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ACCESS TO OFFICIAL DOCUMENTS

Issue Discussion Paper

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This Issue Discussion Paper was prepared by Anders R. Olsson, journalist, author and expert on transparency and public access to information.

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FOREWORD

While the authorities collect more and more data on citizens, there is an unfortunate tendency to prevent the public from accessing government information. Journalists who try to obtain copies of official documents from national and local authorities face obstacles and outright refusal in a number of countries.

Pluralist democracies can only thrive through transparency and openness. For “public watchdogs” to be able to play their vital role against the abuse of power – in both public and private enterprises – they must have access to information about what those in power do and decide, and be able to find the documents they need to see.

Transparency and open government thus promote fair and equal treatment under the law and efficiency in public administration. The need for such transparency is recognised in principle in several European countries, but is not yet a reality throughout large parts of the continent.

The Strasbourg Court has already ruled several times on this issue and has consistently made clear that the public has a right to receive information of general interest. The conclusion is that the transparency of public authorities should be regarded as an important element of freedom of information – with a bearing on freedom of expression.

One obvious problem is that the authorities are not always accustomed to dealing with the media in an open manner. This problem has worsened as a consequence of the trend towards further privatization of services previously organised by local authorities, such as schooling and care for the elderly. Public review of such activities has become more difficult.

There may well be situations where it is justified to keep certain information confidential, for instance to protect national security or the personal integrity of ordinary citizens. To avoid the misuse of such arguments, there is a need for clear regulation on how decisions about confidentiality can be taken and how representatives of the public can challenge such decisions.

There are positive trends which should be recognised. The constitutions of several countries in Europe do guarantee the fundamental right to information. The need for openness is more generally acknowledged, especially with the growing recognition of the connection between transparency and anti-corruption.

Some good models are available: a single online access point developed in the UK, e-government in Estonia and Greece, existence of an oversight body – such as an Information Commissioner – in Serbia, Sweden and several other countries.

This Issue Discussion Paper is written by Anders R. Olsson, a journalist, author and expert on transparency and public access to information. He uses Sweden as an example of how open government can be promoted. Citizens’ right to access official documents has been constitutionally guaranteed in Sweden for more than 200 years and access rights have traditionally been extended as far as possible in this country. Unfortunately this tendency to maximize transparency has gradually been restricted where citizen access to electronically stored information is concerned.

The principal positions my Office has tried to promote in this area are the following:

- In 2009 the Council of Europe adopted a Convention on Access to Official Documents. However, the vast majority of the member state governments have not ratified this convention yet – they should do so;

- Citizens must be able to find the documents they need to see. To this end there must be strict rules for government agencies on how to register their documents and on obligations to help citizens find what they are looking for;

- Institutions supervising transparency, such as the administrative courts, information commissioners and parliamentary ombudsmen, have important functions in the defence of citizens' right to access information within the public sector;

- Strong legal protection for journalists' sources, particularly for public officials acting as whistle-blowers and assisting the media, is also a vital component of transparency. The right of public officials to inform journalists, on their own initiative and without penalties, should be legally protected.

Thomas Hammarberg

SUMMARY

Open government is a prerequisite for a functioning democracy. Transparency promotes fair and equal treatment under the law and efficiency in public administration. In order to achieve this, citizens – very often journalists – must be able to find the documents they need to see.

The aim of this Issue Discussion Paper is to study how open government can be promoted. Sweden is used as an example: in this country citizens' right to access official documents has been constitutionally guaranteed for more than 200 years. It is considered an important element of the right to free speech. If citizens lack access to reliable and relevant information about their society, free speech will be of limited value to them.

Access rights have traditionally been extended as far as possible, with limitations put in place only at the level where the work of public officials might otherwise be seriously hampered. However, this tendency to maximise transparency has been met, beginning some 30 years ago, with waves of criticism. As a result, citizen access to electronically stored information has gradually been restricted.

The Swedish model for openness must be understood as a system, a regime based on the understanding that rules on citizens' access to documents are no more than a first step towards creating transparency. This initial step needs to be complemented by other laws and administrative regulations to have the desired effect. In Sweden, the right of public officials – on their own initiative and without penalties – to inform journalists is legally protected. How the authorities register and handle documents is regulated. The administrative courts and the institution of the Parliamentary Ombudsman have important functions in the defence of citizens' right to access information within the public sector.

Although the political tradition of openness is strong and the societal effects of the model are generally encouraging, the future of the Swedish model is not necessarily bright. Conflicts about privacy protection and international pressure on the legislature to "harmonise" Swedish law with the legal regimes of European Union (EU) members less oriented towards transparency have for several years created friction and heated debate within Sweden and will continue to do so.

