The Swedish Principle of Open Government

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INTRODUCTION[1]

In Sweden the importance of the principle of open government for democracy is frequently asserted in the public debate. It is therefore easy to form the impression that there is a broad societal consensus about the understanding of that principle. But there are significant differences between the perspectives of various stakeholders.

This was, indeed, a striking feature of the debate surrounding the negotiations on Swedish membership of the EU and the resulting referendum (1994). In contrast to the Government's use of the expression "the principle of open government" (*offentlighets-principen*) to denote citizens' right of access to official documents, many critics had a much broader understanding, encompassing "the entire construction intended to guarantee an enlightened discourse between citizens."[2] From their point of view the efforts made by the Government to defend the principle in relation to the EU were not ambitious enough.

Clearly, the different perspectives on the content of the principle of open government reflect different stakeholders' priorities and agendas. Depending on the definition – whether the principle is narrowly or widely understood – the judgment about its compatibility with membership of the EU will be more or less favourable.

In the current text the principle of open government is defined in a strict and narrow way, to denote the right of access to official

[1] For the full report in Swedish with a summary in English, see https://eso.expertgrupp.se/wp-content/uploads/2016/12/ESO-2018_1-Grundlag-i-gungning.pdf

[2] See Alcala, J. and others, *Regeringen måste ge besked*, Dagens Nyheter 3 January 1993 and Alcala, J. and others, *Ordens frihet på papper – vi måste kräva dokumenterade garantier för offentlighetsprincipens bevarande*, Dagens Nyheter 27 January 1993 (quotation translated).

documents (cf. Swedish: *rätten att få tillgång till allmänna handlingar*, French: *le droit d'accès aux documents officiels*, and German: *das recht auf zugang zu amtlichen dokumenten*). This is in line with the meaning given to that principle in modern constitutional lawmaking; in matters related to access to official documents, protection of rights and, indeed, conferral of competence to the EU.

An appropriate expression can be found in the explanations to the government bill underlying the most recent amendments of the constitutional provisions on the public nature of official documents (1976). Although a general "principle that the activities of the authorities of the state shall be transparent" is acknowledged, the focus is still set on the specific chapter of the Freedom of the Press Act (FPA) that establishes a right of access to official documents and the preconditions for its exercise.[3]

THE FOUNDATIONS OF THE PRINCIPLE OF OPEN GOVERNMENT

The point of departure for understanding the significance of the principle of open government in the constitution is to be found in the Instrument of Government (IG) and its introductory declaration that "Swedish democracy is founded on the free formation of opinion" (together with a universal and equal suffrage).[4] The "free formation of opinion", which is fundamental to the formal notion of "democracy", is protected through a set of rights that are all labelled "freedoms of opinion".[5]

Most of them, for example freedom of information or freedom of demonstration, are set out in the Instrument of Government, which is the general constitutional act.[6] But there it is explained that there are also some freedoms of opinion that are set out in the Freedom of the Press Act (FPA), which is a specific constitutional act (and also some that are set out in the Fundamental Law on

[3] See Government Bill *Proposition 1975/76:160 om nya grundlagsbestämmelser angående allmänna handlingars offentlighet*, p. 23 (quotation translated).
[4] See Ch. 1 Art. 1, second paragraph IG.
[5] See especially Government Bill *Proposition 1975/76:209 om ändring i regeringsformen*, pp. 103-110.
[6] See Ch. 2 Art. 1 IG. For official translations of the fundamental laws of the Swedish Constitution see www.riksdagen.se/en/documents-and-laws

Freedom of Expression). This is the case with the press freedom with its numerous components – including the protection afforded to those who give information to the media – and, importantly, the right of access to official documents.[7]

In the Freedom of the Press Act (which is older and more detailed than the Instrument of Government) provisions on "the public nature of official documents" constitute their own chapter (chapter two). This chapter is built around a basic right of access to official documents. There is no reason to go into detail about all elements of the provisions of that chapter. But some more points should be clarified, to provide a comprehensive overview. Thereafter the focus will be on an assessment of the major features that characterise the Swedish principle of open government.

a) The right of access to official documents: constitutional rules

Essentially, the provisions in the second chapter of the Freedom of the Press Act encompass a general rule that establishes the basic right of every citizen – and, normally, all foreign nationals[8] – to have free access to official documents (including an explanation of its objectives); a framework for limitations of that right through rules on secrecy; a set of clarifications of the extent of the notion of official documents; and detailed rules for the administration of official documents and the procedures for granting access.

The right of access to official documents (Art. 1) is not absolute but may be subject to restrictions – through rules on secrecy adopted by Parliament (the *Riksdag*) in "a special act of law" – if this is necessary within regard to certain areas of interest: what are called the grounds for secrecy.[9] Every such restriction must be "scrupulously specified" (Art. 2).

