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The importance of transparency for democracy[2]

Abstract

Sweden's Freedom of the Press Act of 1766 (*Tryckfrihetsförordningen*), the world's very first legislation supporting freedom of the press and freedom of information, is part of the country's constitution and grants today the widest possible public access to official documents. It forms the basis of the traditional Swedish right known as The Principle of Public Access to Official Documents (*offentlighetsprincipen*) and plays a crucial role not only in providing the right to access public documents, but is also indispensable in order to uphold public accountability of government and state officials. Exercising the widest possible transparency contributes to the proper functioning of the liberal democratic system, while curtailing corruption and abuse. Developing transparency and shaping an open society promotes greater participation of citizens in the society, encourages confidence in the state – an essential element in building an effective state that is to serve its owners, the citizens – as well as benefits the functioning of the rule of law and increases the quality of democracy.

Keywords: openness, transparency, official document, public document, accountability, citizenship

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2 Speech by Mr Jan Henrik Amberg, Minister in the Swedish Ministry for Foreign Affairs, at an open seminar of the Faculty of Theory, Philosophy and History of Law at the College of Law at the Kozminski University in Warsaw on 26.02.2018. The speech was delivered in Polish. Based on the provided working notes of the speech – with the consent of Mr Amberg – we publish basically the literal content of the delivered speech. After the speech, a lively discussion took place at the seminar with the participation of guests and employees of the Kozminski University. As public access to official documents belongs to the fundamental rights associated with freedom of speech, information and the press, and since Sweden has a long and established tradition of liberal access to public documents protected by constitutional acts, whereas in Poland there is currently a debate on the limits of openness, and there are works underway on a bill on transparency of public life; the editorial board of "Krytyka Prawa" decided that this speech should be published. The material, headings and footnotes edited by: J. Jabłońska-Bonca.

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Introduction

Thank you for the opportunity to deliver this speech. Special thanks are due to the Chair of Theory, Philosophy and History of Law. I could discuss the subject of the "Principle of Public Access to Official Documents" in Sweden, entirely overlooking the philosophical context, but firstly, I am a guest of the Chair of Theory, Philosophy and History of Law, and secondly, I am convinced that the somewhat philosophical aspect "for democracy" is crucial not only to understand this phenomenon from the point of view of the tradition of Swedish democracy, but is also very important for our society. The "Principle of Public Access to Official Documents" is not practiced in Sweden just in order to satisfy the innate nosiness of our citizens.

Of course, neither do I have the ambition to exhaust the topic, nor do I have any scientific competence when approaching the subject. Nevertheless, I might be able to contribute somehow to deepening the reflection on the modern democracy in relation to the civic perception of the state. I would therefore like to present some personal insights from the perspective of the Swedish society and share a few personal reflections on the importance of this essential principle for democracy.

Why is the "Principle of Public Access to Official Documents" – applied in Sweden for over 250 years – so important for us, Swedes? What is its wording? How do Swedes perceive democracy in general?

L'etat – c'est moi and *l'etat c'est nous*

Key concepts, such as "openness" or "transparency" – referring mainly to "public access to official documents" – will be used in our considerations. Terms such as "insight" and "knowledge" will also be used.[3]

Simply put, access to documents means an effective form of scrutiny of the state, for example of me as a public servant. Each of us, officials of the Swedish state, basically thinks *l'état – c'est moi*. Not in the sense of power, but in relation to

[3] Transparency includes: the right to insight, knowledge and public access to documents held by authorities. The term "openness" is used in the Scandinavian countries as a synonym for "transparency".

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the shared responsibility for the societal system. Just like every citizen can say: *l'état c'est nous*. It only remains to specify in more detail this important connection between *moi* and *nous*, i.e. between the citizen and the state. It is basically about a sort of connection in the form of a contract.

However, openness and transparency are perceived in Sweden not only as important mechanisms in the scrutiny of the functioning of the state by its citizens, i.e. the owners. These are also essential elements of the functioning of a liberal democracy as a system of democracy in modern Europe. "Openness" carries in itself the definition of a state as perceived by citizens. The degree of exercised openness is in fact of major importance for the functioning and the maturity of democracy.

