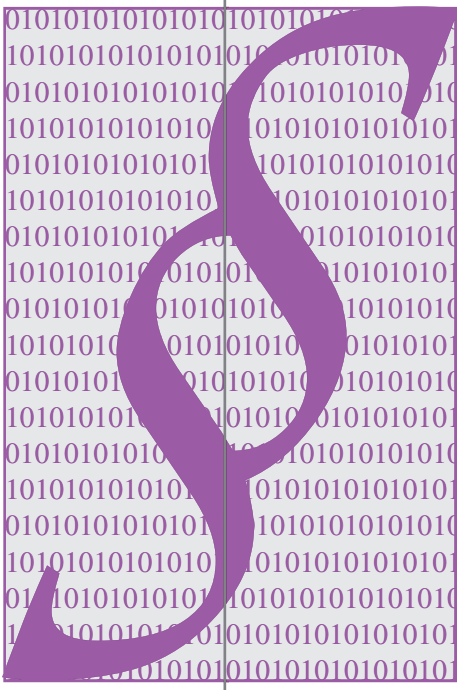
Public Access to Information and Secrecy Act



Information concerning public access to information and secrecy legislation, etc

REGERINGSKANSLIET

Public Access to Information and Secrecy Act

Information concerning public access to information and secrecy legislation, etc

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Foreword

The Public Access to Information and Secrecy Act, which entered into force on 30 June 2009, contains provisions that supplement the provisions contained in the Freedom of the Press Act on the right to obtain official documents, for example provisions on the obligation of public authorities to register official documents, appeals against decisions of authorities, etc. This Act also contains provisions concerning the application of the principle of public access to information by municipal enterprises and certain private bodies.

The Act also contains provisions on secrecy. The secrecy provisions entail both document secrecy and the duty of confidentiality. Secrecy thus entails restrictions both on the right of the public to obtain official documents under the Freedom of the Press Act and on the right of public functionaries to freedom of expression under the Instrument of Government.

The Act also contains provisions regarding the cases where a duty of confidentiality pursuant to the provisions on secrecy limits the right to communicate and publish information permitted according to the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The Act also contains provisions on the cases where a duty of confidentiality under enactments other than the Public Access to Information and Secrecy Act limits such right.

The Public Access to Information and Secrecy Act (Swedish Code of Statutes – SFS 2009:400) is described briefly in this brochure. If you wish to know more, you are referred to the preparatory works of the Act, primarily the Government Bill 2008/09:150 and the report of the Parliamentary Standing Committee on the Constitution - 2008/09:KU24.

The brochure also contains a report on the rules of the Freedom of the Press Act concerning official documents.

Contents

1 The principle of public access to information

1.1 The various forms of the principle of public access to information

The principle of public access to information means that the public and the mass media – newspapers, radio and television – are entitled to receive information about state and municipal activities. The principle of public access to information is expressed in various ways:

- everyone is entitled to read the documents of public authorities: *access to official documents;*
- officials and others who work for the state or municipalities are entitled to say what they know to outsiders: *freedom of expression for officials and others*;
- officials and others in the service of the state or municipalities are normally entitled to disclose information to newspapers, radio and television for publication or to personally publish information: *right to communicate and publish information*;
- the public and the mass media are entitled to attend trials: *access to court hearings*;
- the public and the mass media may attend when the chamber of the Riksdag (the Swedish Parliament), the municipal assembly, county council assembly and other such bodies meet: *access to meetings of decision-making assemblies*.

1.2 Public access to official documents

In principle, all Swedish citizens and aliens are entitled to read the documents held by public authorities. However, this right is restricted in two ways.

Firstly, the public only enjoy the right to read such documents that are regarded as *official documents*. Not all documents of a public authority are in fact considered to be official documents. Thus, for example, a draft of a

decision, a written communication or the like in a matter is not an official document if the draft is not used when the matter is finally determined.

Secondly, a number of official documents are *secret*. This means that the public is not entitled to read the documents and the public authorities are forbidden to make them public.

The fundamental rules on public access to official documents are found in one of our constitutional laws – the *Freedom of the Press Act*. These rules are described in Part 2.

The provisions regarding the extent to which official documents may be subject to secrecy, that is to say are secret, are contained in the *Public Access to Information and Secrecy Act*. The Act is described in Part 3. As mentioned in the Foreword, the secrecy provisions entail both document secrecy and a duty of confidentiality. Secrecy consequently involves restrictions both on the right of the public to obtain official documents under the Freedom of the Press Act and on the right of public functionaries to freedom of expression under the Instrument of Government (see below).

1.3 Freedom of expression for officials, etc.

According to our primary constitutional law – the *Instrument of Government*, passed in 1974 (all Swedish citizens and aliens in Sweden enjoy certain fundamental rights and freedoms. One of the most important of these rights and freedoms is the freedom of expression. This is defined by the Instrument of Government as the freedom to communicate by word, in writing or images or in other ways communicate information and express ideas, opinions and feelings.

According to Swedish constitutional law, the freedom of expression may be restricted by statutes enacted by the Riksdag. One form of restriction on the freedom of expression consists of the legislation concerning the *duty of confidentiality*. The provisions on duty of confidentiality for public functionaries are, as mentioned above, now consolidated in the *Public Access to Information and Secrecy Act*.

1.4 The right to communicate and publish information

The right to communicate and publish information applies to everybody, even to officials and others engaged by the state and municipalities. The rules concerning this right are contained as a component of the *provisions of the Freedom of the Press Act* on freedom of the press.

By *freedom of the press* is meant the right enjoyed by everyone to freely express themselves in printed matter, for instance books and newspapers. If a printed matter contains something criminal there is only one person who may be penalised. This is normally the author. In the case of newspapers it is, however, the person responsible for publication who can be held liable. All others who contribute to a printed matter containing something criminal are therefore, in principle, free from liability. This also applies to a person who provides information to an author or journalist in order for it to be published in the printed matter. This is said to involve a *right to communicate information* on the part of the person providing the information. A person can also personally *publish* the information, for example by publishing the information her or himself.

The protection for freedom of expression in radio, TV, films, videograms and sound recordings etc. is regulated in *the Fundamental Law on Freedom of Expression*, which is based on the same principles as the Freedom of the Press Act.