Introduction

For about 15 years, “transparency” has been a political buzzword at the international level. In 2007, it was reported that more than 70 countries had or were developing major disclosure policies or laws.[1] The reach and the strength of these laws vary considerably, but they are clearly a sign of a political trend. In 2009, the Council of Europe adopted a Convention on Access to Official Documents.[2] In its preamble, the arguments for transparency are eloquently summarised. No doubt today, the need for openness is generally recognised.

Most of this legislation focuses on the public sector, although the need for transparency is apparent in the private sector as well. In the aftermath of corporate scandals such as at Enron, Worldcom and the Murdoch media empire, demands for greater transparency in the private sector are becoming increasingly vociferous. So far though, little has happened regarding “openness” in financial institutions or other multinational corporations. In a market economy the obstacles to realising transparency within private, competing companies appear huge. Creating transparency in public institutions is, at least in the near future, a more realistic option.

I. The Swedish experience

To assess the long-term effects of transparency reform, the Swedish experience can serve as a frame of reference. The country’s law on citizen access to official documents is very old, first introduced in 1766 as part of a Freedom of the Press Act. This act made Sweden the first country in the world to grant constitutional protection for free speech.[3] Access rights and free speech guarantees were abolished a few years later, but were reintroduced in 1810 and have remained in force ever since.

Today, Swedish laws that aim to create transparency are commonly referred to as: offentlighetsprincipen. The word “Offentlighet” could in some contexts be translated into “openness”, but let us use the “transparency-principle” as a practical, although not literal translation.[4] The principle is manifested in several ways in Swedish law and is not quite translatable. It applies to the public sector as a whole.

It is important to note that Swedish rights to access have never been specified as rights for media professionals – they are for everyone. Chapter two of the act begins: “In order to encourage the free inter-change of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents.”

1.1 A practical example

Before discussing the societal effects of this historically unique reform, let us describe it by following a person, living in Sweden, who searches for publicly held information. We will assume that she is a woman and we will call her X.

The basic principle is that when X turns to a state or municipal agency and asks to see an “official document”, it should be handed over immediately and at no cost.[5] A “document” is defined here as a presentation in writing or images but also a recording that one can read, listen to or comprehend only with the use of technical equipment. The word “document” consequently refers not only to hard copy writing or images, but also information stored on other media, for example a magnetic tape or a computer hard disk. Simply put, a document is an object containing

[1] Florini A. (ed.) (2007), The right to know. Transparency for an open world. Columbia University Press, New York.
[2] See: http://conventions.coe.int/Treaty/EN/Treaties/Word/205.doc.
[3] The reasons Sweden adopted such radical legislation as early as the 18th century are somewhat contested among historians, but at the time, of course, ordinary people were not expected to speak publicly or seek to access official documents. The rights for “all” were conceived as rights for the elite.
[4] The alternative would be “Freedom of Information Principle”, but this expression is further from the Swedish term.
[5] There are of course limitations, some pertaining to secrecy statutes. See below for further details.

information. An “official document” is something that is actually available to the agency, and given its final form. It can be either drawn up by the authority or sent to it.

The Freedom of the Press Act contains many rules specifying when a document is considered to have been finalised – drawn up – by a public authority. Thus, it becomes official as soon as the authority dispatches it. A document which is not dispatched is considered drawn up when the matter to which it relates is finally settled by the authority. If the document is not related to a specific matter, it is drawn up when it has been finally checked or has otherwise received its final form. A diary, a journal or similar document that is enlarged on a continuing basis is considered to be drawn up as soon as it is ready to be used.

Falling outside the definition of an official document is, for example, a draft of a decision or a written internal communication in a matter as long as no final determination has been made.

Documents sent to the agency become official as soon as they reach the mailbox (real or virtual) of the agency or otherwise become available to someone working for it. Even a message not addressed to the public authority but to the home of one of its officers becomes official – if it relates to the authority’s activities – as soon as it is delivered. The document need not be registered anywhere in order to reach the legal status of “official”.

It is irrelevant whether or not the documents that X now wants to see personally concern her. The agency, under normal circumstances, is not allowed to ask for the identity of X nor the reasons for her interest in the documents. The fact that citizens do not have to identify themselves means that foreigners also have access to government-held information.

1.2 Secrecy: limits to public access to information

For obvious reasons, the legislation on citizens’ access to documents does not mean absolute transparency. According to chapter two of the Freedom of the Press Act, the Riksdag (Parliament) is allowed to pass legislation limiting public access to information in seven areas, including that related to:

- security of the realm or its relations with a foreign state or an international organisation;
- central financial, monetary or foreign exchange policy of the realm;
- inspection, control or other supervisory activities of a public authority;
- preventing or prosecuting crime;
- public economic interests;
- protection of the personal integrity or economic circumstances of private subjects; or
- preservation of animal or plant species.