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[7] Thus reflecting the systematic structure in the Instrument of Government, the FPA confirms that in order "to secure the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be free, subject to the rules contained in this Act for the protection of private rights and public safety, to express his or her thoughts and opinions in print, to publish official documents and to communicate information and intelligence on any subject whatsoever. See Ch. 1 Art. 1 second paragraph FPA.

[8] See Ch. 14 Art. 5 second paragraph FPA which provides that foreign nationals are equated with Swedish citizens "[e]xcept as otherwise laid down in this Act or elsewhere in law".

[9] Such rules on secrecy may also be adopted by Parliament in another act of law to which the special act refers, if this is "deemed more appropriate in a particular case"

Ch. 2 Art. 1 and Art. 2 of the Freedom of the Press Act

Art. 1 Every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.

Art. 2 The right of access to official documents may be restricted only if restriction is necessary with regard to:
1. the security of the realm or its relations with another state or an international organisation;
2. the central fiscal, monetary or currency policy of the realm;
3. the inspection, control or other supervisory activities of a public authority;
4. the interests of preventing or prosecuting crime;
5. the economic interests of the public institutions;
6. the protection of the personal or economic circumstances of individuals; or
7. the preservation of animal or plant species.

Any restriction of the right of access to official documents shall be scrupulously specified in a provision of a special act of law, or, if deemed more appropriate in a particular case, in another act of law to which the special act refers. With authority in such a provision, the government may however issue more detailed provisions for its application in an ordinance.[10]

The provisions of paragraph two notwithstanding, the *Riksdag* or the Government may be authorised, in a regulation under paragraph two, to permit the release of a particular document, with regard to the circumstances.

The Freedom of the Press Act's provisions on the public nature of official documents contain detailed rules on the definition of "official documents" (Arts. 3–11). A common explanation is that it concerns such productions (physical) or recordings (electronical) that are held by a public authority and which have been received or drawn up by this authority. There are also rules clarifying exceptions, such as personal letters, memoranda and draft documents.

Furthermore, there are provisions setting out detailed rules for the administration of official documents and the procedures for granting access (Arts. 12–18). Of particular importance is a duty of each public authority to make an official document to which there is a right of access available on request "forthwith or as soon as

[10] According to an additional third paragraph.

possible" (Art. 12) and a prohibition against inquiring into the identity or purpose of a person making such a request except, unless necessary to enable the authority to judge if there is any obstacle to release of the document (Art. 14). There is also a right to appeal a decision to reject a request for access to a court of law or, in some instances, to the Government (Art. 15).[11] Finally, a requirement is set out that the conditions for disposal of official documents – such as storage and weeding – shall be adopted by Parliament, in an ordinary act of law (Art. 18).[12]

b) The right of access to official documents: rules on secrecy

The rules on secrecy which, according to the Freedom of the Press Act, shall be adopted by Parliament in "a special act of law" can be found in the Public Access to Information and Secrecy Act (ISA).[13] Here it is explained that 'secrecy' means a prohibition on disclosing information, orally or by making an official document available, or in any other way (for instance by the disclosure of a document, that is not an official document, or production of an article).[14]

It follows from the provisions of the Freedom of the Press Act that the Public Access to Information and Secrecy Act has a primary purpose of specifying "scrupulously" the instances in which the interest of secrecy has more weight than the interest of openness. Besides clarifying the extent of rules on secrecy, the Act is establishing certain preconditions that are now integral to the principle of open government.

First, secrecy does not result from a decision to classify a document. But the Public Access to Information and Secrecy Act permits an authority to make a marking of secrecy on a document that can be assumed to contain certain information.[15] Importantly, such a marking only constitutes an indication – an alarm bell – in anticipation of the assessment of secrecy that may be made in the context of a future request for the release of that document.

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[11] Special provisions apply to the right to appeal against decisions by authorities under Parliament.
[12] See the Archives Act (1990:782).
[13] See the Public Access to Information and Secrecy Act (2009:400). Cf. Ch. 2 Art. 2 second paragraph FPA.
[14] See Ch. 3 Art. 1 ISA.
[15] See Ch. 2 Art. 14 FPA and Ch. 5 Art. 5 ISA.

Second, the Public Access to Information and Secrecy Act is based on a system with a so-called harm test. This means that an authority is only permitted to refuse access to a document if this can be assumed to entail harm.[16] Even if there are numerous exceptions, this means that each authority has to make an autonomous assessment of a request for the release of a document. The logic of the system, when complied with, is that no rule of secrecy must lead to a decision to refuse access in more situations than "inevitably necessary" in order to protect the interest which has prompted that rule.[17]

Third, in accordance with the Public Access to Information and Secrecy Act, secrecy is limited to information that appear within certain activity of, or which is kept by, an authority.[18] Therefore, secrecy is only binding on employees who take part in such activity or other individuals who have been given access to classified information subject to a condition of non-disclosure. Another approach to secrecy, common in several other countries, is that it is instead connected to specific information. This means that the information in itself, irrespective of its form, is classified and that secrecy applies to everyone who has access – in one way or another – to that information (and who ought to know that it is subject to secrecy). In sharp contrast, the Public Access to Information and Secrecy Act does not bind someone who has got access to classified information if, for example, a civil servant violated his or her professional secrecy.