The right to communicate and publish information does not always apply. The *Freedom of the Press Act* and the *Fundamental Law on Freedom of Expression* contain exceptions to this right regarding the following three cases:

- it is not permitted to communicate or publish information if the person providing the information thereby commits certain serious crimes against national security, e.g. espionage or certain other crimes directed towards the State;
- it is not permitted to intentionally provide an official document that is secret for publication;
- it is not permitted to intentionally breach duties of confidentiality in those cases specifically stated in the *Public Access to Information and Secrecy Act*.

1.5 Public access to court hearings

It is laid down by the *Instrument of Government* that court hearings shall be public, i.e. that the public and the mass media may attend trials. The Riksdag may make exceptions to this main rule by enacting statutes providing that court hearings may be held behind closed doors (*in camera*). At such hearings it is only the court and the parties who may be present in the courtroom.

Provisions concerning when court hearings may be held *in camera* are given by the *Code of Judicial Procedure* and other acts concerning judicial proceedings (see Part 4).

1.6 Public access to the meetings of decision-making assemblies

The principle that the meetings of decision-making assemblies shall be open to public attendance is not laid down in the constitutional laws. In the case of the Riksdag, there are provisions contained in the Riksdag Act relating to access to meetings in the chamber. Corresponding rules concerning municipal assemblies and county councils assemblies are provided by the Local Government Act. In exceptional cases these decision-making assemblies may meet *in camera*.

2 Official documents

Chapter 2 of the Freedom of the Press Act defines the term 'official document'. This chapter also includes fundamental rules concerning which official documents may be kept secret. Furthermore, the chapter contains provisions on how the public gains access to official documents that are not secret.

An outline description of these rules in the Freedom of the Press Act is given here.

2.1 What is an official document?

A *document* is a presentation in writing or images but also a recording that one can read, listen to or comprehend in another way only by means of technical aids. The word 'document' consequently refers not only to paper and writing or images but also, for example, to a tape recording or a recording for automatic data processing. One can say that a document is an object which contains information of some kind.

A document is *official* if it is

1. held by a public authority, and
2. according to special rules is regarded as having been received or drawn up by a public authority.

Public authority

The Freedom of the Press Act does not state what is meant by 'public authority'. One may say that public authorities are those bodies included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities. However, companies, associations and foundations are not public authorities even if the state or a municipality wholly owns or controls them. Nor are the Riksdag, the county council or municipal assemblies considered to be public authorities but the Freedom of the Press Act expressly equates these decision-making assemblies with public authorities. Moreover, the Public Access to Information and Secrecy Act also prescribes that the provisions of the Freedom

of the Press Act regarding the right of access to documents also applies to other bodies, for example a company over which a municipality or county council exercises legal powers of control. (See Part 3.2)

Held by a public authority

It is often easy to conclude that a document consisting of paper with writing is 'held' by a certain public authority. In other instances it is more difficult to say where a document is held. This applies for example to information stored on a computer. The computer itself with the recording for automatic data processing may be found at one authority, while another authority has access to the information on its own computer screens or may obtain printouts from the recording directly on its own equipment.

According to the Freedom of the Press Act, recordings shall be deemed to be held by the authority if the authority can read, listen to or in another way comprehend them with technical aids that the authority uses itself. Special rules apply regarding compilations of information from a recording for automatic data processing. Such compilations are only deemed to be held by the authority if the authority can extract them by means of routine kinds of measures. There is a further limitation that such compilations of information stored on computers are not deemed to be held by the authority if they contain personal data and the authority does not have the power according to law or ordinance to make the compilation available. The underlying purpose of this provision is to ensure that the public cannot, by referring to the principle of public access to information, request compilations of personal data that the authority cannot even itself produce having regard to the protection of personal privacy.

If a public authority has the sole function of technically processing or storing a recording for automatic data processing on behalf of another authority or on behalf of a private party, such a recording is not considered to be an official document held by the authority that only has technical functions in this respect.

Received by a public authority

A document has been 'received' by a public authority when the document has arrived at the authority or is in the hands of a competent official, for example, the official dealing with the matter to which the document refers. The document need not be registered in order to be an official document.

The Freedom of the Press Act also contains special rules concerning letters and other messages that are not addressed to the authority directly but to one of the officers of the authority. If such a message relates to the authorities' activities, it is an official document even though it has been addressed to a specific person at the authority. There is one exception to this

rule. For example, a municipal councillor or a trade union representative on the board of an authority can receive letters concerning issues that the municipality or authority is engaged with but without the letter becoming an official document, provided he/she received the letter exclusively in his/her capacity as a politician or union representative.

Drawn up by a public authority

The Freedom of the Press Act contains many rules relating to when a document is considered to have been 'drawn up' by a public authority. The principle may be said to be that a document, which is created at a public authority, is an official document when it obtains its final form. A document is considered to be drawn up when an authority sends it out (dispatches it). A document which is not dispatched is drawn up when the matter to which it relates is finally settled by the authority. If the document does not belong to any specific matter, it is drawn up when it has been finally checked or has otherwise received its final form.

For certain kinds of documents other rules apply concerning when they are drawn up. Thus, for example, a diary, a journal or similar document that is kept on a continuing basis, are considered to be drawn up as soon as the document is completed so as to be ready for use. Judgments and other decisions, with associated records, are drawn up when the ruling or decision has been pronounced or dispatched. Other records and similar documents are generally drawn up when the authority has finally checked them or approved them by other means.

Preliminary outlines and drafts (for example, of a decision of an authority) and memoranda (notes) are not official documents if they have not been retained for filing. By 'memorandum' is meant an *aide-mémoire* or other notation made for the preparation of a case or matter and which has not introduced any new factual information.

2.2 What official documents may be kept secret?

The Freedom of the Press Act lists the interests that may be protected by keeping official documents secret:

1. national security or Sweden's relations with a foreign state or an international organisation;
2. the central financial policy, the monetary policy, or the national foreign exchange policy;
3. the inspection, control or other supervisory activities of a public authority;
4. the interest of preventing or prosecuting crime;

5. the public economic interest;
6. the protection of the personal or economic circumstances of private subjects; or
7. the preservation of animal or plant species.