Content of official documents may not be kept secret in order to protect interests other than those listed above. Exactly what kind of information shall be kept secret is stated in basic law in the Openness and Secrecy Act (OSA). The government may not decide on the limits of secrecy, this is an exclusive right of the Riksdag. However, in a number of provisions of the OSA, the government is allowed to make supplementary regulations. These regulations are stipulated in a Secrecy Ordinance.

The OSA has several hundred clauses on secrecy, but the act also has a number of provisions describing how the authorities should answer requests and their duty to inform an applicant of the right to appeal. It also contains important regulations on how public documents must be registered.

A right to access documents is the rule. The authorities can deny citizens access only under provisions specified in law.

1.3 How to gain access

To gain access, X approaches a state agency that holds information of interest to her. The agency must provide access while it is operative. For a typical administrative authority that would

be during office hours, say between 9 a.m. and 7 p.m. on weekdays. In a police station manned day and night however, citizens can have access to documents at any time.

In order to obtain the relevant official documents X must be able to describe them, in reasonably clear terms. The description need not be precise. It is not necessary for X to be able to state dates or registration numbers. On the other hand, the authorities are not liable to make extensive inquiries in order to find relevant documents when the applicant is unable to provide enough detail.

A request to obtain an official document shall be dealt with speedily by the authority. The exact wording in the key clause of the Freedom of the Press Act is "made available … forthwith, or as soon as possible". Thus, a civil servant receiving X's request to see documents is obliged to treat it as his or her top priority.

There are of course situations where providing a document can take time. One reason may be that the authority must consider whether some of the information contained in the document is secret or not, according to the OSA. If the request is for hundreds or even thousands of documents, examination of the material may require several hours or days of work.

Information cannot be classified as secret beforehand. A formal decision must be taken, whenever access to the contents of a document is asked for and refused. Anybody refused access to an official document is entitled to a written statement, referring to the statute that the decision is based upon, and must be informed about the right to appeal. An appeal shall be dealt with promptly.

If the document that X is asking for cannot be made available, in the agency's opinion, without the disclosure of classified information, she may respond in one of three ways. She can:

- appeal against the decision, following which the matter will be tried in an administrative court;[6]
- choose to explain what she intends to do with the classified information, in the hope of convincing the agency that no harm will be done by providing access. The agency can then – but is under no compulsion to – allow her to see the document subject to reservations restricting her rights to use the information covered by an OSA paragraph. The applicant may, for example, be forbidden to publish the information or to use it for purposes other than research; or
- accept the agency's interpretation of the OSA and be content with having the rest of the document, the non-secret parts, made available in the form of a transcript or copy.

If the documents to which X is given access cannot be read or comprehended without the use of technical aids, the authority must make such equipment available – for example a computer or a tape recorder.

When given access, X may read or examine the documents on the spot. She can also transcribe, photograph or record them. On request, the agency must provide a copy of the document for her. Copies are free of charge up to nine pages. For 10 pages or more, the agency can charge X a fee covering the costs of copying.

1.4 Supervision

Administrative courts are important to safeguard citizens' right to access official documents, as is the institution of the Parliamentary Ombudsman. The four Parliamentary Ombudsmen spend considerable time and effort dealing with complaints regarding access issues. A common reason for complaints is that agencies do not answer requests quickly enough.

Most Swedes never take advantage of their right to see official documents. They may be aware of the legislation, but cannot describe it in sufficient detail and rarely find themselves in situations where they need this kind of information. Journalists and researchers, as well as politically,

[6] The applicant does not need a lawyer to make the appeal, and it is free of charge.

commercially or socially active persons, are those who most make use of their access rights. Typically, government and municipal agencies, dealing with issues of interest to news reporters, are kept “on their toes” because persons frequently demand access to their documents. Agencies of less interest for the mass media – the majority – tend to get less training and make more mistakes when approached by citizens asking to see documents.

1.5 Additional legislation on transparency

To understand how the Swedish law on access contributes to a healthier democracy – an issue to be discussed below – it must be put into context. The protection of journalists’ sources, for example, is an important part of the system to ensure transparency.

In Sweden, as in all comparable states, there are massive numbers of documents in the public sector. The databases are numerous and some of them contain enormous amounts of data. If there is information there suggesting foul play of some kind, journalists almost always need help to find it. And finding it is not always enough. The information may well be complicated; it may take legal, technical or economic expertise to understand it.

The experts are usually not difficult to find, but will they help? Will they point the journalist to the publicly held information that – assembled and explained – makes it possible for him or her to start a serious investigation? This depends on the circumstances.

