

TRANSPARENCY OF THE SWEDISH COMPETITION AUTHORITY

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The constitutional principle of access to public records and the administrative principle of parties' right to access their files create transparency in the Swedish Competition Authority. In many ways Swedish law is built on the same ideas as EU law. However, the Swedish constitution requires more specific provisions on confidentiality in statutes decided by the Parliament. As regards the Swedish Competition Authority, five different sections of the law protect confidentiality, depending on who is to be protected, what activities are concerned, what kind of information is involved and how likely it is that someone will be harmed. These detailed provisions can in principle contribute to predictability, limiting the authorities' discretionary power, but they also constitute a complex patchwork that can be difficult to comprehend. A problematic legal conflict would arise if a document were confidential according to EU law, for example to protect trade secrets, but not confidential according to Swedish law. However, so far, EU law has only been invoked to expand the right to access to documents, especially regarding companies that intend to bring action for competition law damages.

1 INTRODUCTION

Sweden has a long tradition of transparency in the form of access to the documents of public authorities. Rules on such access were first introduced in the Freedom of the press act of 1766. Of course, they have been amended many times since then,¹ but the old roots of these rules are often emphasised in public debate in Sweden. Transparency was even considered so important that Sweden made a special declaration on it when joining the EU.² Nowadays, it is common for states to grant the public rights to access documents of public authorities, at least to some extent. It is also an established principle in EU law.³ Likewise, it is generally recognised that those who are closely affected by an authority's decision should have a right to access information on the case from decision-making authorities. However, the Swedish constitutional regulation is unusually detailed and complex. The rules that apply to the Swedish Competition Authority are an illustrative example of this.

This article will first give an overview of the basic Swedish rules on public access to official records (section 2) and parties' access to material (section 3). Then the article discusses the provisions that are more specifically aimed at the Swedish Competition Authority (section 4). Finally some concluding remarks are offered (section 5).

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¹ For a historical overview see Johan Hirschfeld, 'Free access to public documents – a heritage from 1766' in Anna-Sara Lind, Jane Reichel, and Inger Österdahl (eds), *Transparency in the Future* (Eddy.se 2017).

² The act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C241/9, 397, declaration 47.

³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

2 THE BASIS FOR THE PRINCIPLE OF PUBLIC ACCESS TO OFFICIAL RECORDS

The foundation of the Swedish right to access to official records is laid in Chapter 2 of the Freedom of the Press Act (the FPA, in Swedish “Tryckfrihetsförordningen”). The very first Article of this chapter establishes the main principle that everyone shall be entitled to have free access to official documents. Most of the remaining 22 articles of the chapter detail the scope of, and thus limit, this main principle. Three important aspects of the principle are: what formal types of documents that should be made available to the public (section 2.1), what content is so sensitive that it should nevertheless be kept secret (section 2.2) and how the public should have access to the documents (section 2.3).⁴

Regarding EU institutions, both Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter of Fundamental Rights guarantee public access to documents. This is implemented by regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents⁵ (the Transparency Regulation). This regulation will serve as a point of reference below.⁶

2.1 TYPES OF DOCUMENTS

Regarding the types of documents, Chapter 2, Article 4 of the FPA states that a document is official if it is both held by a public authority and has been received or drawn up by such an authority. The limitation to public authorities can sometimes raise questions when private bodies are in some way involved in the activities of public authorities.

The limitation that the principle of public access only applies to documents already held by the authorities means that the authorities themselves do not need to contact other authorities to find documents just to hand them over to the public. However, this limitation raises several issues in relation to digitally stored information. First, it is enough that the document is accessible to the authority, even if the information is stored on a server outside the authority’s premises. Second, the authorities are to some extent obliged to compile material, thus creating a new document. If the authority can compile information into a document using routine measures, they are obliged to do so.⁷