Official documents may not be kept secret in order to protect interests other than those listed above. The cases in which official documents are secret must be carefully specified in a special statute, that is to say the Public Access to Information and Secrecy Act. However, it is permitted to include provisions concerning secrecy in other enactments provided that the Public Access to Information and Secrecy Act makes reference to them. In other words, the Public Access to Information and Secrecy Act must indicate all the instances when official documents are secret. The Government may not decide on which documents are secret; this is an exclusive right of the Riksdag. However, in a number of provisions of the Public Access to Information and Secrecy Act, the Government is empowered to make supplementary regulations. The Government's regulations are contained in the Public Access to Information and Secrecy Ordinance (Swedish Code of Statutes 2009:641).

2.3 How can the public gain access to official documents?

A person who wishes to obtain an official document should refer to the public authority keeping the document. The person has the right to read the document at that place (provided the document is not secret). If the document cannot be read or be comprehended in any way without using technical aids, the authority must make such equipment available, for example, a tape-recorder in the case of a tape-recording. A document may also be transcribed, photographed or recorded. If a document is secret in part, those parts of the document that are not secret must be made available in transcript or by a copy. Exceptions to the rules described here regarding having sight of the document at the place have been made where, among other things, this 'causes serious difficulty'.

Those wishing to obtain official documents are also entitled to obtain a transcript or a copy of the document for a fee. However, an authority is not obligated to provide a document for automatic data processing in a form other than a printout on paper, unless otherwise prescribed by law. However, it may on many occasions be appropriate to provide an official document electronically (cf. Government Bill 2001/02:70 p. 34 and Section 10 of the Ordinance on the time for providing judgments and decisions, etc. (2003:234)).

Those who wish to obtain official documents need not describe the document precisely, for example, state its date or registration number. But on the other hand, authorities are not liable to make extensive inquiries in order to obtain the document for the applicant when he or she cannot provide the authority with further details of the document.

A request to obtain an official document must be considered speedily by the authority. An official currently working with the document need not release it immediately but unnecessary delay is not permitted.

One reason for some delay in the provision of an official document may be that the authority must consider whether the information contained in the document is secret, according to one of the provisions of the Public Access to Information and Secrecy Act. Sometimes it is an authority other than the one where the document is held that must determine the issue of secrecy. In that event, the request for the provision of the document should be submitted at once to the authority that will decide on the matter.

An authority may not demand that a person who wishes to obtain an official document identifies himself or herself or state what the document is to be used for. However, if it relates to a document falling under one of the provisions of the Public Access to Information and Secrecy Act, the authority must sometimes know who wishes to obtain it and what it will be used for. Otherwise, the authority might not be able to make a decision concerning whether the document may be made available. In that event the applicant may either say who he or she is and state what the document will be used for (for example, research) or relinquish any possibility of obtaining it.

An authority has, under certain circumstances, the possibility of providing a document subject to conditions ('reservations') restricting the applicant's right to use the information contained within the document. The authority may, for example, forbid the applicant to publish the information or to use it for purposes other than research.

A person whose request to obtain a document has been rejected or whose request to an official document has been granted subject to reservations, is normally entitled under the Freedom of the Press Act to request that the matter be reviewed by a court. The Public Access to Information and Secrecy Act contains provisions concerning when reservations may be imposed and the court to which appeals should be addressed.

The decision of an authority to provide an official document cannot be appealed against.

3 The Public Access to Information and Secrecy Act

3.1 An outline of the contents of the Act

The Public Access to Information and Secrecy Act is divided into seven Parts.

Part I contains *introductory provisions* about the matters governed by the Act. These provisions refer to the contents of the Act (Chapter 1), the scope of the Act (Chapter 2) and definitions (Chapter 3).

Part II contains *provisions on authorities' handling of official documents*. These provisions refer to general measures to facilitate searching for official documents, etc. (Chapter 4), registration of official documents and secrecy marking (Chapter 5) together with disclosure of official documents and information, appeals, etc. (Chapter 6).

Part III contains *general provisions about secrecy* (Chapters 7 to 14).

Part IV (Chapters 15 to 20) contains secrecy provisions to protect *public interest*.

Part V (Chapters 21 to 40) contains secrecy provisions that protect information about the *personal or financial circumstances of individuals*.

Part VI contains *special provisions on secrecy at particular bodies*. These provisions refer the Riksdag (Swedish Parliament) and the Government (Chapter 41), the Parliamentary Ombudsmen (JO), the Office of the Chancellor of Justice (JK), the Commission on Security and Integrity Protection, the commissions of inquiry, etc. (Chapter 42) and also courts (Chapter 43).

Chapter 13 Public Access to Information and Secrecy Act contains explanatory provisions regarding how *the right to communicate and publish information* interrelates with the secrecy provisions, etc. Provisions regarding the extent to which the duty of confidentiality prescribed by the secrecy provisions limit the right to communicate and publish information have been included in at the end of the respective Chapter in IV to VI of the Act.

Part VII contains provisions on the *duty of confidentiality* prescribed by provisions contained in enactments other than the Public Access to Infor-

mation and Secrecy Act and which limit the right to communicate and publish information.

3.2 Scope of the Act (Chapter 2)

The Public Access to Information and Secrecy Act governs, in principle, all secrecy in public activities. However, the provisions concerning when courts may hold hearings behind closed doors (*in camera)* are not contained in the Act but are included in the Code of Judicial Procedure and other acts governing judicial proceedings (see more on this in Part 4).

To begin with the public authorities must observe secrecy. Rather like the Freedom of the Press Act, the Public Access to Information and Secrecy Act is silent concerning any definition of the concept of 'public authority'. The words have the same meaning in constitutional law (See Part 2.1).

As in the Freedom of the Press Act, the state and municipal decision-making assemblies are equated with authorities, i.e. primarily the Riksdag, county councils and municipal assemblies. Furthermore, limited companies, partnerships, for-profit associations and foundations where municipalities or county councils exercise legally decisive influence are equated with authorities, first when applying the Freedom of the Press Act's provisions on the right to obtain official documents at authorities, second when applying the Public Access to Information and Secrecy Act.