Protection of sources is crucial. Swedish law – and we are still within constitutional law – states that if someone approaches a journalist, and offers to provide information anonymously, the journalist has a strict obligation to protect the identity of this source. Revealing the name of such an informant can result in the journalist being sentenced to up to 12 months in jail.[7]

What if this human source is bound by his or her own rules of professional secrecy? In the public sector, the OSA applies. The OSA clarifies what civil servants can and cannot tell a reporter. Regarding the most sensitive information, the statutes demand absolute secrecy, and in doing so define the other statutes as demanding a secrecy less than total. Most paragraphs in the OSA actually allow civil servants to verbally present classified information to a reporter. They are not allowed to hand over a document with the classified information, but they can, if they see fit, read the document to the reporter. This rather strange legal solution (apparently, no other country has anything similar) goes to show how serious Swedish legislators have been in their efforts to create an open society.

It is also important to point out that when a civil servant anonymously exercises his or her right to inform a reporter, it is expressly forbidden for other civil servants to try and find out who “leaked” the information. The constitutionally protected right to inform journalists anonymously about almost everything was described a hundred years ago by a governmental commission as “the safety valve which alone makes it possible in many a case for words to be spoken that ought to be spoken, for facts to be brought forward that ought be brought forward”.

Strong protection for media sources is not without complications. Public officials entrusted with secret information of value to the mass media are often willing, especially when offered financial reward, to tip off journalists. The line between making use of the right to free speech and corrupt behaviour is not easily drawn here. In Sweden, the fact that police officers often anonymously leak information to journalists has caused the most controversy. It has been argued that such leaks occasionally are detrimental to police investigations, and demands for a tighter secrecy regime in the police force have been raised repeatedly. So far though, the “safety valve” has been left open for police officers.

Strong protection for media sources is just one of several components necessary to maintain real transparency in the public sector. Transparency cannot be realised with just a few clauses on citizen access to documents; it must be seen as a quality within a system requiring legal support

[7] The journalist may have to tell an editor in charge where the information came from because the editor will be legally responsible for publishing the story. But if told the identity of the source, the editor is bound by the same legal framework of professional secrecy as the reporter.

from many angles and on several levels. When discussing whether the Swedish transparency model works as well in practice as claimed by its most enthusiastic supporters, a few other components should be mentioned. Before that, however, a few words on legal developments and the political debate concerning the Swedish level of openness.

1.6 Transparency versus privacy protection

Although the value of the principle of transparency is uncontested in Sweden, the level of openness is constantly under debate. Some argue that so many exceptions to the principle have been introduced during the last 30 years that, in 2011, Swedish claims to having an open society are unjustified. Undoubtedly, many exceptions have been added. Most, though not all, target information held by the authorities in electronic form. Thirty years ago, virtually any information that could be extracted from a computer file or a database fell under the definition of "official document". This is no longer so. Citizen access to electronically stored information is nowadays quite limited.

At least as common, however, is the argument that Sweden's transparency model constitutes a threat to the privacy of citizens. Several hundred clauses of the OSA protect personal data, but even so the amount of information about individuals still available in official documents is substantial. Thus it is argued that the strong emphasis on transparency in the public sector has an unacceptable side effect – the underdeveloped protection of the individual.

This debate is ongoing and fuelled by both technological and political developments. To the dismay of most privacy advocates, a surprisingly large part of the population is willing to share a lot of personal information with anyone – using Facebook and other social forums. On the political level though, privacy advocates still seem to have the upper hand, at least in part because Swedish legal standards on free speech and access to official documents are under pressure.

The EU demands harmonisation. Considering how small (in terms of population) Sweden is – and how few of the other members support radical access legislation – it seems likely that European norms on privacy protection will win out and Swedish ideals of transparency will be suppressed accordingly.

In a verdict drawing some attention, the European Court of Human Rights came to the conclusion that German law should not have allowed magazines like Bunte and Freizeit Revue to publish pictures of Princess Caroline of Monaco taken when she was appearing in public places: riding, shopping, eating at a restaurant. There was nothing offensive in the pictures, but the Court still maintained that their publication breached her right to protection of private life, guaranteed in Article 8 of the European Convention on Human Rights.[8]

To publish pictures such as these would not have been considered illegal in Sweden, and the country has no law granting general protection for privacy. There is an obvious risk that Swedish legislation also would fail, in the eyes of the Court, to meet the demands of Article 8. Although it could be argued that the Court's verdicts on privacy issues are not altogether consistent, its approach is quite troubling to advocates of the Swedish tradition of free speech and transparency.

The value and the downside of transparency can and will be discussed as long as our countries are governed democratically. Although not the only relevant one, the single most important issue in this regard is – and will most likely remain – privacy protection. Why then, has Sweden come to approach the conflict between transparency and privacy protection differently from most other countries? Let us take a closer look.

