudsman, which are not binding, are the only means of reviewing the decisions of highest level of the state administration, other than protracted litigation through the ordinary courts.

There can be a long wait for decisions from some reviewing bodies, for example 16 months for the Supreme Administrative Court in Finland, while the administrative appeal court in Sweden is quicker, normally deciding within two or three months. In the Danish law on public access there is in principle a deadline of 20 days for an appeal instance to deal with a case. In Norway the Ombudsman assumes that appeal instances are subject to the same deadlines as apply to the first instance.

The decisions of administrative courts in Finland and of the appeal board in Iceland and appeal bodies in Norway can be enforced. In Denmark the State Administration can enforce decisions against regional and municipal authorities, but other review bodies cannot do so.

## 9. The varied Nordic openness

### *The weight of tradition*

For hundreds of years Sweden was the dominant power in the eastern part of the Nordic region, including Finland until 1809. Under Russian rule in Finland from 1809 to 1917 the old Swedish fundamental laws still applied in Finland. Finland became an independent republic with its own constitution from 1919.

At the time when freedoms were introduced in the Swedish-Finnish State, the western part of the Nordic region was subject to autocratic monarchical rule. For hundreds of years Denmark was the dominant power in the western part of the Nordic region; its union with Norway lasted for more than 400 years up to 1814. The Swedish-Norwegian union of 1814-1905 was limited to the two countries having the same king and a joint foreign policy. The union of Denmark and Iceland was gradually dissolved and finally came to an end in 1944, when Iceland terminated the union and became an independent republic.

There are still certain differences between the eastern and western parts of the Nordic region. The rules on access to information in Finland and Sweden are based on the concept of ‘public transactions’ (*allmänna handlingar*) and do not include internal memoranda. The administrative courts are important reviewing tribunals which also make decisions in cases on access to information. However, the Finnish law on access to information has moved away from the Swedish tradition, especially with its 1999 revision. Differences have also opened up between the laws of the western part of the Nordic region – Denmark, Iceland and Norway – in the most recent revisions of the laws.

Another pattern is that the older nation states – Denmark and Sweden – tend to be more traditional than Finland, Iceland and Norway. The Danish and Swedish traditions for state administration and legislation have an influence on the rules on access to information.

The Swedish regulations are still based on a number of fundamental rules in its law on freedom of the press and the many detailed provisions on its law on access to information and secrecy. Even though the Danish law on access to information was given additional provisions in its 2013 amendment, it still has many fewer provisions than the Swedish law. The most distinct difference is in the regulation of access to personal data, where the Danish law suffices with a few words on the protection of individuals’ private lives. The Swedish

law on access to information and secrecy regulates access to and protection of personal data in a great many of its more than 400 sections.

The Swedish constitutional tradition emphasises the sovereignty of the people, and the decisions of the people's representatives cannot be set aside by the courts or other reviewing instances. It is paradoxical that a constitutional tradition that attaches so much weight to the sovereignty of the people does not allow the people to request the review of a decision of the government to keep certain information secret.

It is also paradoxical that a modern country such as Sweden has not introduced access to information by electronic means. There appears to be a connection between the Swedish openness about much of personal data and a fear that electronic access could lead to the spread of personal profiles. There has been much debate and many deliberations but strangely enough Sweden has not found a form of regulation to solve the problem.

Under the autocratic monarchy in Denmark, civil servants and royal advisers could rule in privacy, with the king placed above them on a pedestal. That secrecy was the guiding principle was evident in the name of the highest state council, the Privy Council (*Gehejmekonseil* 1660-1770) and subsequently the Privy Council of State (*Gehejmestatsrådet* 1772-1848). In modern times the exceptions to the law on access to information mean that documents from civil servants in the highest levels of the administration forming the basis for political decisions, can be kept secret.

It is very strange that Denmark, which is otherwise characterised by openness, should maintain and even reinforce the secrecy of documents that are important to the political decision-making process. After its amendment in 2013, the Danish law on access had both a broad exception for ministerial advice and a special exception for documents exchanged between government ministers and individual members of parliament as a basis for political agreements. Among other things these exceptions mean that the professional basis for decisions can be kept secret.

### *Nordic rules take the lead*

Apart from the historically based patterns, many of the differences between the Nordic rules on access to information have no clear pattern. There are examples of Nordic rules that are in advance of international developments:

The Finnish law ensures a high level of access to information about political power in the highest state bodies, and this was the aim with the amendment to the law in 1999. The Finnish law ensures general access to information about the basis for decisions, as a rule before decisions are taken.

In respect of environmental information, the Norwegian law on environmental information is clearly the most open in the Nordic countries as it also

covers private undertakings and contains clear requirements to make information public. Norway has gone further than its international obligations, while the other Nordic countries have not fully complied with the requirements for making environmental information public.