However, a state-owned limited company, for-profit association or foundation or a private body is only liable to apply the principle of public access to information and the Public Access to Information and Secrecy Act if the body in question has been listed in the Appendix to the latter Act and in such cases only in the operation that is listed in the Appendix. Private law bodies other than state-owned enterprises can be included in the Appendix to the Public Access to Information and Secrecy Act with the consequence that they become liable to apply the principle of public access to information. One reason for including a state-owned company or a private body in the Appendix may be that the body in question engages in the exercise of official powers in relation to private parties. For example, Posten AB has been entered into the Appendix as regards, among other things, participation in elections and the Swedish Sports Confederation has been entered into the Appendix as regards operations relating to the allocation of government grants to sports activities.

The secrecy provisions contained in the Public Access to Information and Secrecy Act also apply to persons who are employed, contractors or under an obligation to serve at authorities and other bodies to which the Act is to apply. Secrecy shall also be observed after the employment, assignment,

etc. has ceased. A composite designation for such persons, which is often used, is 'public functionaries'. A prerequisite for a public functionary to be bound to observe secrecy concerning something is that he or she has learned of it in his/her work, assignment, etc. What public functionaries may have learned in other quarters is consequently not subject to secrecy under the Public Access to Information and Secrecy Act.

There are duties of professional secrecy under other enactments than the Public Access to Information and Secrecy Act regarding persons who are not public officials (for example, advocates, clergymen and physicians in private practice).

3.3 Definitions (Chapter 3)

The concept of secrecy and several other core concepts used in the Act are defined at the beginning of the Public Access to Information and Secrecy Act. 'Secrecy' means a prohibition on disclosing information whether orally or by making an official document available or in any other way (for instance by the disclosure of a document, which is not an official document, or production of an article). Secrecy thus expresses two different aspects of the same matter: if the public is not entitled to obtain an official document, the authorities and the public officials are consequently forbidden from making the document available or disclosing its contents in another way. One can say that a secret document's contents are protected by both document secrecy and the duty to observe secrecy. Further, information held by a public authority that is not an official document may be subject to secrecy.

3.4 Handling of official documents by public authorities (Chapters 4 to 6)

3.4.1 GENERAL MEASURE TO FACILITATE SEARCHING FOR OFFICIAL DOCUMENTS, ETC.

The Public Access to Information and Secrecy Act states that the authorities must take into account the principle of public access to information when they deal with official documents. The authorities should in particular ensure, among other things, that official documents can be made available with the expedition required according to the Freedom of the Press Act and that automatic data processing of information at the authority (that is to say the handling of information in the authority's data system) is arranged in a manner that takes into account the interest that private parties

may have in themselves using technical aids to search for and obtain official documents. The authorities are also liable, with the aim of facilitating searching for official documents, to draw up a description that provides certain information about, among other things, the authority's operations and organisation, which types of information the authority regularly gathers from or discloses to others and how and when this is done, means of searching available, etc.

The Archives Act (1990:752) also contains provisions that are to be taken into account when handling official documents. This act contains, among other things, a provision stating that when producing and registering official documents, account shall be taken to the care of archives, and a reminder of this has been included in the Public Access to Information and Secrecy Act.

3.4.2 REGISTRATION OF OFFICIAL DOCUMENTS

An official document received by an authority or drawn up there must be registered. There are four exceptions to this rule. The following documents need not be registered:

- Documents that are obviously of little importance to the authority's activities (for example press cuttings, circulars and advertising material);
- documents that are not secret and are kept in such a manner that it can easily be ascertained whether they have been received by the authority or drawn up there;
- documents that are found in large numbers at an authority and which the Government has exempted from the registration requirement by special provisions (in the Public Access to Information and Secrecy Ordinance); and
- recordings for automatic data processing (that is, information that is found in a data system) that are available at the authority by the authority having electronic access to them at another authority.

In order to permit the public ready access to read the registers of authorities, such registers should, in principle, not contain any information subject to secrecy. The authorities may, however, to a certain extent, keep registers with secret information, either as a complement to the public registers or with the permission of the Government (in the Public Access to Information and Secrecy Ordinance).

3.4.3 MARKING AS SECRET

If an official document contains information for which it may be assumed secrecy applies, the authority *may* mark this by a special note, a 'secrecy mark'. (A common way of expressing this earlier what that the document was 'stamped secret'.) In the case of a paper document, the note is made

directly on the document. If the document is electronic, the note is entered into the document or in the data system where it is dealt with. The note must contain information about the relevant secrecy provision, the date when the note was made and also which authority has made the note.

Official documents that are of great importance to national security *must* be endorsed with a 'secrecy mark'. Such a notation has binding force as regards which authority is empowered to determine whether the document may be disclosed.

If a person requests to gain access to a document that is marked secret, the issue of providing the document should be considered in the normal manner. Thus, a mark denoting secrecy does not release the authority from the obligation to conduct such a review. Consequently, a secrecy mark only operates as a 'warning signal'.

3.4.4 THE DUTY OF THE AUTHORITIES TO PROVIDE INFORMATION

On the request of a private party, the authorities shall provide information from the official documents held by the authority that are not subject to secrecy. This duty is in addition to the duty to provide the document itself (see Part 2 regarding the latter obligation). The authorities must also assist private parties with the special information needed in order to obtain recordings for automatic data processing that comprise official documents at the authority.

The authorities must on request also provide each other with such information at their disposal that is not subject to secrecy.

A prerequisite for the duty to provide information is that it may be done without impeding the usual functioning of the authority.

3.4.5 WHO CONSIDERS WHETHER AN OFFICIAL DOCUMENT MAY BE DISCLOSED?

The matter is considered in the first instance by the *official* responsible for the care of the document, for example, a registrar or a person reporting on a matter. In doubtful cases, the official should refer the matter to *the authority* if this would not delay determination of the matter. Further, if the official refuses to provide the document or supplies it subject to a reservation (see Part 2,3), the matter must be referred to the authority on the request of the applicant. The applicant shall be advised that he or she may make such a request and that a decision by the authority must be made in order for it to be possible to appeal against a decision. 'The Authority' can be a more senior official or, for example, the authority's board.