There are several common arguments for open government. Information held by the authorities is there in the public interest and should therefore be available to everyone. Transparency is important to guarantee the accountability of the authorities at all levels, promoting citizens' trust. Institutions of power which are better informed are able to exploit and abuse less informed citizens. Regimes of secrecy tend to breed arbitrariness, inefficiency and corruption.

[8] Von Hannover v. Germany, Appl. No. 59320/00, judgment of 24 June 2004.

These are good arguments. The traditional Swedish approach to explaining the value – some might say necessity – of transparency in the public sector is divided into three arguments. The second and third arguments are in accordance with those already mentioned. The second concerns efficiency: dysfunctional institutions will attract attention sooner if they work "on stage" than they would working behind closed doors. The third is about democracy. Authorities at all levels, both government agencies and local authorities, need to gather information about the society they serve. If as much of that information as possible is also available to citizens, the quality of debate on societal issues will be higher. Democracy needs well-informed citizens.

The first argument, however, directly addresses the conflict between openness and privacy protection. It refers to the rule of law. Open government is a way of ensuring that citizens are treated fairly and equally – and in accordance with the law. Citizens who suspect that they are not treated correctly should have the right to see for themselves how others are treated. If citizen A is not allowed to build a tool shed in his garden, but his neighbour B is, A needs to see B's application and the formal decision from the local authority; otherwise A will not be able to find out if building permits are granted equally and fairly. Therefore personal data in documents held by the authorities should be publicly available unless there are obvious reasons for keeping it secret.

If it is reasonable to believe that the content of a document could cause economic, physical or psychological harm to an individual if it were made publicly available, a rule of secrecy could apply. Secrecy then, would typically cover information indicating something about a person's physical or mental health, political convictions, religious beliefs, sexual orientation or alcohol or drug use. The basic idea, though, is to have a "two-step test". The first step would ask if it is likely that a specific piece of personal information, if publicly available, would cause harm to the individual. If the answer is yes, the second step would ask: is citizens' access to this kind of information clearly of greater importance than the protection of the individual?

It is worth mentioning that the right of X to access a certain document does not automatically give her the right to publish the content. Personal data in a police investigation may be accessible in a police station or a court of law, but dissemination could well constitute libel. A newspaper editor can be found guilty of libel if the paper has described a person in a way that is likely to expose him or her to the contempt of others. This is the basic rule, which means that truth is not an absolute defence.

The Swedish approach to access rights should be compared to the way most democracies have chosen transparency as a guiding principle for their courts of law. Court proceedings in European (and many other) countries are normally open to citizens and written verdicts are publicly available. This means that much personal information about individuals on trial for criminal behaviour will be exposed. Not only that, victims of crime and even witnesses may have to reveal sensitive information in this public arena. Maintaining trust in the court system is usually considered more important in this conflict of interests.

The difference between Sweden and most other democracies is that Sweden applies the same argument to the public sector as a whole. All authorities make decisions of importance to citizens, at the very least about how to make use of taxpayers' money, and in some instances decisions as important as verdicts from a court of law. Transparency should be the rule, and secrecy – when necessary to avoid harm – the exception.

With the rise of the ideology of general data protection, however, the Swedish model based on evaluating the sensitivity of personal data has been severely undermined. The concept of data protection, developed in the 1970s, is based on the assumption that all handling and dissemination of personal data must be minimised, in order to promote privacy protection on a societal level. Harm-testing thus becomes irrelevant, since danger stems from personal data as such: the more personal information – sensitive or not – available for gathering and analysis, the more certain it is that invasions of privacy will occur.[9]

[9] This leads to questions about the possibility of extracting sensitive information out of larger quantities of non-sensitive personal data – issues of "data mining" and "profiling". They are complex and will not be explored here.

It must be stressed that access rights that completely exempt personal data become very limited in reach. Authorities making decisions about individuals, as well as for social planning and the allocation of societal resources, do so using personal data. These decisions, often crucial to citizens, cannot be critically monitored by an outsider without access to the basic data upon which they are based. In the conflict between access rights and policies of data protection, a great deal of transparency is at stake.

The arguments for general data protection may not have won every Swede over but, as already indicated, Swedish politicians have in recent years found themselves caught between two competing interests. The national tradition of transparency is so strong that it cannot, at least not openly, be questioned. On the other hand, external pressure has been mounting to adopt general data-protection policies. As noted above, the Riksdag has, without much public debate, taken a number of steps to limit citizen access to electronically stored information, usually referring to the need for privacy protection. This may have reduced the tension between Swedish ideals of openness and typically European ideals of data protection, but it has not been eliminated.

Weighing the arguments for transparency against the arguments for privacy protection is indeed a complex task.