⁴ The principle of public access to official records is presented in rather few international publications, such as Iain Cameron, ‘Secrecy and Disclosure of Information in Sweden’ (2024) 30(2) *European Public Law* 117, Patricia Jonason, ‘The Swedish Legal Framework on the Right of Access to Official Documents’ in Hermann-Josef Blanke and Ricardo Perlingeiro (eds), *The Right of Access to Public Information: An International Comparative Legal Survey* (Springer 2018), Jonas Racine, *Das schwedische Öffentlichkeitsprinzip und dessen Anwendung im auswärtigen Handeln. Eine seit 1766 existierende Institution zur Sicherung der Transparenz im Verhältnis zur zunehmend internationalisierten Verwaltungstätigkeit* (EIZ Publishing 2022), and Patricia Jonason, ‘Le droit d’accès à l’information en droit suédois : une épopée de 250 ans’ (2016) 2 *Revue Internationale De Droit Des données Et Du numérique* 37. However, most literature is in Swedish, such as Håkan Strömberg and Bengt Lundell, *Handlingsoffentlighet och sekretess* (14th edn, Studentlitteratur 2023), Alf Bohlin, *Offentlighetsprincipen* (9th edn, Norstedts juridik 2015), and Carl-Fredrik Bergström and Mikael Ruotsi, *Grundlag i gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen* (Elanders Sverige AB 2018).

⁵ See for example Centre for Law and Democracy (CLD), ‘The RTI Rating – analyses the quality of the world’s access to information, laws’ <<https://www.rti-rating.org/>> accessed 01 June 2024.

⁶ For comprehensive analysis on this regulation and other EU law in relation to transparency in competitions proceedings, see Helene Andersson, *Access and Cartel Cases: Ensuring Effective Competition Law Enforcement* (Hart Publishing 2020).

⁷ Chapter 2, Article 6 of the FPA.

In order for the public to have the right to access a document, it is also required, as mentioned above, that the document has either been received or drawn up by the authority. As to documents which are received by the authority, Chapter 2, Article 9 of the FPA reflects the presumption that every document that arrives to the authority is finalised enough to be relevant for public access. This applies regardless of whether the document is in the form of papers or digital information. It may be more difficult to determine when to give access to documents that public authorities (and their employees) draw up themselves. The intention is that the public only need to access documents that are so finalised that it is meaningful for the public to read it.⁸ Therefore, the main rule is that the public is only entitled to access documents when they have been dispatched, for example if the authority has sent a decision or otherwise communicated with a party in a case. Documents that are not to be distributed are covered by the principle of public access when the matter to which it relates has been finally settled by the authority or when the documents have otherwise received final form.⁹ There are also some special rules for certain kinds of documents.¹⁰

In sum, the Swedish constitutional provisions in general resemble the general structure of the Transparency Regulation, where article 2(3) states that the regulation applies to documents drawn up or received by an institution, and article 4(3) makes some exceptions for internal documents. However, since they are separate legal instruments, the application may of course always differ.

2.2 CLASSIFIED CONTENT

In addition to the above-mentioned restrictions regarding the forms of documents, the content may be so sensitive that access to the documents needs to be restricted. The FPA contains an extensive list of grounds for keeping documents secret, such as national security, the activities of authorities for inspection and the protection of individuals' financial circumstances.¹¹

The content of this article as such is not unlike that of Article 4(1) and (3) of the Transparency Regulation. A major difference, however, is that article 2 of the FPA requires more precise provisions in law enacted by the parliament. Thus, the specific conditions for secrecy are laid down in the Public Access to Information and Secrecy Act. This act is very comprehensive, with 43 chapters and more than four hundred sections that specify which information is to be kept secret. Because the rules are so specific, they also need to be constantly amended as the authorities' activities change or new needs are identified.

It is of course not possible to describe all these hundreds of sections, and they are also very disparate. Some provisions apply to certain types of information, such as information about individuals' health. Other provisions focus on which authority handles the information, which activities it concerns or who is to be protected. In some provisions, openness is the main rule, so that confidentiality only applies if disclosure of the information would lead to harm in the individual case. In other provisions, on the contrary, confidentiality is the main rule, but exceptions are made when disclosure is harmless. Sometimes

⁸ Cf. Government bill 1975/76:160 p. 72.

⁹ Chapter 2, Article 10 of the FPA.

¹⁰ Chapter 2, Articles 12–14 of the FPA.