The "Principle of Public Access to Official Documents" as a form of transparency refers to the whole society in the Swedish concept. These are not merely technical solutions for the duties of public officials and their actions. The principle of public access is in a sense a concept of how to apply democracy and, consequently, it answers both the question of what democracy is and what the state is – and who the citizens ultimately are in relation to the state.

Why do the Scandinavians' have this evident soft spot for openness/transparency? What are their/our main motives?

Tradition of the freedom of press

The Nordic practice of openness/transparency has a very old tradition. This principle is rooted in the historical democratic tradition of the Scandinavian countries. It is not only a result of the requirements of the model of modern liberal democracy.

The Swedish tradition of public access to official documents was developed at the beginning of the 19th century by the first member of the current Bernadotte royal dynasty, King Charles XIV John of Sweden – formerly: Jean-Baptiste Bernadotte, Marshal of France[4]. During his reign, the following rights were defined: freedom of speech, freedom of information and freedom of press, hence ensuring their incorporation in the constitutional acts.

However, the principle of openness/transparency in the Swedish law has even older roots. It has been one of the Basic Laws of Sweden since 1766 (Swedish: *Tryck-*

[4] Charles XIV John of Sweden (actually Jean-Baptiste Jules Bernadotte; 1763–1844) – Marshal of France in 1804–1811, king of Sweden and Norway from 1818 until his death, founder of the Bernadotte royal dynasty; J.B.J. Bernadotte was adopted by King Charles XIII of Sweden and elected heir in 1810. After the death of the king, he ascended the Swedish throne as Charles XIV John and the Norwegian throne as Charles III John.

frihetsförordningen/TF – The Freedom of the Press Act).[5] Therefore, Sweden is the first country in the world to adopt a constitutionally guaranteed right to freedom of expression and public access to state documents.

TF 2 Chap. 1 § 1 reads that: *Till främjande av ett fritt meningsutbyte och en allsidig upplysning skall varje svensk medborgare ha rätt att taga del av allmänna handlingar* ["To encourage the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be entitled to have free access to official documents"].

Today's "Principle of Public Access to Official Documents" (Swedish: *offentlighetsprincipen*) in the Basic Laws governs the duties of public institutions regarding the access to official documents and all public documents. There are few exceptions defined in the very restrictive law on secrecy. They apply to the state's interest (mainly to defence and international relations) and the protection of personal rights.

Openness of tax returns of all citizens

The category of official documents also includes information about tax returns of all citizens. This may be surprising. Is it not a violation of the privacy of citizens? Where is the protection of the individual?

As perceived by the Swedes, taxes represent the income of the state budget, and therefore it is public information. All you need is a phone call to a tax office to find out how much your neighbour earns. It is generally not contested by citizens. Not necessarily because everyone wants to be able to check not only officials, but also the wealth of neighbours.

Not disclosing official documents or obstructing access to them is treated as an offence and is penalised. It is also penalised to abstain from registering correspondence in an official log[6].

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5 The Freedom of the Press Act (Swedish: *Tryckfrihetsförordningen*) of 1766 (TF) precluded the censorship of press, publications and other printed texts except for religious censorship). It was the first law of this kind in the world. The *Tryckfrihetsförordningen* was amended in 1949. There are currently four acts in force in Sweden with the status of Basic Laws. The most important one is the *Regeringsformen* – the Instrument of Government, which regulates the most important state institutions and relations between them. The other "Basic Laws" (Swedish: *grundlagar*) include the Act of Succession (Swedish: *Successionordningen*) of 1810, the Freedom of Press Act (Swedish: *Tryckfrihetsförordningen*) of 1766 and the Fundamental Law on Freedom of Expression (Swedish: *Yttrandefrihetsgrundlagen*) of 1991.

6 The log is a list of documents that have been drawn up or archived, or documents that have been received by a given public administration.