A consequence of the societal development where formerly public matters are, today, carried out by independent actors, has led to a situation where the transparency intended by the Freedom of the Press Act has become less extensive. Therefore, in an attempt to satisfy the interest of openness in publicly funded activity funded, new rules have been inserted into the Public Access to Information and Secrecy Act stating that the right of access to official documents shall also apply to documents from some private actors (for example companies over which municipalities or county councils exercise a decisive influence).[19]

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[16] See especially Government Official Report *Betänkande av offentlighets- och sekretesslagstiftningskommittén SOU 1975:22*, p. 90.
[17] See Government Bill *Proposition 1994/95:112 Utrikessekretess m.m.*, p. 22–23 (quotation translated).
[18] See Ch. 2 ISA.
[19] See Ch. 2 Arts. 3-5 ISA.

THE CHARACTERISTICS OF THE PRINCIPLE OF OPEN GOVERNMENT

There is no agreement about the precise characteristics of the principle of open government. But there appears to be an overwhelming consensus that the principle has become a distinctive feature of Swedish democracy – a part of the "constitutional, political and cultural heritage" – and therefore something that makes us different from the rest of the world.[20] Today that conclusion is drawn without much reflection: without any clarification what it is that the makes the principle of open government so Swedish – besides being very old – and without any serious consideration of the contemporary situation in other countries. There appears to be a profound lack of modern Swedish studies unreservedly comparing the rules underlying our principle of open government with corresponding rules in other countries.[21] But there are numerous international studies that indicate that the principle – understood as citizens' right of access to official documents – has become an important component of many national constitutions (not seldom with a construction that has many similarities with the Swedish).[22] This lack of modern Swedish studies means that it is difficult to say, credibly, if our principle of open government is better than that of other countries and why.

To get a clearer picture of the principle of open government – what it contains and what may make it distinctive – this text seeks to identify the characteristics that are more or less consistently presented in modern constitutional lawmaking. These are:

a) an old ideal rooted in liberalism
b) a flexible construction for balancing interests
c) a basis for democracy and confidence in public authorities
d) a historic and systematic link to press freedom
e) a central component of modern civil rights.

[20] See the Declaration (47) by the Kingdom of Sweden on Open Government, attached to the Act of Accession to the EU, OJ 1994 C 241, p. 9.
[21] Cf. Government Official Report *Betänkande av grundlagsutredningen inför EG SOU 1993:14*, where a survey is made of the corresponding rules in the member states of the EC.
[22] See especially Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015) and Maurer, A., Comparative Study on Access to Documents (and Confidentiality Rules) in International Trade Negotiations, European Parliament Policy Department, Directorate-General for External Policies 2015, PE549.033, pp. 9–11.

a) An old ideal rooted in liberalism

The basic constitutional rule providing for the principle of open government was first introduced in the Freedom of the Press Act from 1766.[23] This fundamental law, adopted more than 20 years before the US Bill of Rights and the French *Déclaration des droits de l'homme et du citoyen*, acknowledged a freedom for all citizens to "write and let print" anything that was not explicitly prohibited (and also a freedom to "declare one's thoughts about everything"). To this press freedom – the world's first – an extensive right was tied to have access to official documents and to transcribe their content.[24]

There is much that is exciting to say about the series of events that preceded the Freedom of the Press Act from 1766 (and much has also been written about it).[25] The person who is associated, most strongly, with the process in the Swedish Parliament is Anders Chydenius, a young priest from the Finnish half of the country. Chydenius – who was a liberal – belonged to the left wing of the opposition and has been described as one of the periods' most fervent members of parliament.[26] His attitude was representative of the new ideals of the Enlightenment; that it must be possible to scrutinize and to criticize everything and everyone, even those exercising public power. And the more who had a say, the better. For a greater insight is often to be found in people who are less successful in society, Chydenius claimed, than in those who are more illustrious.[27] But more people than Chydenius were campaigning for such ideals. The most important thinker, who undoubtedly influenced Chydenius and his supporters, was another young man from the Finnish half of the country, Peter Forsskål.

