Summary

The question that this report seeks an answer to is: has the Swedish principle of transparency (*offentlighetsprincipen*) weakened as a result of the Swedish EU membership? Our answer, in short, is yes. One fundamental reason for this state of affairs, is that the right to access public documents (*rätten att få tillgång till handlingar*) from Swedish authorities – not from the EU institutions and organs – has lost weight when balanced against the interest of secrecy. But, it should not have to be this way.

Fears that Sweden's EU membership might tip the scales in favor of secrecy are not novel. Going all the way back to when Sweden joined the EU (1995), there have been wide spread opinions to the effect that an EU membership would risk undermining the Swedish principle of transparency. This picture of the EU, being seen as a threat to one of the cornerstones of Swedish democracy, is still vibrant.

One difficulty in determining whether, and to what extent, the EU membership has influenced the Swedish principle of transparency, is the lack of consensus when it comes to pin-pointing the concrete legal contents of the principle. This in turn, is a consequence of the fact that the importance and special nature of the Swedish principle of transparency are, more or less, taken for granted. It is true that the Swedish constitutional protection of the principle of transparency is historically unique, but times have changed. Presently, more than fifty states in the world have similar constitutional guarantees. And rights of access to public documents would seem to be recognized by all member states of the EU (constitutionally or statutory). Even so, there is basically no Swedish research, using comparative materials, substantiating that the Swedish principle of transparency is better than the transparency

found in other countries. Any claim to that effect can, hence, be neither corroborated nor refuted.

In light of the above, it has been one of our priorities to nail down the defining features of the Swedish principle of transparency. We have found a number of characteristics (which are expounded on in the report). Two of these, deserves to be highlighted in particular; the flexible construction of the principle, and its function as a central component in the protection of basic rights. The flexible construction enables the legislator to change the actual protection of the principle of transparency, by amending laws on secrecy. At the same time, another defining feature of the principle is its function as a fundamental right – which limits the level of flexibility afforded to the legislator.

There are fundamental and important similarities between the scheme of permitted limitations to the right of access to public documents, laid down in the Freedom of the Press Act, and the conditions for limiting other fundamental rights, as laid down in the Instrument of Government. Somewhat simplified, these conditions entail:

- any limitation must be prescribed by a narrowly tailored and precise law
- proportionality: a careful balancing exercise must be performed, weighing the protection of the right against the need for restricting the right
- effective remedies: restrictions must be subject to judicial scrutiny

Our belief is, that there is a lot to gain from affirming these similarities in terms of the scheme for restricting rights. And to foster a systemic view of our constitution, which aligns the right to access public documents with the general protection of fundamental rights granted by the Instrument of Government. Perhaps, it would be sufficient that this systemic view gains acceptance in the Swedish courts. But more expansive solutions might also be considered. Such as an amendment of the Freedom of the Press Act, making the scheme for restrictions of rights of the Instrument of Government directly applicable to the right of access to public documents. Or to

sever the right of access to public documents from the Freedom of the Press Act, and place it in the Instrument of Government.

We have seen that the Swedish constitution constrains the ways in which the legislator is allowed to limit the principle of transparency. But to what extent does the Swedish constitution permit the EU to influence the principle of transparency? The answer to that question is principally found in the Instrument of Government (chapter 10, section 6); the "EU-clause".

According to the EU-clause, the legislator can only transfer decision-making powers to the EU, provided that those powers don't "interfere with the principles of government" (*what* the EU can do). Even though the exact meaning of this phrase is difficult to pin down, it is obvious that the principle of transparency is one of the "principles of government". Roughly speaking, the EU-clause does not permit the EU to decide on measures harmonizing the principle of transparency itself. But, on the other hand, measures that only limit the principle to a certain degree (such as secrecy clauses), would not be considered to "interfere with the principles of government".

Additionally, the EU-clause demands that the EU should maintain a – from a Swedish perspective – satisfactory protection of fundamental rights, within the areas where powers of decision making are transferred to the EU (*how* the EU can act). In our opinion, there are strong reasons for including the right of access to public documents as a part of the *how*-requirement of the EU-clause. Such a conclusion is not self-evident, however, seeing as the EU-clause only refers explicitly to the rights contained in the Instrument of Government, and not to the Freedom of the Press Act where the right of access to public documents is set out.

This means that the principle of transparency forms part of both the principles of government, where the legislator is barred from transferring decision-making to the EU (the *what*-requirement), *and* the protection of rights that the Swedish constitution demands the EU to guarantee (the *how*-requirement). The construction that the Swedish constitution provides for the principle of transparency – a main rule consisting of a right to access public documents, but granting exceptions for secrecy clauses prescribed by law (among other conditions) – is a characteristic which is so fundamental that it cannot be touched by the EU. But at the same time, the core of

the principle of transparency is the right to access public documents; a right that the legislator is permitted to limit by law if certain conditions are met. And this right to limit the principle of transparency, the legislator may legitimately transfer to the EU.