3.4.6 APPEALS

If an authority has rejected a request to obtain a document or if it has supplied an official document subject to a reservation (see Part 2.3), the applicant is generally entitled to appeal against the decision. Appeals are usually presented to an administrative court of appeal. A decision of such a court may be appealed against to the Supreme Administrative Court. If the party whose application has been rejected is a central government authority, the appeal is presented to the Government instead of to an administrative court of appeal.

3.5 General provisions on secrecy (Chapters 7 to 14)

3.5.1 FUNDAMENTAL PROVISIONS

If secrecy applies (see Part 3.3) to information, then nor may the information be exploited outside the operation where it is subject to secrecy (for example, for stock-exchange speculation).

If secret information is disclosed by one authority to another, one of the basic principles in the Public Access to Information and Secrecy Act is that the secrecy does not as a main rule attach to the recipient authority. This results from, among other things, the need for and the strength of secrecy cannot be determined solely considering the interest in having protection. In every case a balance must be drawn in relation to the interest in having access to the authorities' operations. This balancing can very well have a different outcome outside the area where the secrecy rule applies than within that area. The interest of public access to information can consequently require that information treated as secret by one authority be public at another authority that has collected it from the first-mentioned authority. However, certain provisions on transfer of secrecy that have limited scope and foreseeable areas of application have been introduced. Consequently, information that is secret at one authority and disclosed to another authority is secret information with the recipient authority only if secrecy is prescribed by a

a) secrecy provision that is directly applicable at the recipient authority, a 'primary secrecy provision', or
b) special provision on transfer of secrecy.

If neither of these preconditions is satisfied, the information is public at the recipient authority. The same applies if an authority has direct access to information that is secret at another authority.

Secrecy provisions often prescribe many preconditions, known as 'requisites', that must be satisfied for secrecy to apply in a particular case (see

more on this in Part 3.6.2). If someone requests the release of information at an authority and the information falls under several different secrecy provisions applicable at the authority in question, a review must consequently be made as to whether secrecy also applies according to these provisions in the individual case. If the information upon such a review transpires to be public according to certain provisions and secret according to other provisions, the main rule is that the latter provisions have priority, that is to say the information is to be kept secret.

When applying the main rule regarding competition between several secrecy provisions, it does not matter whether the competing provisions are to be directly applicable at the authority in question, 'primary secrecy provisions' or, if the matter involves secrecy provisions that are applicable as a consequence of a provision on transfer of secrecy, 'secondary secrecy provisions'. It is always the or those secrecy provisions according to which secrecy applies for the information in the individual case that have priority. There are, however, some exceptions to this main rule (see Part 3.5.7).

3.5.2 THE PARTIES AGAINST WHOM SECRECY APPLIES

If information is subject to secrecy this means that the information may not be made available to *individual* persons, corporations, associations, etc. except in those cases stated in the Public Access to Information and Secrecy Act, or in an enactment or ordinance to which the Act refers.

Furthermore, secrecy also means that information may not be made available to *other Swedish authorities* in cases other than those stated in the Public Access to Information and Secrecy Act or in an enactment or an ordinance to which the Public Access to Information and Secrecy Act refers. To a certain extent, secrecy also applies *within an authority*, namely between various operational branches within an authority where these are to be considered to be independent in relation to each other.

Finally, secrecy means that information may not be disclosed to *foreign authorities* or *international organisations* except if the disclosure is made in accordance with a special rule contained in an Act or Ordinance or under certain preconditions specified in the Public Access to Information and Secrecy Act.

The reason there being provisions allowing the disclosure to a private party or to another authority (operational branch) of secret information under certain preconditions is that there are situations where the authority's interest in disclosing certain information or a private party's or another authority's interest in obtaining this information is deemed to weigh heavier than the interest that the secrecy provision generally protects (see also Parts 3.5.4 to 6).

3.5.3 PROHIBITION IN OTHER LEGISLATION ON DISCLOSING OR USING INFORMATION

One of the principles underlying the rules contained in the Public Access to Information and Secrecy Act is that all duties of confidentiality within public activities shall be stated by the Act, either directly or through reference to another Act. Set against this background, the Public Access to Information and Secrecy Act has included references to restrictions to the possibilities of using or disclosing information according to other Acts. For example, mention may be made of the limitations that, according to the Act on Penalties for Abuse of the Market when Trading with Financial Instruments (2005:377), apply to persons in possession of insider information.

3.5.4 PROVISIONS OVERRIDING AND EXEMPTIONS FROM SECRECY

A provision that overrides secrecy means that secret information may be disclosed under certain preconditions.

There are rules overriding secrecy that apply to protect *both private parties and authorities*. Secrecy does not for instance prevent information being made available to another authority or to a private party, if it is necessary in order for the authority to perform its own functions. Thus, if it is necessary, an authority may, for example, consult an independent expert, even if this should involve providing information to the expert that is subject to secrecy.

Secrecy to protect an individual does not as a main rule apply in relation to the individual her or himself and can completely or partially be waived by that person both in relation to other authorities and in relation to other private parties. An individual who waives secrecy in relation to another private party can also require that the authority should make a reservation when the information is provided. Such a reservation means that the individual recipient cannot freely use the information. For example, he or she may be prohibited from publishing the information or using it for anything other than research purposes. A private party who makes use of information in violation of a reservation may be subject to a penalty for breach of confidentiality (Chapter 20, Section 3, Penal Code). A person who requests to obtain an official document need not be satisfied with receiving the document subject to a reservation, but can appeal and have the reservation considered by a superior instance (see Part 2.3).

A party in a case or matter before a court or other authority is, regardless of whether the party is an authority or a private party, in principle entitled to see all information in the case or matter. It is only in exceptional cases that something can be kept secret from a party. Judgments and decisions

must always be provided to the parties. If information that is subject to secrecy is provided to a party, a reservation may be made when the information is provided.

Secrecy does not apply to information comprising environmental information secrecy if it is obvious that the information is of such importance from an environmental perspective that the interest of public awareness of the information has priority before the interest that the secrecy is to protect. Certain secrecy also does not apply to information regarding emissions to the environment.