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Correspondence arriving at the address of an office – regardless of whether it is a municipal road maintenance authority or the prime minister's office – is to be considered official correspondence, and therefore it is public. *Allmän handling* (official document) is an essential concept for us, public servants. Every document that is printed, in electronic form, drawn up, sent to or kept by a state institution is, as a rule, an "official document", thereby an open-access document. A list of folders in an official's computer is public, but the contents thereof not necessarily. The records of documents and cases are public. The purpose of this law is to exercise civic scrutiny of the work of state offices and institutions, among other things through public access to documents.

Digitisation of the citizen-state relationship and the right to access official documents

However, in relations between the citizen and the state, one can notice certain consequences of a very far-reaching digitisation of the state administration. Its goal is to ensure that as many processes as possible at the citizen-state level are conducted via electronic means. Today, very few matters are dealt with in a traditional, non-digital way.

Unfortunately, access to public information does not always keep pace with the process of digitisation. It is difficult to say whether this process, which in a way hampers the right to access documents, ergo openness, refers to practical issues only. However, all public decisions are commonly accessible if they are not classified pursuant to the "Public Access to Information and Secrecy Act" [Swedish: *Offentlighets- och sekretesslagen*]. This Law specifies the limits of openness and secrecy, thus ensuring, on the one hand, protection of individuals and on the other, essential interests of the state.

The basic principle is, nevertheless, that everyone, also anonymously, has the right to access official documents in all parts of the state administration. It is not required to substantiate the need to access documents. Every citizen has the right to read documents, make copies and take photographs thereof, etc. They may also demand a paid copy (a fee may be requested to cover the costs of the production only, i.e. for the paper, toner, etc.). Copies are sent by post. There is no obligation (yet) to issue digital copies, but an office itself may choose such a form. Access to documents is exercised under an urgent procedure (usually on the same or the next day). If a document is not made available immediately, the official is obliged to inform about the available way of appeal against such a decision. Only working material is not considered an official document. However, a material that has been

drawn up, i.e. archived or sent to another state office, automatically becomes an official document.

Official document and public document

You have to distinguish between an official document [Swedish: *allmän handling*] and a public document [Swedish: *offentlig handling*] – they do not have to be the same. In order for a public document to be an official document, it must not be classified. A medical record book/hospital log are public documents, but they are not official documents. Not everyone has the right to access every hospital documentation.

At the same time, it is possible to individually decide whether a classified document is public, but needs to be kept secret, or whether it can be considered an official document. Every day, the Swedish Ministry of Foreign Affairs, as well as other authorities, receives requests for decision whether a given classified document is to be considered an official document or not. Such requests are submitted first of all by journalists, but often also by individual citizens.

The log, for example, is always publicly accessible, so you can have an insight into the subject of all documents that have been received, dispatched or drawn up. In a registry's log, the titles of all documents are always accessible to the public. A document may be a public document and a secret one at the same time. In such cases, you can apply for declassification of a document, and then the officials check whether the document – despite the red seal – can be disclosed in whole, in part or not at all.

Personally, as a public servant, I have to carry out such procedures quite often. I have to analyse the content of the document. When it comes to documents I deal with, I have to assess, among other things, the degree of threat to bilateral relations with foreign states. Afterwards, I submit a proposal for a decision to the legal department, which takes the final decision and conveys the document to the person who requested it, wholly or in part.

The Swedish "Principle of Public Access to Official Documents" is established as a guiding principle. Openness is to be used always, and exceptions from it should be limited to the minimum and only where the consequences of transparency could cause damage to the state. The exceptions are constitutionally regulated and it is not up to the public servants to decide upon whims or subjective interpretations. The Swedish openness model must be understood as a system in which the law governing citizens' access to documents is primarily the means of maintaining and guaranteeing transparency in the state.

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In order to strengthen citizens' right to information by means of the right to access official documents, public servants also have constitutionally guaranteed freedom of expression and criticism, the freedom to provide any public information, i.e. non-classified information. They can speak anonymously if they want to. Additional laws protect officials who anonymously submit information on cases of abuse of power.