Peter Forsskål was a fairly unknown philosopher and botanist. After having successfully defended a thesis at the Georg-August-Universität in Göttingen – one of the most progressive academic environments of that time – Forsskål returned to Sweden, to make

[23] See *Kongl Maj:ts nådiga förordning angående skrifter och tryckfriheten av den 2 december 1766*.
[24] See Art. 10 and also Art. 11.
[25] For an example of a text in English see Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015).
[26] See Björnsson, A., *Rätten att kritisera överheten – svensk tryckfrihet 250 år, Hammarskjöld-föreläsning vid Nordeuropainstitutet på Humboldt-Universität zu Berlin den 21 juni 2016*(available at www.tffr.org)
[27] See Björnsson, A., above.

a career at Uppsala University. During his stay in Göttingen, Forsskål had gained respect for his research and he had been elected to the German Academy of Science. But in Uppsala he was regarded with distrust and when he tried to present a new thesis reflecting radical liberal tendencies he was not allowed to do so. One crucial reason was that the thesis had been written not only in Latin but also in Swedish so that it could be read by ordinary people.[28] Forsskål therefore decided to print it himself in the form of a pamphlet, and this gave it impact. The title of his text was "Thoughts on Civil Liberty" and the subject how important it was to restrain executive power (which at this time was royal power) through a citizenship based on rights and freedoms: a basic freedom to write (press freedom and freedom of expression), but also a right to property and a freedom of trade and a right to education and guarantees for the rule of law (such as access to justice). It was in this context that Forsskål also formulated thoughts on access to official documents.[29]

But in spite of these rights, it would seem that Parliament's decision to adopt the Freedom of the Press Act was not the result of any widespread support for a high-minded ideological standpoint. It is more probable that the arguments put forth by Chydenius, Forsskål and several others were of immediate use to Parliament's two groupings, which both had a long-term interest in securing information about the exercise of executive power.[30] A conclusion that has been drawn is therefore that:[31]

> The genesis of the constitutional provisions on public access to documents in Sweden at [sic] the middle of the eighteenth century probably remains a historical accident, entrenched in the prevailing political context of the time. In this respect, the link between the philosophies of enlightenment and the right of access to official

[28] See Björnsson, A., above and Nordin, J., Forsskål lade grunden för det fria ordet, Svenska Dagbladet 10 July 2013 and Spangenberg, C. G., *Tankar om den borgerliga friheten - Peter Forsskåls skrift om tryckfriheten 250 år* (Uppsala University 2009).

[29] See Forsskål, P., *Tankar om Borgerliga Friheten* (Salvius 1759), § 20. For a translation to English see www.peterforsskal.com/thetext.html.

[30] For an overview of the political situation in the Swedish Parliament at the time see Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015), pp. 7–11 and Nordin, J., *1766 års tryckfrihetsförordning: bakgrund och betydelse* (Kungliga Biblioteket 2015).

[31] See Öberg, U, EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act, Cambridge Yearbook of European Legal Studies 1999 p. 303. See also Goldberg, D, From Sweden to the Global Stage: Freedom of Information as European Human Right? International Media and Entertainment Law 2017-18, p. 1.

> documents that Swedes have now enjoyed for more than two hundred years has yet to be firmly established.

Support for that conclusion can be found in the fact that it would take another 200 years for the general protection of citizens' rights that Forsskål had been thinking about to find sufficient support in the Swedish Parliament (see below 3.2.e).[32]

Developments since the Freedom of the Press Act of 1766 and up to the present have not followed a straight line. Like history in general, the principle of open government is characterized by many uneven steps, the direction of which has often been affected by battles for political power.

Following the *coup d'état* of King Gustav III in 1772 the freedom of the press was curtailed, less than six years after its introduction. Even if a core set of rules was preserved (relating, in particular, to insight within the judicial system), the general preconditions for transparency in the activities of public authorities deteriorated throughout the period leading up to the arrest of King Gustav IV Adolf in 1809. But the new fundamental law adopted that year – the Instrument of Government – strengthened the principle of open government.[33] A few years later, rules on citizens' right of access to official documents, similar to those that had been introduced in 1766, were enshrined the Freedom of the Press Act from 1812.

The rules applied without major changes until 1937.[34] Then all detailed rules on secrecy were separated and placed in an ordinary act of parliament, called the Secrecy Act.[35] Simultaneously, a new nomenclature was introduced. The Freedom of the Press Act from 1949 – the present one – clarified that the freedom of the press and citizens' right of access to official documents are sustained by an interest in securing and encouraging "the free exchange of opinion and availability of comprehensive information" (cf. Ch. 1 Art. 1 and Ch. 2 Art. 1 FPA).

In the 1970s two important reforms were made of the constitutional rules on the public nature of official documents. First,

[32] See especially Government Bill *Proposition 1975/76:209 om ändring i regeringsformen*, Government Bill *Proposition 1978/79:195 om förstärkt skydd för fri- och rättigheter m.m.* and Government Bill *Proposition 1993/94:117 om inkorporering av Europakonventionen och andra fri och rättighetsfrågor*.