The Government has been empowered to, in certain cases, make exceptions to (grant a waiver from) secrecy that otherwise applies. Such possibilities are available regarding information concerning Government matters. The Government can also grant a waiver from secrecy in accordance with certain specified secrecy provisions. The Government is also empowered, in exceptional cases, to provide a waiver from secrecy under any secrecy provision whatsoever if there are extraordinary reasons to do so. If the matter involves secrecy for an item of information held by the Riksdag or some other authority reporting to the Riksdag, it is instead the Riksdag that is entitled to grant a waiver. A waiver may be combined with a reservation in relation to a private party.

There are also provision breaking secrecy that only apply for the benefit of *authorities*, see Part 3.5.5, or which only apply for the benefit of *private parties*, see Part *3.5.6*.

Provisions overriding secrecy that refer to secrecy according to all or to a large number of secrecy provisions have been brought together in the Part III (Chapter 10) of the Act. Provisions overriding secrecy that only refer to individual secrecy provisions contained in Part IV or V of the Act have instead been placed in direct conjunction with the relevant secrecy provisions contained in the different Parts of the Act.

3.5.5 PROVISIONS OVERRIDING SECRECY FOR THE BENEFIT OF AUTHORITIES

According to a provision contained in the Public Access to Information and Secrecy Act, secrecy does not prevent information from being provided to another authority, as long as there is a provision in a statute or ordinance that the information should be provided to the authority. One example of such an obligation to provide information is the obligation to testify according to the Code of Judicial Procedure.

Nor does secrecy prevent information being provided to another authority in a number of situations directly stated in the Public Access to Information and Secrecy Act. Examples of such situations are that information is

needed for a trial of an official for an offence in office, for reconsideration of a decision or a measure by the authority that has the information, or for supervision of the authority that has the information or for auditing the authority

The legislator is unable to anticipate all situations where it may be necessary to disclose secret information to another authority. A 'general clause' has been introduced for this reason. According to this provision, secrecy does not prevent information from being provided to another authority if it is obvious that the interest of information being disclosed has priority before the interest secrecy is to protect. However, there are exemptions from this provision. Among other things, it may not be applied when concerning matters of secrecy within the health and medical services and within the social welfare services. Provisions in other statutes and ordinances, which state the case in which information of a particular kind may be provided to other authorities, may also exclude the application of the general clause.

3.5.6 PROVISIONS OVERRIDING SECRECY FOR THE BENEFIT OF PRIVATE PARTIES

A person who is suspected of or charged with an offence in office may provide information subject to secrecy to his defence counsel, provided this is necessary in order to be able to protect his/her rights. A corresponding restriction of secrecy applies to such legal proceedings as matters concerning disciplinary measures.

Secrecy in accordance with certain provisions does not prevent an authority from providing information to the trade union representatives of public employees, if the authority has a statutory duty to provide the information (as is the case, for example, under the Employment (Co-determination at the Workplace) Act (MBL) and the Work Environment Act). If the person who receives information is employed by an authority, he or she shall observe the secrecy provision applicable to the authority. If the trade union representative is employed there, the authority can impose upon him/her a duty of confidentiality by imposing a reservation (see what is said about reservations in Part 3.5.4). A trade union representative may, independently of his/her duty of confidentiality, pass information on to a member of the board of his/her trade union organisation. The trade union representative shall then inform the member of the board about the duty of confidentiality, and the member of the board in his/her turn becomes bound by the same duty of confidentiality. A trade union representative may also use information, for example, to stop the operation of a dangerous workplace, provided that he/she does not disclose the information.

Besides the possibility of making reservations in relation to private parties as mentioned in this Part and in Part 3.5.4, there is a more general rule that makes it possible for an authority to impose a reservation when information is provided to a private party. A precondition for the general rule on reservations being applicable is that the matter relates to information that is subject to secrecy in accordance with some secrecy provision that contains a requirement of damage (see more on 'requirement of damage' in Part 3.6.2). If those conditions that are imposed by the reservation eliminate the risk of damage that prevents the information from being provided, the authority shall provide the information and at the same time impose the reservation. Use of the information in violation of the reservation is subject to a penalty. Moreover, the party to whom the reservation is directed is able to appeal and have the reservation considered by a superior instance (see Parts 2.3 and 3.5.4).

3.5.7 TRANSFER OF SECRECY

As mentioned in Part 3.5.1, the main rule in the Public Access to Information and Secrecy Act is that secrecy does not attach to the information disclosed to another authority. However, certain provisions on transfer of secrecy that have limited scope and with a foreseeable area of application have been introduced. The provisions on transfer of secrecy are mainly of two kinds.

Certain provisions on transfer of secrecy are aimed at particular bodies or particular operations that normally obtain information from a number of different operations. In these cases, general provisions on transfer of secrecy have been introduced whereby in principle all secrecy that applies for information at other authorities is transferred when the information is disclosed to the special body or the special operation. Examples of operations to which secrecy is transferred are supervisory operations or operations that engage in audits. Examples of bodies to which secrecy is transferred are archive authorities and courts.

The other category of provisions on transfer of secrecy aims to cover certain information that is considered to be particularly sensitive. In such cases secrecy is attached to the information regardless of which authority the information has been provided to. One example of information that is subject to such a provision on transfer of secrecy is information about an individual's personal circumstances in a matter under the Act on Fictitious Personal Data (1991:483).

Provisions on transfer of secrecy that refer to secrecy according to all or a large number of secrecy provisions have been gathered together in the third Part (Chapter 11) of the Act or, if the provisions refer to the special bodies

dealt with in Part VI of the Act (among others. Parliamentary Ombudsman (JO) and the Office of the Chancellor of Justice (JK) and the courts), in that Part. The provisions on transfer of secrecy that only refer to individual secrecy provisions in Parts IV or V of the Act have instead been placed in direct conjunction with the relevant secrecy provisions contained in the different Parts of the Act.