No public institution in Sweden has the right to conduct investigations in order to disclose, for example, the source of press releases, and such attempts are prosecuted by law. Repressions of state officials for the exercise of these rights are prohibited.

Freedom of the press

A mirror reflection of freedom of expression is the constitutionally guaranteed protection of journalists from the compulsory disclosure of the sources of press releases. Strengthening the freedom of the press and the right to information beyond the control of the authorities is the Swedish legal principle of personal liability for press publications in the form of the institution of publisher (Swedish: *ansvarig utgivare*).

This seems to be clear anyway, but I let me clarify a bit further. The "Principle of Public Access to Official Documents" does not only apply to the media and journalists. Democracy needs as much transparency as possible to be truly democratic. Therefore, the Swedish concept of openness applies to all citizens. Germany and France still have remnants of old traditions of confidential administration. Until recently, there has been no right of free access to public information in Germany.[7]

Laws similar to the Scandinavian ones are currently in force in countries such as the United Kingdom, France, the Czech Republic, Estonia and South Africa.

Transparency in the European Union

Transparency has been a fashionable concept globally for some 20 years. The number of countries that introduced major legislative solutions was estimated at over 70 in 2007. Obviously, with a very wide range of solutions. Nevertheless, it has been a strong trend for a long time. The principle of openness and transparency

[7] Recently, the situation has been changing even in Germany. The federal states: Berlin, Brandenburg and Schleswig-Holstein introduced the principle of public access to documents. The tradition of administration acting "behind closed doors" seems to be becoming a thing of the past.

has been increasingly strengthened also within the European Union. Nonetheless, the principle of transparency of decision-making processes in the EU institutions has not been introduced until the Maastricht Treaty.[8] With an intensifying discussion on the "democratic deficit" in the EU, the question of transparency mechanism gains in importance.

A great challenge for the EU is how citizens of the Member States can hold accountable not only their national authorities, but also politicians and officials at the EU level. With the deepening of the EU integration and a closer co-operation between Member States, the number of joint decisions of fundamental political importance increases. This is followed by the growing demands of citizens for accountability of the decision-making structures in Brussels.

It is worth noting that the increasing of influence on the part of citizens in the EU does not necessarily, but may, weaken the responsibilities of national authorities. Therefore, there is a growing need for civic participation and opportunities for citizens to hold both national and EU structures accountable.

This challenge involves a fundamental question: how to anchor the principles of representative democracy, both at the national and EU level, so that it takes place in a balanced way, strengthening and not weakening parallel structures. Irrespective of how countries perceive the EU and in which direction the EU should develop, the reactions of governments will always tend to focus on maintaining sovereign control over political decisions. Regardless whether they are taken in the capital or in Brussels.

We are also facing a significant paradigm change in the context of a globalising world. We are overwhelmed by information of varying nature and quality; we are practically surrounded by permanent information noise. Today, it is often even not clear what is information and what is not.

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[8] Maastricht Treaty (Treaty on European Union) – international treaty signed on 7 February 1992 in Maastricht, the Netherlands. It entered into force on 1 November 1993 following referendums in 12 Member States. The Treaty was accompanied by Declaration No. 17 of the Member States promoting the principle of transparency. The treaty was amended by the treaties of Amsterdam, Nice and Lisbon. A mechanism was created on the basis of the Decision of the European Council (93/731/EC) to guarantee the right of public access to EU documents. Under Article 255 of the TEU, which was implemented by the Treaty of Amsterdam, public right to documents has been introduced. The European Commission has implemented a Code of Conduct on matters related to access to Commission and Council documents to the text of Article 1 of Decision 90/94.

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Electronic communication

The authorities communicate mainly through various electronic media, which results in today's politics take place, to a great extent, in the digital space. When politicians say they will not deal with political issues through media, we are even more convinced that it is the very case.