One reason for this is that the value of transparency is so difficult to elucidate. This has created an imbalance. The price people pay for openness is usually made public, whereas the price paid for secrecy is not. When access to official documents actually creates a situation where someone is being harmed – and the harm could have been avoided with more secrecy – it is often reported by journalists and made widely known. An example could be a doctor or a teacher reported to a supervisory authority for serious professional misconduct, perhaps serious enough to attract the attention of journalists. The accusations may later turn out to be unsubstantiated but impossible to prove false. The damage done to a reputation could well be irreparable.

These situations are rare, but do occur – and are probably unavoidable with any access legislation that has teeth. There is an obvious public interest in the reporting of professional misconduct in many areas. When it happens, there is an identified victim and people engaging in his or her cause. Even politicians who really support the idea of open government will then find it difficult to reject demands for more secrecy.

Transparency advocates, on the other hand, can never point to the victims of secrecy. They remain unknown. When information that citizens really need to have in order to act in their own interest is successfully withheld, no one will know. No one will protest. No demands for more transparency will be heard. Thus secrecy has a tendency to spread, slowly and almost irresistibly, to cover more and more infor-mation in the hands of the authorities.[10]

II. European Union transparency policies

The EU has battled internally about the appropriate level of openness for at least 15 years. An important step was taken in 2001 when it adopted Regulation No. 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents, giving citizens a right to access documents at those EU institutions. The regulation shares several of the virtues of the Swedish legislation, but there are a few important differences. The secrecy requirements are described only in general terms, making it difficult for citizens to argue their case when denied access to information. Personal data is not subject to sensitivity-testing and is normally considered classified. Another difference is that EU institutions are granted more time (up to three weeks) to answer requests from citizens.

A tug-of-war between member states, civil society, the European Commission and the European Parliament on openness has been under way since the regulation was introduced. Conflicts have arisen about which documents the regulation should cover, the levels of secrecy, the right of a

[10] A study conducted in 2002 of how the number of clauses on secrecy in Swedish law increases year by year is available in Swedish at: www.sjf.se.

member country sending documents to an EU institution to influence decisions on their accessibility, and many other topics.

To summarise developments, it seems that the EU in 2011 is taking steps towards less, not more transparency. A few recent verdicts – all from 2010 – from the European Court of Justice illustrate this trend. In both Commission v. Technische Glaswerke Ilmenau (C-139/07 P) and Sweden/API/Commission (C-514/07 P, C-528/07 P, C-532/07 P) the European Court of Justice actually changed the presumption of openness, established previously in its case law, to a presumption of secrecy. This is not just a question of how to describe the glass – half-full or half-empty. When secrecy becomes the rule and access to information the exception this needs to be justified, as it is a decisive shift of power. If citizens should be required to explain their reasons for accessing official documents, and the authorities and courts must decide on the cogency of their arguments, this is a significant step away from the transparency-principle.

It remains to be seen if the European Court of Justice will interpret the regulation on access rights in the same way in future cases, but it is obvious that case law fluctuates on this issue. Less transparency will most likely be the result.

When asked about the extent to which the national Swedish legislation on transparency is affected by EU decisions and policies, leading Swedish politicians generally claim that no such influences exist. In fact, both at the beginning of negotiations about membership and at their conclusion in 1994, the Swedish delegation declared – officially but one-sidedly – that the transparency-principle and citizens' constitutionally protected right to inform journalists were fundamental parts of the national political heritage and would not be affected by EU membership.

Since then, the Riksdag has limited access rights in a number of ways, in particular access to electronically stored information, but no such decisions have been taken with reference to what the EU might like or dislike. One example is the (estimated) 150 new laws on specific state databases, strictly limiting citizens' right to access information from larger collections of personal data at government agencies.[11] Most neutral observers agree that the Riksdag, feeling the pressure from "data-protection oriented" European courts, is trying hard to adjust, although very discreetly, to a mainstream EU position on transparency.

III. Societal effects of transparency

The question Swedes are always asked about their national model of transparency is: does it really work?

There are at least three answers to this question, depending on what is meant by "work": Yes, Yes and No. To explain, let us repeat the three different arguments traditionally referred to in defence of Swedish access laws. Citizens' right to access promotes fair and equal treatment under the law, as well as efficiency and democracy. I find that the Swedish experience proves that all these arguments are valid. Of course, citizen access to official documents does not guarantee any of these qualities in a society, but without access rights it is far more difficult to establish them.

The first Yes relates to the civil servants themselves. The elites within politics and major bureaucracies are not really enthusiastic about transparency. Publicly, they always stress the value of open government and access legislation, and when speaking generally about our political culture they are probably honest. However, when something goes wrong within their organisation and journalists begin to investigate, their appreciation of Swedish access legislation turns out to be quite limited. The many steps to effectively minimise citizen access to electronically stored information – the first taken more than 30 years ago – also illustrate how legislators as pragmatists tend to be less supportive of access rights than they are as theorists.