As mentioned in Part 3.5.1, the main rule in the event of competition between several secrecy provisions that are applicable at an authority, is that secrecy provisions according to which information is subject to secrecy in the case in question have priority before secrecy provisions according to which the information is not subject to secrecy in the case in question. Exemptions from this main rule have been introduced as regards first the provisions on transfer of secrecy in Chapter 11 of the Act, second the provisions on transfer of secrecy to courts in Chapter 43 of the Act. These exemptions mean that such secrecy provisions in Parts IV and V of the Act that apply directly to the operation in question or to the body in question, for example a court, as a main rule have priority before transferred secrecy. This applies regardless of whether the directly applicable secrecy is stronger or weaker than the transferred secrecy. If, for instance, secrecy that is subject to health and medical services secrecy has been provided by a health and medical services authority to a court in a particular case or matter and there is a secrecy provision that is directly aimed at such cases and matters, then a request for the disclosure of information at the court must be considered according to the latter provision.

3.5.8 SECRECY IN RELATION TO AN INDIVIDUAL PERSONALLY AND IN RELATION TO A CUSTODIAN

As previously mentioned, secrecy to protect a private party does not apply as a main rule in relation to the individual/party personally and can completely or partially be waived by them, both in relation to other authorities and to other private parties (see also Part 3.5.4). In a couple of exceptional cases, the individual/party does not have any right to control secrecy that protects them. Thus, for example, a hospital file may be kept secret from the patient, if the patient's condition would deteriorate seriously if he or she were allowed to read the file

Secrecy to protect a minor may also apply in relation to the minor's custodian. However, as a main rule such secrecy does not apply in relation to the custodian to the extent that the custodian is, according to the Children and Parents Code, entitled to and has an obligation to decide on matters relating to the personal affairs of the minor. If secrecy does not apply in relation to the custodian, the secrecy protecting the minor is controlled by

the custodian alone or, depending on the age and maturity of the minor, the custodian together with the minor.

3.5.9 LIABILITY

The provisions imposing penalties for offences against secrecy are not contained in the Public Access to Information and Secrecy Act but in the Penal Code, more particularly in Chapter 20, Section 3 (breach of professional secrecy). In a case of intentional commission of a breach of professional secrecy the penalty is a fine or imprisonment for a maximum of one year and in the case of a breach committed by carelessness a fine. Petty cases of carelessness are not subject to any penalty.

3.6 The real secrecy provisions and their structure (Chapters 15 to 40)

3.6.1 THE DISPOSITION OF THE SECRECY PROVISIONS

Secrecy provisions to protect public interest, for instance the public financial interest or the interest to prevent and combat crime, have been gathered together in the Part IV (Chapters 15 to 20) of the Act. (cf. Part 2.2).

Secrecy provisions to protect information about a private party's personal or economic circumstances (cf. Part 2.2) have been gathered together in the Part V of the Act. The secrecy provisions that comprise the minimum level of protection of personal integrity of private parties throughout the entire public sector have been gathered together in the first Chapter of this Part (Chapter 21). These provisions are supplemented with a large number of secrecy provisions of limited scope, that is to say provisions that only apply in a certain type of operation, in a certain type of matter or at certain specified authorities (Chapters 22 to 40).

Part 3.5.1 explains what applies in the event of competition between several secrecy provisions.

3.6.2 THE STRUCTURE OF THE SECRECY PROVISIONS

As mentioned in Part 3.5.1, the secrecy provisions often contain many preconditions, known as 'requisites', that must be satisfied for secrecy to apply in an individual case. These provisions are introduced with the expression 'Secrecy shall apply' in combination with the words 'for information'. The information is always described in detail. The information is of some definite kind (for example, 'Sweden's relations with another State' or 'the personal circumstances of a private party'). Secrecy is usually stated to apply to information found in some special context, for example, in certain matters,

in certain operations or at certain authorities, which are described with varying levels of detail by the provisions.

A number of secrecy provisions do not lay down any special conditions for the applicability of secrecy to information mentioned in that context. One then usually refers to secrecy being 'absolute'. However, the majority of secrecy provisions are subject to prerequisites regarding their applicability, which require that certain special conditions are met. The condition is usually formulated as a 'requirement of damage'. Such a requirement means that secrecy applies provided that some stated risk of damage arises if the information is disclosed. There are two main types of requirement of damage: 'straight' and 'reverse'.

The form of the *straight requirement of damage* is indicated by the following examples: "Secrecy shall apply to matters concerning occupational injury insurance or partial pension insurance for information concerning a private party's business or operational circumstances, *if it can be assumed that disclosure of the information would cause damage to the private party*". The straight requirement of damage indicates the main rule to be that secrecy does not apply and that the information may be disclosed.

The *reversed requirement of damage* assumes secrecy to be the main rule. An example of this type of requirement of damage is as follows: "Secrecy applies within the social services to information concerning a private party's personal circumstances, *unless it is manifestly evident that the information may be disclosed without the private party or a person closely related to him being harmed*".

As indicted by these two examples, the words 'damage' and 'harm' are used for the requirement of damage. As regards secrecy to protect private individuals/parties, the word 'damage' refers to economic damage that someone may suffer because the information about their financial circumstances has been disclosed to, for example, a business competitor. The word 'harm' primarily designates various kinds of violations of privacy that may arise because information about someone's personal circumstances is disclosed. (A legal person, e.g. a corporation, cannot suffer 'harm' within the meaning of the Public Access to Information and Secrecy Act). 'Harm' includes both physical injury and mental distress. The disclosure of information that is not normally sensitive (e.g. a person's address) may also sometimes involve harm, for example, if it may be assumed that the person who receives the information will use it to expose the other to violence or harassment. To some extent, 'harm' also includes the consequences of a person's private financial situation being disclosed.

The secrecy provisions sometimes also contain other conditions as a requisite for secrecy, for instance that the private party has requested that secrecy is to apply.

Rules on time limits are one of the possible ways that has often been employed in the Public Access to Information and Secrecy Act for restricting the extent of secrecy. Such rules on secrecy periods only relate to information in official documents. The rules on limitation of periods for document secrecy may however also be important for secrecy generally. For instance, it cannot be reasonably claimed that there is a duty of confidentiality regarding secrecy contained in a document that has become public as a consequence of the prescribed secrecy period having elapsed. The period for the document secrecy is therefore often decisive for the question of how long the duty of confidentiality applies. The secrecy period is usually formulated as a maximum period specifying the longest period that the information in an official document may be kept secret. As most secrecy provisions contain a requirement of damage, one may expect that the risk of damage will have often ceased before the secrecy period expires.