Information, including public information, is now transmitted and stored electronically. This facilitates not only communication, but also transparency. However, it also causes complications for transparency, not only from the practical point of view. The right to openness has been focused mainly on the public sector – in Sweden since 1766. However, the private sector also needs more transparency today. It is enough to mention cases like Enron, WorldCom and Murdoch.[9] Foreign policy is not limited to diplomacy today; players deciding the fate of the world are not limited to politics or even the interests of a particular state. Sweden's internal policy is affected today by the Chinese economy to the same or even higher extent as the Swedish or European economy. The European Commission is in dialogue with the global private sector giants such as Google, Facebook and others. Nonetheless, I think that all these interesting and important threads and challenges go beyond the scope of my speech.

Transparency of the state and corruption

We have found that transparency facilitates the scrutiny of authorities, prevents abuse and corruption of officials. It promotes the quality of administration and the legitimacy of decisions made. An official works better if they feel they are supervised not only by the official hierarchy, but also by external entities – by the media and, above all, by citizens. Unofficial participation of stakeholders, not only journalists, but also individual citizens, increases the effectiveness of the overall control carried out by the bodies appointed for this purpose.

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[9] Enron Corporation – a large energy company in the USA. At the end of 2001, it went bankrupt in connection with the scandal associated with the falsification of financial records. Enron has become a symbol of corruption in corporations. WorldCom – a huge telecommunication company in the USA, which went bankrupt in 2003 as a result of fraud and falsification of accountancy. K.R. Murdoch – an Australian publisher, owner of a press, television and publishing corporation – News Corporation. His media empire was shaken by the phone hacking scandal: one of his newspapers obtained information by hacking private cell phones and buying information from police officers.

Of course, this does not mean that transparency and the constitutionally guaranteed right to access official documents automatically rule out corruption. However, openness reduces the risk thereof and, above all, increases the quality of the law that is implemented. How it is used in practice is more important than what is written in the Constitution.

Is it possible to say that the greater the degree of transparency of the state for the society, the lower the risk of corruption? I think it is. Transparency and openness reduce the opportunities of the authorities to conceal their actions. For example, when writing instructions or corresponding with other authorities such as Swedish embassies, I automatically think about its content. It is so also because I cannot rule out that it will be once quoted in a tabloid.

But are there no negative effects of transparency? Can transparency lead to the transfer of decision-making processes outside the area covered by the principle of openness? Of course, it can. The principle of public access does not include, for example, processes preparing decisions in the parliament, government or consultations of political parties. However, I believe that this is a delay of the effects of transparency rather than limitation thereof. Sooner or later, the consequences of these processes and their fruits will come to light.

What is still most important, however, is the principle of public access and that the principle of transparency is to be featured in the overall functioning of the state and its purposefulness. This is a fundamental starting point.

Insight and access to information

The mechanism of transparency requires precise law. There is also a need for a guarantee that citizens know how to make use of this right. Transparent legislative and administrative systems must allow and facilitate access to official documents. As a citizen I want to know, I want to have access to information; about politics, about what is decided not only in matters that directly affect me, but also those that are taken on my behalf.

However, "insight" is not necessarily the same as "access to information", despite the fact that the principle in question in Sweden is, as mentioned before, defined as "The Principle of Public Access to Official Documents" in English. The citizen has the right to gain access to a document itself and its contents, but not to the information as such.

Perhaps it is the issue of "access to information" – in contrast to "access to the document" – where the complex issues with a democratic dimension lie. This is a difficult theoretical issue. It has a reference to the issue of the extent of rights of

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the individual in the context of its social participation and the decision-making role of the political authority.

A balance between the representative mechanism of democracy and civic influence is required in addition to voting in elections. The law is the bridge and the connecting vessel. We speak of liberal democracy as the majority rule while respecting and legally guaranteeing the rights of minorities. Liberal democracy includes a system of restrictions to ensure the greatest possible public accountability.

The democratic system as such does not rule out corruption, nor does it *per se* guarantee that democratic values will be respected. The institutional effects of democracy must be distinguished from normative effects. Democratic countries have, for example, a lower level of corruption, mainly because democratic standards have been established in the society, such as those that present corruption in a bad light. However, also because citizens perceive the state not as an element distinguished from their role and from their participation in the society.