Norway is also clearly in the lead with internet access to registers of documents and good searching facilities. The Electronic Public Records are under development to give direct access to documents.

There is a Nordic tradition for allowing access to information about the tax payments of citizens and companies. Denmark has not followed this route since 1960, but has re-introduced access to information about companies' taxation.

### *Other differences*

The Nordic countries have been considered a model for the development of freedom of information. Without looking too closely at the differences between the Nordic countries, in the Explanatory Report on the Tromsø Convention, on the preamble, it is stated that the right of access to official documents was first developed in the Nordic European States. It is true that Sweden started in 1766. On the other hand it is not true if one were to believe that freedom of information is a consistent characteristic in the Nordic countries in all areas of the administration. This article shows that the rules on access to information vary widely between the Nordic countries.

This comparison of the Nordic rules on access to information does not allow a general ranking to be made. Legislation which gives the best conditions for freedom of information in some respects will give worse conditions in other respects.

In Finland, Norway and Sweden freedom of information is rooted in their constitutions and is a fundamental principle for public authorities. Iceland is in the process of preparing a new constitution, but there is no prospect of constitutional change in Denmark.

Sweden has gathered together all the restrictions on freedom of information in its law on access to information and secrecy. In contrast Denmark and Norway have many exceptions to the right to information in legislative acts other than their laws on access to information.

Companies in which public authorities own more than half the capital are covered by the laws on access to information in Iceland and Norway. This also applies to municipally-owned companies in Sweden, while state-owned companies are excluded, and the same applies to companies in Finland.

The law on access to information covers many public-private organisations in Denmark, but companies are only covered if a public authority owns for than 75 % of the capital.

In Finland and Iceland tasks that are outsourced by a public authority are covered by the law on access to information, while only specific outsourced tasks are covered in the other Nordic countries.

There is a right to make data compilations in Denmark, Norway and Sweden, but Sweden lacks rules on electronic access to ensure the practical implementation of this. Finland and Iceland have not provided for a right to make data compilations. Denmark is the only Nordic country to supplement this right with a requirement for authorities to give descriptions of data that can help the practical exercise of the right to make data compilations.

The Danish law on access to information makes general exceptions for some kinds of cases and an extra exception that is not limited to what kind of interest is protected. There are no corresponding exceptions in the other Nordic countries.

The Danish law on access has the most clearly expressed right to information about the factual basis of a case at any stage of the case. The Norwegian law on access does not ensure the right to information about the factual basis of a case.

Denmark is alone in having developed the practice of having one to three special advisers in each ministry who can work on behalf of a political party without being subject to the rules on freedom of information.

Of the Nordic countries, the Norwegian law ensures the most access to local government with access to documents that are exchanged between entities that have delegated independent decision-making authority.

All appeals against refusals of access in Iceland are sent directly to a special appeal board for freedom of information which has authority to make binding and enforceable decisions. Denmark and Norway have a number of ordinary administrative appeal bodies while Finland and Sweden have administrative courts.

## 10. International developments

For a long time international developments in the field of freedom of information stood in the shadow of freedom of expression. For almost 200 years the Swedish law of 1766 on access to information was almost unique.

After World War II the international development of freedoms was strengthened and they were included as part of core human rights. Freedom of information was included in international conventions alongside freedom of expression, and it has gradually been developed as one of the essential characteristics of a democratic society.

Freedom of information concerns the right to seek and receive information and it has two elements. First, there is the right to seek and received available information, including access to independent media and the internet. Second,

there is the right of access to documents and data which the authorities not make available on their own initiative.<sup>19</sup>

The Tromsø Convention of 2009 can be a turning point for the further development of the right to access, but is notable that only six countries had ratified the Convention by June 2014, when it was five years old.

International rules play a special role for the development of freedom of information about the environment. The Aarhus Convention of 1998, which has been ratified by many countries and the EU, has laid a firm foundation.

EU law has a growing role in the development and regulation of freedom of information. The Nordic Member States – Denmark, Finland and Sweden – together with the Netherlands and more recently Estonia and Slovenia, have worked to develop freedom of information rules in the EU. Sweden has been particularly active. The EU Regulation on access to the documents of the EU institutions was adopted under a Swedish presidency, and Sweden has brought cases before the CJEU that have resulted in important decisions of principle.

The EU Commission has typically been restrictive, while the European Parliament has worked for greater openness. In a number of its judgments the CJEU has emphasised the importance of freedom of information. An important milestone was its judgment in 2007 which ruled that an individual Member State does not have a veto right on the publication of documents from its authorities. Other important milestones have been a judgment in 2007 on access to the advice given by the European Council's legal service, and a judgment in 2013 on access to a proposal that was included in the decision-making process of a working party of a Council of Ministers.<sup>20</sup>

In recent decades the right of access to information has been an important part of freedom of information and expression, but it cannot be taken for granted that this development will continue. At all times and in all societies the boundary between secrecy and openness is drawn in rules and in practice. There are many actors and interests pulling in different directions.