[33] See Arts. 85 and 86 of the Instrument of Government from 1809.

[34] See Government Official Report *Betänkande från 1944 års tryckfrihetssakkunniga SOU 1947:60*, p. 67.

[35] See *1937 års lag om inskränkningar i rätten att utbekomma allmänna handlingar*.

the application of the principle of open government was extended to cover recordings that may only be comprehended using technical aids (and parallel to that the constitutional rules on the protection for personal integrity were strengthened). Second, a "modernisation" was carried out that would give "greater firmness to the constitutional regulation" (and parallel to that some new grounds for secrecy were introduced, as was a new possibility for the Government to supplement Parliament's Secrecy Act with rules on implementation).[36]

In the early 1980s a new secrecy act was adopted; it coordinated detailed rules on the classification of official documents with the rules on the confidentiality of civil servants.[37] The basic idea was that this should make the rules less difficult for public authorities to apply. Importantly, a new system with a harm test was introduced (see above 2.b). One reason for this was that a large number of different rules had come into being, which often implied a "presumption of secrecy, even if the position ought to be the opposite." Therefore many such rules were replaced by rules based on a reverse presumption, where "secrecy is made dependent on a case-by-case assessment of the damage that can be assumed to result from a disclosure."[38]

In the late 2000s the Secrecy Act was replaced by the Public Access to Information and Secrecy Act (see above 2.b). Once again adjustments – many of editorial nature - were made to simplify the numerous rules: to make them less difficult for public authorities to apply and also "to emphasise that openness is the general rule and secrecy is the exemption."[39]

The provision of the Swedish Constitution which, currently sets out the general rule establishing citizens' right of access to official documents is to be found in the Freedom of the Press Act from 1949. Here it is explained that every citizen "shall be entitled to have free access to official documents, in order to encourage the free

[36] See Government Bill *Proposition 1975/76:160 om nya grundlagsbestämmelser angående allmänna handlingars offentlighet* and Government Bill *Proposition 1973:33 om ändringar i tryckfrihetsförordningen och datalag* (quotation translated).
[37] See *sekretesslagen (1980:100)*.
[38] See Government Official Report *Betänkande av offentlighets- och sekretesslagstiftnings-kommittén SOU 1975:22*, p. 90.
[39] See Government Bill *Proposition 2008/09:150 Offentlighets- och sekretesslag*, p. 1 (quotation translated).

exchange of opinion and the availability of comprehensive information" (Ch. 2 Art. 1 FPA). In this way "it is clarified that the public nature of official documents represent an element of the civil freedom of expression and information and therefore one of the prerequisites for the free democratic formation of opinion."[40]

b) A flexible construction for balancing interests

The construction of the principle of open government is based on the idea that citizens' right of access to official documents cannot be absolute but may be subject to restrictions – through detailed rules on secrecy – within the confines of specific, although broad, areas of interest (cf. above 2.a and b). Today that construction is said to result from a wish to focus the constitutional text on "the basic rules needed to give the principle of open government firmness and stability" which shall set out "the grounds which may prompt secrecy while the detailed rules on secrecy that follow are given in ordinary legislation."[41]

The reasoning underlying this construction was explained by the committee of inquiry that prepared the most recent amendments of the constitutional rules on the public nature of official documents. Most notably, the committee clarified that in this way the detailed rules on secrecy could be made more precise and less difficult to change (compared to the original solution where the constitutional rules included detailed rules on secrecy). Of particular importance, in that context, is the interlinkage that was made between the principle of open government and the role of Parliament. The committee clearly acknowledged the flexibility of the modern construction – that new rules on secrecy can be introduced without any constitutional amendment – but stressed that this still required "the involvement of Parliament" which, in turn, constituted a "sufficient guarantee that the principle of open government will remain the general rule."[42]

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[40] See Government Official Report *Betänkande av utredningen om utrikessekretessen SOU 1994:49*, p. 16 (quotation translated).
[41] See Government Official Report *Betänkande av offentlighets- och sekretesslagstiftningskommittén SOU 1975:22*, pp. 89–90 (quotation translated).
[42] See Government Official Report *Betänkande av offentlighets- och sekretesslagstiftningskommittén SOU 1975:22*, pp. 88–90 (quotation translated).

Consequently, the construction of the principle of open government can be said to embody a balance of interests: between the right of access to official documents and such restriction of that right – through detailed rules on secrecy – that "appears necessary in consideration of significant opposing interests."[43] This means that the principle of open government does not in itself contain any fixed measure of openness but functions, instead, as a constitutional mechanism giving citizens more or less insight, depending on the extent to which Parliament makes use of its discretion to adopt detailed rules on secrecy (and, of course, the substance of the proposals presented to Parliament by the Government). Therefore, it is the constitutional limits for such rules and, within those limits, the political responsibility for balancing interests that are central to the principle of open government, not the degree of secrecy that is accepted in the detailed rules that exist at any given point in time.