Ultimately, nevertheless, it must be concluded that the correlation between the democratic system and the level of corruption is somewhat complex. It is also difficult to measure the level and quality of both democracy and corruption and their interrelations.

Confidence of the Swedish citizen in the state

However, let us return to the question of the importance of the principle of public access for democracy and how the question of transparency as an important element of democracy and the civic scrutiny obligation looks like in the Swedish context. How does this affect the perception of the state? What is the state for us, the Swedes?

First, one extremely important thing without which democracy can hardly function must be indicated. I mentioned it previously. A prerequisite for a properly functioning liberal democracy is a sufficient level of the individual's confidence in the state, in particular in its institutions. Without this confidence, all other mechanisms are practically in vain. You may not trust politicians in general, but if confidence in the state institutions is weak or in doubt, it negatively affects the functioning of the democracy as whole. Therefore, the quality of democracy depends on the level of confidence of citizens in the state. If there is no confidence in the state, then both the state and democracy fail.

These two concepts of transparency/confidence can also be seen in the axionormative perspective. But what do the basic democratic values have to do with openness in the functioning of the official apparatus? What does the axionormative

system have to do with the citizens' right to access official documents? What does Mr Svensson (Swedish Mr John Doe) have to do with the documents I sign on my desk at the Swedish Ministry for Foreign Affairs?

In Sweden, transparency can be seen as an additional form of ensuring such confidence rather than a sign of the lack thereof. Nevertheless, confidence needs to be constantly maintained. It does not work automatically and does not work only on the basis of law. The greater the openness and transparency in the functioning of the state, the greater the motivation to have confidence in the state. Citizens want to be informed in order to be able to participate fully in the public life and enjoy their democratic rights.

The transparency of public life is one of the main foundations of democracy. Citizens should have the right to have access to the decisions of the authorities. In such a case, they can be kept informed, while controlling them for correctness. An open and transparent political system promotes the participation of citizens, which is important for democracy, and gains acceptance to a greater extent. We understand transparency as an integral and essential part of democracy.

Democracy requires limiting the will of the majority, so as to ensure that the interests of the entire society are safeguarded in a consistent manner. For this purpose, you need the principle of the state of law and the rule of law, guaranteeing the rights of the individual regardless of the will of the majority. The citizen needs legal protection from the state itself.

If democracy, from a citizen's point of view, is limited to participation in the elections of the authorities every few years, there is a risk that it will become a weak democracy prone to various kinds of distortion. A necessary and indispensable condition for a proper functioning of democracy is the rule of law. We speak of *checks and balances*, both in the form of legal supervision and an opportunity for citizens to hold the authorities accountable. Also by open access to the documents on my ministerial desk.

Openness vs. the quality of governance and civic responsibility

The greater the transparency in the governance, the greater the chance for a high quality of governance. It is not only about strengthening the democratic system, but also increasing the efficiency of governance and the ability to exercise civic duty through the mechanisms of scrutiny of authorities. Therefore, the more openness, the greater the chance for the rule of law – without corruption and arbitrary decisions and with observance of the rights of the individual, also in small matters.

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Opportunities to develop and acquire civic competences are needed in democracy. A developed, engaged and efficient civil society is important both from the point of view of the quality of the rule of law and the area in which minority rights are guaranteed, which may contribute to the above-mentioned legal consistency.

Therefore, the principle and practice of the transparency is not just a question of whether the state administration works correctly and whether it is free of corruption. It is an important mechanism, but the principle of openness is also an important factor for increased and active democratic participation, and hence for increased civic responsibility. This way, the society and its citizens learn democracy. It is a continuous process that never ends.

Finally, the key and basic concepts on which societies of the free world are based emerge – the democracy, the state of law and the rule of law, civil society, accountability of the authorities, openness and transparency. Together they constitute a system of connected vessels. Of course, democracy is not static and given forever. It is a continuous and dynamic process. It focuses primarily on the requirements of citizens. Democracy is a task for all of us, not just for the authorities. Responsibility for the state, as well as for democracy, lies with us all. Every and each one of us. Everyday.