¹¹ Chapter 2, Article 2 of the FPA.

confidentiality is absolute, so that the authority does not need to make a case-by-case assessment of whether the information is harmful. All in all, it is a complex patchwork of different specified rules that determine when information must be kept secret. As shown below (section 3), the regulation of the Swedish Competition Authority's activities is a good example of this complexity. The detailed rules leave Swedish authorities considerably less room for discretion than the Transparency regulation.¹²

2.3 DISCLOSURE OF DOCUMENTS

Authorities must disclose official documents very quickly. In principle, nothing else should be given higher priority. The public should be able to examine the documents immediately, or as soon as possible, free of charge on the authorities' premises (Chapter 2, Article 15 of the FPA). Anyone who prefers to have a copy may have to pay the cost of making the copy.¹³ Thus, these general principles correspond to those in article 8 and 10 of the Transparency Regulation.

However, in contrast to article 12 of the Transparency regulation, Swedish authorities are in principle not obliged to release material recorded for electronic data processing in any form other than a printout on paper.¹⁴ One of the main reasons for this is that it is considered to favour privacy by making it more difficult to compile and process data on individuals. If authorities consider it appropriate, they are allowed to send computer files via e-mail, for example, but there is no obligation to do so.¹⁵

Anyone who has been rejected a request to examine an official document may appeal.¹⁶ These appeals go directly to the Administrative Court of Appeal as the first instance.¹⁷ However, a person cannot appeal a decision of a public authority to reveal information that the person thinks is sensitive, even if the information concerns that person him-/herself. Further, in contrast to article 4(4) of the Transparency regulation, Swedish authorities have no obligation to consult third parties before releasing documents originating from the parties.

3 ACCESS TO DOCUMENTS FOR PARTIES

In addition to this general principle of public access to documents, those affected by a particular administrative procedure may have a special interest in and need for information on that procedure. In EU law this is, for example, recognised in 41(2) b of the Charter of Fundamental Rights. As to the Commission's competition procedures, Article 27(2) of

¹² The differences between Swedish law and EU law may cause potential problems when Swedish administrative authorities and EU institutions interact. However, each legal system is only applicable to its own institutions. Further, the Swedish Public Access to Information and Secrecy Act has provisions on confidentiality regarding information received from or transmitted on the basis of EU law acts or agreements, if it can be assumed that Sweden's ability to participate in the cooperation referred to in the act or agreement would be impaired if the information were disclosed (Chapter 15, Article Section 1 a).

¹³ Chapter 2, Article 16 of the FPA.

¹⁴ Chapter 2, Article 16 of the FPA.

¹⁵ Some obligations to hand over data in electronic form may of course come from Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) [2019] OJ L172/56.

¹⁶ Article 19 of the FPA.

¹⁷ Chapter 6, Section 8 of the Public Access to Information and Secrecy Act.

Regulation 1/2003¹⁸ and Article 15 of Regulation 773/2004¹⁹ grant a right to access to documents. Unlike public access to documents, where Swedish law is more detailed than EU law, the two EU regulations provides more detailed provisions than Swedish law on parties' access to documents.

As to Swedish authorities, section 10 of the Administrative Procedure Act (2017:900) establishes a right to access documents. According to that section, a party in a matter has the right to access all material included in the matter.

A first question is who is a party. Here it can be mentioned that the person who reports a suspected infringement to the Swedish Competition Authority does not automatically become a party. However, notifiers' right to access material on a European law basis has been discussed in some court decisions, see below (section 4.3).

A second question is how the right to access for parties relates to the conflicting interests that authorities and individuals have of keeping information secret. This conflict is also apparent in corresponding EU law, which acknowledges the legitimate interests of confidentiality and of professional and business secrecy.²⁰

In Swedish law, parties' access to classified material is regulated in Chapter 10, section 3 of the Public Access to Information and Secrecy Act. This states that the secrecy provisions in that Act shall in principle give way to a party's access. Parties thus have a more far-reaching right to information than the public.

However, this right is not without exception. Authorities may not disclose confidential information to the extent that, for reasons of public or private interest, it is of *particular importance* that the information is not disclosed. This may be the case, for example, where a whistleblower risks being penalised or if the authorities' investigative measures would be harmed.

If the information is not disclosed, the authorities must otherwise inform the party of the content of the material to the extent necessary to enable the party to exercise its rights and without serious harm to the interest that confidentiality is intended to protect. Confidentiality never prevents a party to a case or matter from taking part in a judgment or decision in the case or matter.