The act of legislation that establishes the detailed rules currently in force is the Public Access to Information and Secrecy Act (see above 2.b). This comprises 44 chapters of which 30 (14-43) contain rules for different areas of secrecy (a total of 362 sections). Most extensive is Chapter 30 on "secrecy for the protection of individuals in activities which concern supervision etc. in relation to business" (46 articles).

Undoubtedly, many of the rules in the Public Access to Information and Secrecy Act have been introduced in order to adapt the principle of open government to legislation from the EU. But even before the Swedish membership of the EU was initiated, the conclusion was drawn that the construction of the principle of openness had meant that the legislation for exemptions from the general rule – the rules on secrecy – had become very detailed. Furthermore, the assessment was made that most rules on secrecy in legislation from the EU already had corresponding rules in Swedish legislation. It would therefore "not be a question of any sort of information that has hitherto been public for us becoming secret with a membership."[44]

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[43] See Government Bill *Proposition 1975/76:160 om allmänna handlingars offentlighet*, p. 73 (quotation translated) and, for example, report of the Parliament's Committee on the Constitution *Betänkande 1997/98:KU18 Personuppgiftslag*.

[44] See Government Official Report *Betänkande av grundlagsutredningen inför EG SOU 1993:14*, pp. 185, 205-207 and 215 (quotation translated). See also Government Bill *Proposition 1994/95:112 Utrikessekretess m.m.*, p. 10.

c) A basis for democracy and confidence in public authorities

It is difficult to measure the importance of the principle of open government for society. But there is no lack of research that indicates, clearly, that openness has an inhibitory effect on corruption in the public sector and, therefore, increases confidence in public authorities.[45] In international comparisons Sweden has a low level of public sector corruption. Modern research suggests that one reason for this can be found in the generous possibility of insight into the activities of public authorities (and that another reason can be found in a general perception that corruption is simply not acceptable).[46]

A striking impression from modern constitutional lawmaking is that no attempts are being made to demonstrate the importance of the principle of open government empirically. Instead the great significance of the principle of open government for our democracy is treated as axiomatic. But a valuable effort to formulate the anticipated significance of the principle of open government was made by the committee of inquiry that prepared the most recent amendments of the constitutional rules on the public nature of official documents:[47]

> Since the authorities' measures are subject to general insight the public gets possibilities to control the authorities' administrative routines, ambition and efficiency. Erroneous or improper action may be subject of critique, which in favourable cases leads to correction or makes repetition more difficult. Irresponsible or poorly supported criticism of authorities working correctly will be less likely to win trust among a public, which is itself able through openness to check the degree of truth of allegations made. This insight also improves the overall situation with regard to information, and the democratically vital discourse about the organisation, tasks and state of society can be based

[45] See for example Rothstein, B., The Quality of Government (University of Chicago Press 2011) and Making Sense of Corruption (Cambridge University Press 2017), and Rose-Ackerman, S., Corruption and Government: Causes, Consequences and Reform (Cambridge University Press 2016) and Cordis, A. S. & Warren, P. L., Sunshine as Disinfectant: The effect of State Freedom of Information Act Laws on Public Corruption, Journal of Public Economics 2014, p. 18.

[46] See especially Andersson, S., Corruption in Sweden – Exploring Danger Zones and Change (Umeå University 2002) and interview at www.publikt.se/artikel/affarerna-som-hotar-demokratin-2927.

[47] See Government Official Report *Betänkande av offentlighets- och sekretesslagstiftnings-kommittén SOU 1975:22*, p. 87 (quotation translated).

> on a more reliable foundation than it would if the material of the authorities was not available.

It would appear that this explanation can still be used to understand the Swedish view of the principle of open government and the way in which that principle makes its mark on the society; and it certainly does resemble the ideals of the Enlightenment (cf. 3.a).

If the principle of open government is of vital importance for the Swedish democracy, are countries with a less pronounced approach to openness less democratic? No attempt will be made here to answer that question. But it should be observed that today there are many countries that have understood the importance of openness. According to the global 'RTI index', in 1993 only 19 countries had legislation securing a right of access to official documents but in 2013 there were 95 that did.[48] It appears that 53 of these 95 countries had legislation of constitutional validity.[49]

The same development can be observed in the member states of the EU. Shortly before the Swedish accession in 1995 the Government concluded that the current member states had "completely different traditions with respect to the general right to insight into the activities of public authorities" and that only a few of them had "legislation ensuring citizens access to information from the public authorities."[50] Today it would seem that all EU member states have legislation establishing a citizen's right of access to official documents and at least half of them have legislation of constitutional validity.[51] But this does not mean that there are not significant differences. In terms of strength of the national legislation, several EU member states are ranked highly in the RTI index (Finland, Sweden, United Kingdom, Estonia and Ireland),

[48] This index is produced within the project Global Right to Information Rating, conducted by Centre for Law and Democracy together with Access Info Europe and a network of experts. See www.rti-rating.org.