As stated above, in 2013 Denmark, which participates in EU initiatives for openness about political processes, adopted a law on access to information which involves significant restrictions on access to the highest levels of political decision-making in Denmark.

When it joined the EU, Sweden emphasised that the Swedish principle of openness must not be undermined. With membership of the EU, many situations that had previously been domestic matters have become foreign policy matters, and the Swedish rules on foreign policy matters have been changed so that there is a presumption of access to information. At the beginning of 2014 the Swedish rules on access to information were changed, and under the new

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19. Kyrre Eggen, *Ytringsfrihet* (2002), Oslo: Cappelen, pp. 171-182 and 650-660.

20. Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*; and Case C-280/11 P *Access Info v Council*.

rules access to information may be denied if it would complicate Sweden's participation in international cooperation.

The EU Directive on the protection of personal data does not restrict national rules that give a right of access. In 2012 the EU Commission proposed to replace the Directive with a regulation that has direct effect in the Member States.<sup>21</sup> In June 2014 it was not clear whether Parliament, the Council and the Commission could agree on its form and content. New rules could mean that the boundary between the protection of personal data and access to information will be affected.

The latest developments show how the EU Commission and the Council regard the systematic publication of information as a useful means of strengthening the control of companies and citizens in various areas. This does not prevent the Commission and the Council resisting other forms of access to information that could strengthen control of the political decision-making process. The same contradictory tendencies can be seen in some of the national authorities, such as the State Administration in Denmark.

## 11. The purpose of the rules on access to information

Many organisations, including public authorities, are happy to give information as long as they are able to control what information is given and how it is presented. This is done widely and extensively, often with the help of professional communications advisers. This openness is provided on the authorities' terms.

Openness does not just mean that an authority must inform about what it thinks is suitable, it must also allow access to documents without changing their form and content. Openness can only be assured by legal rules requiring authorities to allow access to authentic documents and data upon request or at the initiative of the authority. This requirement is the *raison d'être* of the rules on access to information.

The main purpose is to strengthen the basis for democratic control of the exercise of power, and for the participation of citizens in the democratic process. This is the basis for the rules on access to information in all the Nordic countries.

Openness can also support free and fair competition between commercial companies, for example in tendering for work, contracting, subsidies, environmental controls and taxation. From a narrow perspective openness can be difficult for the individual company. However, from a broader perspective it is important for stimulating competition, for commercial development, and to prevent competitive advantages being given to companies that do not live up to the standards of society.

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21. European Commission IP/12/46 25/01/2012.



The effectiveness of the administration of public authorities is a beneficial side-effect. Openness can reveal mistakes, neglect and abuse of power, and its preventive effect is at least as important. From a narrow viewpoint openness can cause difficulties for the individual authority, but seen more broadly openness is important for upholding the demand for impartial administration, for ensuring a broad basis for making decisions, and as inspiration for development.

The purposes of the Aarhus Convention and the EU Directive on public access to environmental information are to strengthen openness as an important part of the efforts to obtain a clean environment and improve health. Political and administrative measures are not enough to ensure effectiveness. Openness is necessary to reinforce, control and stimulate authorities and companies to do their bit.

Openness can also support the work of authorities in other areas where it is difficult or requires considerable resources to ensure proper administrative control. For example, this is one of the reasons for the EU's openness on agricultural subsidies. Openness about applications and decisions can support social responsibility and can stimulate companies and citizens to give correct information.

Openness can thus serve important purposes and there will usually be a synergistic effect between different purposes. Openness aimed at strengthening social responsibility and openness about companies and citizens can together contribute to openness about the measures taken by authorities and politicians.

However, the beneficial side-effects of openness do not alter its fundamental purpose. It is a characteristic of a genuinely democratic society that everyone has a right to access to authentic information about the political and administrative exercise of power.

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# Public or Secret

Principles of freedom of information require authorities and other public agencies to provide access to authentic documents and data. The demand for authenticity is the *raison d'être* of the right-of-access principle.

This book *Access to Information in the Nordic Countries* explains and compares the legal rules determining public access to documents and data in Sweden, Finland, Denmark, Norway, and Iceland. In addition, international rules emanating from the United Nations, the Council of Europe and the European Union are elucidated.

Free access to public records is crucial to democratic control and participation. Rules of law and legal practice concerning access and secrecy are of far-reaching significance to all sectors of society and to the relationship between citizens and the state.

*Access to Information in the Nordic Countries* demonstrates that, in the five Nordic countries, right-of-access rules are very different and show no consistent pattern. A country with the best conditions in some areas may have poor conditions in others.

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