The authorities are also obliged to communicate relevant information on their own initiative before making a decision in a case.²¹ This corresponds to Article 27(1) of Regulation 1/2003.

¹⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003). For a comprehensive analysis of right to transparency according to the right to access to Commission documents, see Andersson (n 6).

¹⁹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 (Regulation 773/2004).

²⁰ See 41(2) b of the Charter of Fundamental Rights, Article 27(1) of Regulation 1/2003, Article 15(2) of Regulation 773/2004 and more generally Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006), 224 ff. and 250 ff.

²¹ Section 25 of the Administrative Procedure Act.

4 CONFIDENTIALITY AT THE SWEDISH COMPETITION AUTHORITY

As already mentioned, the confidentiality provisions that apply to the Swedish Competition Authority are a clear example of how the Swedish regulations are structured. The Public Access to Information and Secrecy Act contains five different sections that are specifically aimed at different aspects of the Swedish Competition Authority's activities. Chapter 17, section 3 aims to protect the Authority's activities (below section 4.1). Chapter 30, sections 1, 1a, 2 and 3 aim to protect the interests of individuals, including private corporations (below section 4.2). Parties and – in some cases other stakeholders – have a privileged situation regarding access to information (below section 4.3).

The case law on these provisions is limited. The Supreme Administrative Court has not ruled on any case specifically related to them. A search in available databases results in 18 judgments from the court of appeal in Stockholm (where the Swedish Competition Authority is located),²² most of which are not so comprehensive. This is not a sufficient basis for drawing conclusions about the legal situation. However, the cases will in the following sections illustrate how parties and others have used the provisions.

4.1 PROTECTION OF THE SWEDISH COMPETITION AUTHORITY

Regarding the protection of the Swedish Competition Authority's activities, Chapter 17, Section 3 states that confidentiality may apply to information in investigations of infringements of Article 101 or 102 TFEU or corresponding provisions in Chapter 2, Section 1 or Section 7 of the Swedish Competition Act. However, for confidentiality to apply, the provision requires that it, with regard to the purpose of the investigation, is of *particular importance* that the information is not disclosed. The requirement of particular importance is thus very high. This is because the provision is primarily aimed at parties and the criterion is therefore coordinated with the wording of Chapter 10, section 3, which limits parties' access.²³

The purpose of the provision is to prevent companies under investigation from gaining access to information that could enable them to sabotage the investigation.²⁴ According to the preparatory works to the Act, this risk is most significant in the initial stages of the investigation. The right to transparency should therefore normally increase as the

²² A search on the relevant sections of the law was conducted in the Swedish database service JUNO on 27 February 2024. One of the cases was not available in full text in the database but was provided directly from the court (according to the principle of access to public records). The 18 cases of the Administrative Court of Appeal in Stockholm are case number 2990-05, 27 May 2005, case number 6102-08, 9 September 2008, case number 3602-09, 14 July 2009, case number 4684-10, 30 September 2010, case number 4991-11, 24 October 2011, case number 6507-11, 21 December 2011, case number 49-12, 22 March 2012, case number 1004-12, 29 June 2012, case number 6265-13, 17 December 2013, case number 5557-14, 12 December 2014, case number 6214-14, 17 September 2014, case number 7436-14, 22 December 2014, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015, case number 973-16, 26 April 2016, case number 3859-17, 28 July 2017 and case number 5989-23, 23 November 2023.

²³ Government bill 2001/02:69 p. 8 f. and 16.

²⁴ Government bill 2001/02:69 p. 13 and 21.

investigation progresses. , If the authority has not done so before, it should entitle the party full transparency, when the authority announces a decision that goes against a party.²⁵

The Court of Appeal has applied Chapter 17, Section 3 in one third of the appeal court decisions studied.²⁶ In all cases except one,²⁷ it is the company under investigation that has requested documents. It is usually not evident in the decisions what kind of information the documents contain, but at least one case it concerned communication between two companies suspected of being part of a cartel.²⁸