[49] See www.right2info.org. Cf. Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015).

[50] See Government Bill *Proposition 1994/95:112 Utrikessekretess m.m.*, p 1 (quotation translated) and Government Official Report *Betänkande av utredningen om utrikessekretessen SOU 1994:49*, p. 43. See also Government Bill *Proposition 1994/95:19 Sveriges medlemskap i Europeiska unionen*, p. 461.

[51] See www.rti-rating.org and also Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015) and Maurer, A., Comparative Study on Access to Documents (and Confidentiality Rules) in International Trade Negotiations, European Parliament Policy Department, Directorate-General for External Policies 2015, PE549.033, pp. 9-11.

while others are ranked much lower (Germany and Austria).[52] Most EU member states are ranked in the middle.

A brief comparison of the principle of open government in Sweden and the principle of open government in other EU member states that have legislation of constitutional validity suggests that the construction is essentially the same (cf. below 2.e). But one thing that appears to be specific to the principle of open government in Sweden is the extensiveness of the constitutional legislation, containing many detailed rules that the other member states locate in ordinary legislation (for example rules setting out the definition of an official document and prescribing how it should be stored). Another thing which appears to be specific is that the principle of open government in Sweden has a historical and systematic link to freedom of the press.

The driving force behind the development that has taken place internationally is not obvious. But undoubtedly, there are many countries that share the old Swedish ideal. One expression of that can be found in a forceful judgment from 2008 where the Court of Justice of the EU stressed that access to documents from the Union's own institutions and bodies "contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated."[53]

d) A historic and systematic link to press freedom

It is still an open question whether the Freedom of the Press Act from 1766 took its starting point in a right to disseminate ideas or a demand for transparent exercise of public power. But irrespective of which, the connection between the principle of open government and press freedom was clear. The citizens' right of access to official documents was tied to a freedom to "write and let print" anything that was not explicitly prohibited and there was no sharp distinction between the two of them.[54]

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[52] See www.rti-rating.org/country-rating.
[53] See Judgment of the Court (Grand Chamber) of 1 July 2008 in Joined cases C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v Council of the European Union, EU:C:2008:374, point 59.
[54] See the Freedom of the Press Act from 1766 and especially Art. 11.

The terminological overlap between the principle of open government and press freedom was still present in the Freedom of the Press Act from 1812 and it was not until the Freedom of the Press Act from 1949 (the present one) that the two concepts became clearly separated.[55] But the relationship between the two of them remained strong. Most obviously the constitutional rules on the public nature of official documents are still located in the context of press freedom and not in the general catalogue of citizens' rights. It is submitted that this systematic link serves not only as a reminder of the common past but also as an expression of an underlying corporatist thinking: that "the principle of open government primarily fulfils its general function through its use by representatives of political parties, of other organisations and of the media" (and not for its use by citizens who wish to invoke one of their rights).[56] It may also be noted that the Freedom of the Press Act from 1949 also made a certain reinforcement of the link between the principle of open government and the press freedom, with the introduction of a constitutional protection of those who give information to the media, known as the freedom to inform (*meddelarfriheten*).[57]

e) A central component of modern civil rights

Finally it should be observed that the principle of open government is perceived not only to be vital for democracy and for citizens' confidence in public authorities, but also as "one of the pillars of the Swedish legal system".[58] The functioning of the principle of open government does not merely require public authorities to provide extensive information about their work. Their activities must lie open in such a way that the citizens may obtain information as they please and independent of what information the authorities

[55] See the Freedom of the Press Act from 1812 and especially Art. 2.
[56] See especially the Government Bill *Proposition 1975/76:160 om nya grundlagsbestämmelser angående allmänna handlingars offentlighet*, pp 70-71 (quotation translated).
[57] See Ch. 1 Art.1, second paragraph FPA. Cf. Ruotsi, M., Public Officials as News Sources; Constitutionally Protected Corruption or Disclosures in the Public Interest? in Lind, A-S et al. (Eds.), Transparency in the Future (Ragulka 2017), pp. 256-257.
[58] See Government Official Report *Betänkande av utredningen om utrikessekretessen SOU 1994:49*, p. 15 and Government Official Report *Betänkande av grundlagsutredningen inför EG SOU 1993:14*, pp. 215-216 (quotation translated).

themselves prefer to give.[59] That was precisely the central demand presented by Peter Forsskål and Anders Chydenius 250 years ago, and it is difficult not to regard it as the core of what has now become our most distinctive constitutional identity.