The secrecy period varies from 2 to 70 years, depending on the interest to be protected. For the protection of a private party's personal affairs, the secrecy period is usually 50 or 70 years while, as regards public or private parties' financial circumstances, it is often 20 years.

One main rule concerning the point of departure in the computation of the secrecy period is stated in one of the fundamental provisions of the Act. For most documents the starting point is with the date the document was made. As regards diaries, journals, registers and other notes kept continuously, the time is counted from when the information was entered into the document. Some secrecy provisions also contain other deviations from the main rule.

3.7 Special secrecy provisions for particular bodies (Chapters 41 to 43)

3.7.1 SECRECY FOR THE GOVERNMENT, THE RIKSDAG AND OTHERS

Sometimes the real secrecy provisions contained in Parts IV and V of the Act are applicable to the Government and Government Offices (the ministries). Furthermore, there are some provisions on transfer of secrecy that are directly aimed at the Government. According to one of these provisions, secrecy that applies to an item of information transfers to the Government in cases where the Government must decide whether the information may

be provided. This may, for example, concern an issue where one central government authority has appealed against a decision by another central government authority to not provide information to the authority (see Part 3.4.6) or that the Government has to consider a request for a waiver of secrecy (see Part 3.5.).

The above comments, concerning the Government, also largely apply to the Riksdag. Secrecy within the Riksdag is limited to a particularly stringent level as regards such matters as have been discussed in the Chamber and to issues concerning information in records, commission and committee reports and similar documents.

Secrecy is also limited to a particularly stringent extent regarding the Parliamentary Ombudsman (JO) and the Office of the Chancellor of Justice (JK). This particularly applies to information that a private party has provided. The decisions of the JO are, in practice, always public.

There are also special provisions on restrictions on secrecy at the Commission on Security and Integrity Protection.

3.7.2 SECRECY FOR THE COURTS

As mentioned in Part 3.5.7, Part VI of the Act contains a provision on transfer of secrecy to courts. However, there are exceptions to this main rule. One of these exceptions, as mentioned previously, means that such secrecy provisions contained in the Parts IV and V of the Act that are directly applicable at the courts as main rule have priority above transferred secrecy.

As a main rule, if a court hearing in a case is held in public, secrecy that applied to information that has been provided or adduced at the hearing ceases. If the hearing is held behind closed doors (*in camera*) (see Part 4), the main rule is that secrecy is preserved. When the court then determines the case, the secrecy ceases, unless the court specially decides that secrecy shall continue.

Secrecy does not apply to an item of information that is included in a judgment or a decision made by a court, unless the court specially decides that secrecy shall continue. The final judgment and corresponding part of a decision may only be marked as secret in rare exceptional cases.

3.8 Restrictions on the right to communicate and publish information

Parts 1.1 and 1.4 deal with what is meant by 'the right to communicate and publish information'. It is, among other things, explained there that, according to the Freedom of the Press Act and the Fundamental Law on Freedom of Expression

a) it is not permitted to communicate or publish information if the person providing the information thereby commits a serious crime against national security or certain other crimes directed towards the State;
b) it is not permitted to intentionally provide an official document that is secret for publication and
c) it is not permitted to intentionally breach duties of confidentiality in those cases specifically stated in the Public Access to Information and Secrecy Act.

The Public Access to Information and Secrecy Act contains provisions regarding first, the cases where a duty of confidentiality pursuant to the secrecy provisions contained in the Public Access to Information and Secrecy Act limits the right communicate and publish information, second the cases where a duty of confidentiality under other enactments limits such right. As indicated above, the right to communicate and publish information is in addition to this directly limited owing to the provisions of the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. This means that it is in certain cases allowed to disclose secret information verbally for publication in, for instance, a newspaper, but that it is never allowed to disclose the secret official document which contains this information nor to disclose information if one thereby commits such a crime as referred to in the said fundamental laws.

The reason for having this structure is, among other things, that the provisions on secrecy do not always provide sufficient scope to enable public officials, to the extent that is desirable, to provide a basis for public debate and to be able to participate in it. By having a right to communicate and publish information that to some extent may also be exercised as regards secret information, the opportunities are enhanced for unsatisfactory situations in society becoming public, ventilated and discussed. The right to communicate and publish information does not mean that public officials are *liable* to provide information to the mass media but only that they have an *opportunity* to do so, if they consider that the interest of public access to the authorities' operations weighs more heavily in the balance than the interest to be protected by the secrecy.

Part III of the Public Access to Information and Secrecy Act contains a Chapter with general provisions on the right to communicate and publish information (Chapter 13). This Chapter contains, among other things, provisions on information concerning the interrelationship of the rules of the fundamental laws (i.e. constitutional laws) and the rules of the Public Access to Information and Secrecy Act and also a provision on enhanced protection for persons communicating information who are employees

and contractors at certain private law bodies that are required to apply the principle of public access to information.

It is stated at the end of the respective Chapters of Parts IV to VI of the Public Access to Information and Secrecy Act the extent to which the duty of confidentiality prescribed by the secrecy provisions contained in the Chapter, or by a reservation that has been imposed pursuant to provisions of the Chapter, limits the right to communicate and publish information.

The Part VII of the Act finally contains provisions on the extent to which the duty of confidentiality according to provisions of an enactment other than the Public Access to Information and Secrecy Act limits the right to communicate and publish information.

Most of the duties of confidentiality that prevail over the freedom of communication are those that are imposed on public officials. In certain cases the freedom of communication is also limited for individual persons by the duty of confidentiality (among others, advocates and physicians in private practice).

4 Court hearings in camera

If information subject to secrecy is to be provided or adduced at a court hearing, the court may generally hold a hearing behind closed doors (*in camera*). However, in the general courts (district/city courts, courts of appeal and the Supreme Court) strong reasons are usually required to be able to hold a hearing *in camera*. The possibilities for holding hearings *in camera* are greater in administrative courts (county administrative courts, courts of administrative appeal and the Supreme Administrative Court) than in the general courts. If a court hearing has been held *in camera*, the court may impose a duty of confidentiality on those who have been in attendance. If secret information is presented in open court, the secrecy for the information as a main rule ceases to apply (see Part 3.7.2).

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