[11] These laws not only curb citizen access to the personal data as such – to a large extent classified anyway, under the OSA – but also to statistical information based on the content of these databases.

For precisely the same reason that legislators and bureaucratic elites can have doubts about the value of openness, low and middle-level civil servants appreciate effective access legislation. It becomes a safety guarantee for them. As long as they have done what they have been ordered to do, they are safe. Responsibility for the failure of an authority, whatever it is, lands where it should land – on the desks of the leaders. With a non-transparent administration, those in charge are more easily able to avoid responsibility. They can blame others, they can delay investigations or at least create so much confusion that accountability is more difficult to achieve.

The second Yes is about revealing weaknesses and misbehaviour in the public sector. It is true for Sweden and probably for most countries that civil servants usually want to do, and really try to do, a good job. Nevertheless, occasionally things go wrong. It could be due to their own incompetence or even laziness, but difficulties could just as well be caused by circumstances beyond their control. They could stem from ill-informed or unrealistic orders from the political level. It could simply be a matter of bad luck, with trouble that no one could anticipate.

We can disregard the reasons. Something goes wrong in the middle of a project or some administrative process. Only then may civil servants feel the urge to cover something up. With strict laws on open government in place, this is very difficult. Many documents about the plans and the actions taken will have been publicly available for months or even years, and copies could be anywhere. Although civil servants, under pressure, may consider the possibility of destroying or manipulating relevant documents, they will realise that doing so is a dangerous gamble. Destroying documents is a crime, and because of the acute risk of being discovered, hardly anyone dares try. That is the Swedish experience.

As an example, in the 1980s three Swedish ministers of justice were fired – three in a row – because they had done something unacceptable and proof was available in official documents. None of them attempted, while under pressure, to manipulate the content of the documents.

Thus, freedom of information laws are extremely valuable to journalists – and to citizens in general – when they need clarity about mistakes or wrongdoing by civil servants that are unplanned. Laws on openness do also have a limiting effect on planned wrongdoing, such as corruption, but more indirectly and in the long term. Officials carefully planning to do what is not allowed will of course, as far as possible, avoid putting incriminating facts into official documents. However, creating an atmosphere of openness, a sense among civil servants of always performing on stage, will over time diminish the temptation to do what is forbidden.

Finally, there is the No answer. The Swedish transparency model does not always work in the sense that it sometimes tends to have an undesirable effect: information relevant to citizens may be omitted from official documents. It has been argued that public officials generally will document their work poorly when they sense a risk of unfavourable attention or publicity. Poor documentation may of course indicate unwanted, unethical or even criminal intention, but does not always signal suspect behaviour. Civil servants might simply find it easier to do the job without concerned citizens or journalists – the latter feeding on conflict – monitoring their activities.

3.1 Transparency and media coverage of the public sector

When a parliament adopts legislation on citizen access to official documents, the arguments are usually about accountability and the aim of strengthening citizens' trust in state and local authorities.

As mentioned previously, a great number of countries have during the last 15 years engaged in openness reform. Researchers have been quick to evaluate these legislative efforts.[12]

[12] Fung A., Graham M. and Weil D. (2007), Full disclosure. The perils and promise of transparency, Cambridge University Press, Cambridge; Hood C. and Heald D. (eds) (2006), Transparency. The key to better governance? Oxford University Press, Oxford; Roberts, A. (2006), Blacked out. Government secrecy in the Information Age. Cambridge University Press, Cambridge; Florini A. (ed.) (2007), The right to know. Transparency for an open world. Columbia University Press, New York.

What the studies show is not encouraging in every way. Citizens' trust in government agencies is, after a few years of transparency, not strengthened in many countries. There are no reliable statistics, but in many places the average citizen actually has become more suspicious and negative towards government agencies. This should not come as a surprise, considering the way news reporting is conducted today.

In the richer parts of the world, and increasingly in the not-so-rich parts, people live in societies where the media are a dominant force. What citizens learn about the world beyond their local neighbourhood – about the region, the country, the world – they learn from the media. The Internet has not changed this situation. The basic principles of news reporting are no secret. A government agency doing what it should, in an effective manner, is unlikely to draw the attention of journalists. Who buys a newspaper to read stories about that?

Journalists typically start paying attention to government agencies when, somewhere, something is not going well. Consequently, when things have gone wrong, and journalists have a right to access information about what happened, there will be more negative news about government activities than before. Covering up, hiding mistakes, was often possible when the administration worked behind closed doors. Now this is no longer possible where information can be accessed.

It could be argued however, that researchers are looking for results too early and, more importantly, that they have been looking for the wrong kind of results. Political cultures and administrative traditions will not change from one year to the next. At this stage it might be more rewarding for researchers, when studying the effects of modern transparency reform, to focus on the actual performance of civil servants rather than on what insufficiently informed citizens believe about that performance.