As we see it, the Swedish constitutional conditions, with its restrictions on the legislator when imposing secrecy clauses, cannot be upheld within the areas where decision-making powers have been transferred to the EU. This is so, because the EU lacks a specific provision, which states unequivocally that the right to access public documents from the authorities of member states is an interest protected by the EU.

This means that the EU, when limiting the right to access public documents held by Swedish authorities, is not bound by *any* rules protecting this right (neither the EU's own, nor Swedish rules).

In spite of the above, there have been no concrete conflicts between Sweden and the EU. Not even concerning areas where the EU, by imposing secrecy clauses, directly limit the right to access public documents. This lack of confrontation must be viewed in light of the strategies employed by Sweden in order to facilitate the relationship between EU law and the principle of transparency.

Sweden has, since joining the EU, been a force for transparency within the Union (e.g. the adoption of the Access Regulation). In the past twenty years the EU, and other member states, have closed the transparency gap in relation to Sweden. Whilst working for increased transparency within the EU, Sweden has also strived to protect the Swedish principle of transparency by hindering EU legislation that might conflict with the principle of transparency. One example of such negotiating work, is found within the area of data protection, where Sweden has been able to implement clauses which may make it possible to reconcile the EU's demand for protection of personal data with the right to access public documents.

The most common situation, after all, is perhaps that Sweden is unable to secure guarantees for the protection of the principle of transparency. What usually happens under such circumstances, is that the Swedish legislator takes advantage of the inherent flexibility of the principle of transparency, and adapts it to the relevant EU legislation. This is done by means of "double regulation"; the Swedish legislator adjusts national secrecy clauses, in order for them

to conform to the demands of EU law. This can be seen as Sweden's main strategy.

One fundamental problem with the Swedish approach to handling the principle of transparency's encounter with the EU, is that is has become mainstream for the Swedish legislator to continually adapt Swedish secrecy clauses, to conform to the demands of EU law. This means that legislation from the EU is not only implemented into Swedish law, but it is also "internalized" into the Swedish principle of transparency. And, therefore, gives the impression that the principle of transparency remains untouched by EU law; it is still the Swedish legislator imposing restrictions on the right to access public documents held by Swedish authorities. In our view, there is a risk of excessive appeasement from the Swedish legislator, slowly making the right to access public documents from Swedish authorities redundant.

Quite a few of the secrecy clauses that have been introduced in Swedish law, stemming from EU law, have been implemented in a manner that conforms to traditional Swedish ways of formulating secrecy clauses. But, at the same time, there exist several secrecy clauses that have been formulated in ways that are foreign to Swedish tradition. Foremost, we are referring to secrecy clauses based on the notion of "originator control"; meaning that a decision to grant or withhold access to a document is to be made by the foreign authority (or international body) from whence a document originates, and not by the Swedish authority holding the document in question.

Rules containing originator control, are a consequence of the fact that member states have varying views on the proper balance between openness and secrecy, and derive from a lack of mutual trust for the judgment of authorities in other member states.

One immediate problem with secrecy clauses granting originator control, is that such clauses have nothing to say concerning the legal preconditions that must be met in order for the originator to validly invoke secrecy. In light of this, it is impossible to determine whether such rules comply with Swedish constitutional requirements on when the right to access public documents may be limited. And since, there is no rule in EU law protecting a right to access public documents held by authorities in the member states, it is impossible to determine whether the various secrecy clauses of other member states comply with these requirements.

One conclusion stemming from the above, is that the Swedish legislator cannot implement secrecy clauses (in ordinary statutes), which limit the constitutional construction of the principle of transparency; its function as a fundamental right. Any such change in the principle of transparency would require constitutional amendments. Further, the Swedish legislator is not allowed to transfer powers to the EU to limit this constitutional character of the principle of transparency; the legislator cannot transfer decision-making powers to the EU that are more far-reaching than the decision-making powers that the legislator himself disposes of.

Having said this, we can also see that these formally prohibited secrecy clauses implemented by the legislator, have in practice had very little impact on the right to access public documents held by Swedish authorities.

In our view, the preconditions for protecting the right to access public documents held by Swedish authorities on a long-term basis, is dependent on how we view the principle of transparency. There are two complementary but to some extent competing views; one is an introvert outlook that emphasizes old differences between the member states' constitutional traditions, and the other is an extrovert outlook that emphasizes new commonalities between the member states' constitutional traditions.

Our assessment is that, today, we can genuinely talk about the right to access public documents within the EU member states as one of their "common constitutional traditions" (and hence something which could form a general principle of EU law). The right to access public documents was initially a distinctly Swedish feature, but is today a more or less common feature of the legal systems of all member states.

In our judgment, the possibilities of protecting the right to access public documents held by Swedish authorities on a long-term basis, is wholly dependent on EU law developing what it lacks today; a specific guarantee for the right to access public documents held by the authorities of the member states.

In light of the above, we conclude by pointing out that the Swedish principle of transparency is better served by a discussion focusing on how secrecy clauses are formulated and applied, rather than on where they are being authored. Additionally, there is an

extensive need of modern Swedish research that, without preconceived notions, compare Swedish rules on the right to access public documents with similar rules in other states.