The companies that are subject to investigations naturally want to be able to understand and respond to suspicions as soon as possible. On the other hand, the Swedish Competition Authority argues that there is a need for confidentiality until the suspected infringement is so concrete that the authority can determine with certainty which circumstances, information and documents will be of central importance. If an undertaking receives disclosed material, it can adapt its explanations and thereby make the authority's investigation more difficult or impossible. It is also of great importance for the authority to be able to ask questions and hold hearings without the risk of the undertaking limiting its answers to that which is already apparent from the disclosed documents. Thus, the Swedish Competition Authority argues that until the authority has had the opportunity to ask questions regarding the collected material and to supplement it, it is of particular importance that the information in the requested documents is kept secret.²⁹ According to the administrative court of appeal, the fact that an investigation has been going on for ten months does not prevent it from being in an initial stage. Therefore, the material may be confidential.³⁰

Even though the requirement for confidentiality – that it must be or is of *particular importance* that the information is not disclosed – is strict, the court upheld confidentiality in all but one of the cases in this study, and partly upheld it in the last case.³¹ Since it is mostly the parties who have been prevented from gaining access to material under this section, the assessment is close to the assessment of party confidentiality (see section 4.3 below).

When the investigation has progressed so far that disclosure of documents would not interfere with the investigation, this provision cannot be used to support secrecy. However, there may still be reason to protect individuals. such that the documents must be kept secret according to the rules described in the next section.³²

4.2 PROTECTION OF INDIVIDUALS AND COMPANIES

The regulation is more complex regarding the protection of individuals than regarding protection of the Swedish Competition Authority. Chapter 30, section 1, first paragraph contains a general rule on confidentiality in the authority's supervision and investigation

²⁵ Government bill 2001/02:69 p. 20 f.

²⁶ Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012, case number 4991-11, 24 October 2011, case number 3602-09, 14 July 2009, case number 5989-23, 23 November 2023, case number 6265-13, 17 December 2013, case number 3859-17, 28 July 2017.

²⁷ Administrative Court of Appeal in Stockholm, case number 6265-13, 17 December 2013.

²⁸ Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012.

²⁹ Cf. Administrative Court of Appeal in Stockholm, case number 3602-09, 14 July 2009.

³⁰ Administrative Court of Appeal in Stockholm, case number 5989-23, 23 November 2023.

³¹ Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012.

³² Government bill 2001/02:69 p. 18.

activities for information about an individual's business or operating conditions, inventions or research results. Such information is confidential if it can be assumed that the individual will suffer damage ('skada') if the information is disclosed.

Further, the second paragraph of the same section states that absolute confidentiality applies to information about other financial or personal circumstances of a person who has entered into a business or similar relationship with the subject of the authority's activities. There is therefore no need to assess any potential negative effects with regard to such information, and confidentiality always applies.

Most of the Court of Appeal judgments studied (thirteen) have concerned this section.³³ In seven of these cases,³⁴ a party has requested material. In three cases³⁵ it was the complainant and in two cases other companies that intended to sue for damages. In one case,³⁶ the relation to the investigation is not clear. The persons requesting documents won in full or in part in five³⁷ of the thirteen cases. The documents have, for example, included answers to questionnaires sent by the authority to customers or competing companies, including information on the company's annual turnover, the proportion of trade with a particular company, the company's investments and purchases, and the actual circumstances of the company's business and operating conditions.³⁸

The Swedish Competition Authority has emphasised that it is of utmost importance for the Authority's activities that undertakings can submit material to the Authority with the certainty that it will not benefit competitors. The companies' need for confidentiality is therefore particularly significant. In addition, the undertakings have a far-reaching obligation to provide information about their circumstances to the Competition Authority.³⁹

An important difference between the first and second paragraph is that publicity is the main rule under the first paragraph, while secrecy always prevails under the second. However, it is not entirely clear in the Court of Appeal's judgments how to separate the two provisions. In one case, the court emphasises that the decisive factor is whether the information concerns business or operating conditions, and, if so, the first paragraph should then be applied.⁴⁰ Unless the authority shows that someone risks suffering harm, the information

³³ Administrative Court of Appeal in Stockholm, case number 973-16, 26 April 2016, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015, case number 7436-14, 22 December 2014, case number 5557-14, 12 December 2014, case number 6214-14, 17 September 2014, case number 6265-13, 17 December 2013, case number 49-12, 22 March 2012, case number 6507-11, 21 December 2011, case number 4684-10, 30 September 2010, case number 6102-08, 9 September 2008, case number 2990-05, 27 May 2005.