It must be acknowledged, though, that journalism is a part of the problem. In Europe and North America at least, the commercialisation of journalism blurs the line between the entertainment and news reporting industries. When "news" becomes just another commodity in a market of "information products", journalists find it increasingly difficult to claim to be doing their job in the democratic process. That job means, on the ideological level, providing citizens with the kind of information about their society that helps them understand it, and ultimately make crucial decisions. When selling news stories becomes the dominant reason for producing them, the democratic function is easily lost. When selling, your task is to provide the buyer with what he or she wants. In journalism, it will either be stories that flatter the customers, that support their preconceived notions and their prejudices, or stories that shock them or call for outrage whether there is reason for it or not.

And as with all industrial production in a competitive environment, the costs for producing news must be cut to the lowest level possible. As cutting costs inevitably means that journalists must produce more "content" and more news within a shorter time span, the quality is likely to deteriorate and the nature of the news will change. Serious, thorough journalistic work tends to take time, and the number of journalists engaging in this kind of work is decreasing.

But if journalism is part of the problem, it must also be part of the solution. The quality of the information provided to citizens must be high, and the costs for keeping it high must be met by someone. It must be stressed though, that stronger government control over news reporting cannot be the solution. Journalism must be independent in order to function as a pillar of democracy.

The quality of future journalism is worth mentioning as a reminder of the complexity of any successful transparency reform. Openness must be seen as a regime, a system consisting of several legal, administrative and political components supporting each other. Passing a law on access to official documents may actually be the easier task. Implementing an open government regime takes more effort.

3.2 The future of transparency

The number of countries that have adopted some kind of access legislation should be cause for optimism. The ideal of transparency seems to have swept the world. However, there are clouds on the horizon.

The fact that citizens' trust in government agencies in many cases actually decreases as a first effect of journalists' access to publicly held information is a problem. That finding will not seem encouraging to parliamentarians in countries considering new or radicalised transparency reform.

Another problematic aspect, with regards to transparency, is globalisation. Globalisation may be both necessary and rewarding in many aspects, but one of its effects is that governments that are forced to "open up" to international co-operation lose control over decision-making processes. In a world where nations and economies are increasingly dependent on each other, national leaders and parliaments have shrinking remits within which they are free to make decisions. Transparency is about ensuring that citizens understand how and why important political decisions are made, but when decision making moves to international levels and is the result of politically sensitive negotiations, transparency does not move with it.

The World Bank, the International Monetary Fund, the World Trade Organization, the North Atlantic Treaty Organization, the United Nations and a number of other international bodies make decisions that have far-reaching effects on nations and their citizens. The decision-making processes within these organisations are rarely "open" in a real sense. And today, of the 100 largest economic bodies in the world, more than half are not nations but multinational corporations. They are not open.

In 1995 Sweden joined the EU, and has since allowed considerable decision-making powers to be transferred to that higher political level. It has created what is usually described as a "democratic deficit", as most Swedes find it extremely difficult to follow political debate and decisions within the EU. The previously mentioned regulation on citizens' right to access EU documents has done little to change this. For a number of reasons, real transparency is hard to realise in a political body of this kind. The differences in political cultures are significant among the nations of the EU. There are language barriers to bridge and there are no European newspapers, television or arenas for political debate. Again, access rights are important, but insufficient.

On the subject of future challenges for transparency enthusiasts, let us not forget that the societal forces opposing open government are both strong and persistent. This is certainly true in Sweden, and I am sure it is true for most countries. As with free speech and other civil rights, access to official documents needs constant protection. Forces advocating a more closed society will always be at work. People and organisations that have won a battle for openness will constantly have to defend what they have just accomplished. Have no illusions: it is a never-ending struggle.

IV. Conclusions

The Swedish experience from two centuries of transparency within authorities at all levels is clearly positive. Open government promotes fair and equal treatment under the law and efficiency in public administration – and it strengthens democracy. However, the concept of transparency is complex. Granting citizens rights to access official documents is crucial, but rarely enough to achieve the goal of transparency.

Citizens must be able to find the documents they need to see. Thus, strict rules for government agencies on how to register their documents and obligations to help citizens find what they are looking for are important. Strong legal protection for journalists' sources – in this context, particularly for public officials assisting the media – is also a vital component of transparency. Vigorous institutions (such as the courts and ombudsmen) supervising the transparency regime are another.

The reach of access rights requires continuous scrutiny and debate. In particular, the right of one citizen to access information about another is a key issue when determining the level of openness. Applying strict data-protection principles when deciding on limits to citizens' right to access official documents may at first glance seem preferable, but it is important to realise that it also severely limits the positive effects of transparency.