Today several other countries have constitutional rights of access to official documents.[60] But in contrast to the constitutional rules in those countries, which typically place the rights of access to official documents within a general catalogue of citizens' rights, the constitutional rules in Sweden are, instead, located together with a multitude of old and lengthy rules on freedom of the press and thus separated from most other citizens' rights (see above 3.d).[61]

The way in which the modern principle of open government not only relates to rules on press freedom (the Freedom of the Press Act from 1949) but also to rules on other freedoms of opinion and citizens' rights in general (the Instrument of Government from 1974), is not easy to understand. One explanation is that our constitutional tradition with regard to press freedom is old, while our constitutional tradition with regard to citizens' rights in general is young. This makes Sweden different from most other countries in the EU.

Even if there are several differences between the constitutional rules on the public nature of official documents and the constitutional rules on citizens' rights in general, there are fundamental – and important – similarities, in particular with regard to the conditions that must be satisfied in order for any restriction of (non-absolute) rights to be permitted. In both cases such conditions require that a restriction may only be imposed to satisfy a purpose that is acceptable in a democratic society and, therefore, does not pose a threat to the free formation of opinion. This shall be secured through:[62]

- a requirement for legality: that the limitation is made in a legislative provision that is clear and precise;

[59] See, for example, Government Bill *Proposition 1975/76:160 om nya grundlagsbestämmelser angående allmänna handlingars offentlighet*, pp. 69-71 and report of the Parliament's Committee on the Constitution *Betänkande 1997/98:KU18 Personuppgiftslag*.
[60] See especially Riekkinen, M. & Suksi, M., Access to Information and Documents as a Human Right (Åbo Institute for Human Rights 2015).
[61] See for example the Finnish Constitution Ch. 2 Art. 12 point 2.
[62] Cf. Ch. 2 Art. 2 FPA and Ch. 2 Arts. 20-25 IG. See further Bergström, C. F. & Ruotsi, M., *Grundlag i Gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen*, Report of the Swedish Government's Expert Group on Public Economics (ESO) 2018:1, pp. 65-70.

- a requirement for proportionality: that a correct balance is struck between the protection of a right and the need to restrict that right;
- a requirement for effective remedies: that there is access to judicial review.

That the balancing of interests required by the principle of open government is intended to guarantee proportionality appears particularly clear in the light of the considerations underlying the introduction of a new system with a harm test in the Secrecy Act from 1980 (see above 2.b and 3.a). The logic of the system is that no rule on secrecy must lead to a decision to refuse access in more situations than "inevitably necessary" in order to protect the interest which has prompted that rule.[63]

But there are also (and have always been) several detailed rules on secrecy that are atypical in the sense that they do not fit into the system of a harm test. Most obviously there are rules on secrecy that provide for 'absolute' secrecy (and do not leave any room for public authorities to make an autonomous assessment of the risk of harm). For such rules to satisfy the requirement of proportionality they must be drafted so that they can only have a narrow application. That corresponds to the clarification in the Freedom of the Press Act that legislative provisions containing "[a]ny restriction of the right of access to official documents shall be scrupulously specified" (see above 2.b).The more intrusive the restriction that Parliament wishes to make to the right of access to official documents, the less discretion it may allow public authorities to exercise when applying the resulting rule.[64]

Focusing on the similarities between the right of access to official documents and other (non-absolute) citizens' rights in the Swedish constitution – rather than the differences (essentially the historic and systematic link to a rather peculiar press freedom), the Swedish principle of open government no longer appears so different from the corresponding principle in many other countries.

In most countries that now have legislation establishing a citizens' right of access to official documents (see above 3.c), restrictions of this right are permitted in the form of rules on

[63] See Government Bill *Proposition 1994/95:112 Utrikessekretess m.m.*, pp. 22-23.
[64] Cf. Ch. 2 Art. 21 IG.

secrecy. These restrictions are viewed as exemptions from a basic right of access to official documents and must be necessary to protect legitimate interests. To assess if such restrictions should be deemed acceptable, scholars and experts of transparency advocate a test in three steps, based on a requirement for legality, a requirement for proportionality and a requirement for effective remedies.[65] This test confirms that the old rules on the public nature of official documents in the Swedish constitution should not be so difficult for other countries to understand, since they correspond to a modern international view of a good standard.

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[65] See for example Maurer, A., Comparative Study on Access to Documents (and Confidentiality Rules) in International Trade Negotiations, European Parliament Policy Department, Directorate-General for External Policies 2015, PE549.033, pp. 9–11. Cf. the indicators in the RTI index which are found within the category "exemption and rejection" and also the test which is explained at www.right2info.org.

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