³⁴ Administrative Court of Appeal in Stockholm, case number 6102-08, 9 September 2008, case number 6507-11, 21 December 2011, case number 5557-14, 12 December 2014, case number 8289-14, 22 June 2015, case number 7436-14, 22 December 2014, case number 9867-14, 13 February 2015, case number 973-16, 26 April 2016.

³⁵ Administrative Court of Appeal in Stockholm, case number 2990-05, 27 May 2005, case number 49-12, 22 March 2012, case number 6265-13, 17 December 2013 KR 6265-13.

³⁶ Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010.

³⁷ Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010, case number 6507-11, 21 December 2011, case number 6214-14, 17 September 2014, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015.

³⁸ Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 7436-14, 22 December 2014.

³⁹ Administrative Court of Appeal in Stockholm, case number 7436-14, 22 December 2014.

⁴⁰ Administrative Court of Appeal in Stockholm, case number 2990-05, 27 May 2005.

must be disclosed.⁴¹ In another case, however, the court seems to primarily assess whether the information concerned someone who had connections with the company under investigation, in which case the second paragraph is applied and the information is kept secret.⁴² The first approach seems most consistent with the wording of the law.

Chapter 30, Section 3 contains a somewhat more specific provision on investigations of infringements of Article 101 or 102 of the TFEU or corresponding rules in the Swedish Competition Act. For information provided by individuals in notifications or statements, confidentiality applies if it can be assumed that the individual will suffer *considerable* damage ('skada') or *significant* harm ('men') if the information is disclosed.

In the Public Access to Information and Secrecy Act, 'damage' ('skada') refers only to economic damage, whereas 'harm' ('men') has a very broad meaning. Harm can include both the risk of being exposed to the contempt of others and negative economic effects. Often it is enough that an outsider knows about the sensitive information. Even completely legal measures – such as the imposition of a sanction – can be considered damage or harm for the purposes of the act.⁴³

In addition to the more general provisions, there are a few rules aimed at even more specific situations. Chapter 30, Section 1a is an implementation of Article 31(1) of Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. It therefore applies to leniency statements or settlement submissions. Such information is subject to absolute confidentiality, unless it is included in certain decisions of the Swedish Competition Authority. Chapter 30, Section 2 contains provisions on counselling prior to notification of a merger. During the actual counselling, absolute confidentiality applies. If such a notification is then made, however, the situation is instead covered by Section 1, which means that it is often necessary to assess whether there would be any harm in disclosing the information.

None of the cases studied in this article referenced section 1a, 2 or 3.

Overall, there are differences in the protection of confidentiality in terms of who is to be protected, what activities are concerned, what kind of information is involved and the degree to which particular injury must be expected. The differences can be summarised in the table below:

| Activities | Kind of information | Injury needed | Section |
|--|--|--|--------------------------|
| The Competition Authority's activities consisting of supervision and investigation | Information about an individual's business or operating conditions, inventions or research results | Confidential if it can be assumed that the individual will suffer damage if the information is disclosed (possibly different in relation to a party) | Chapter 30, Section 1, 1 |
| The Competition Authority's activities | Other financial or personal circumstances | Absolute confidentiality | Chapter 30, Section 1, 2 |

⁴¹ Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010.

⁴² Administrative Court of Appeal in Stockholm, case number 7436-14, 22 December 2014.

⁴³ Government bill 1979/80:2 Part A p. 83.

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|---|--|---|------------------------|
| consisting of supervision and investigation | of a person who has entered into a business or similar relationship with the subject of the authority's activities | | |
| All activities of the Competition Authority | Leniency statements or settlement submissions, if the information is not included in decisions | Absolute confidentiality | Chapter 30, Section 1a |
| The Competition Authority's counselling prior to notification of a merger | All information relating solely to the counselling | Absolute confidentiality | Chapter 30, Section 2 |
| The Competition Authority's investigations of infringements | Information provided by individuals in notifications or statements | Confidential if it can be assumed that the individual will suffer considerable damage or significant harm if the information is disclosed (possibly different in relation to a party) | Chapter 30, Section 3 |

4.3 SPECIAL RIGHTS OF PARTIES AND OTHERS

As already mentioned, parties to administrative proceedings have both a special interest and a special right to access documents. In two thirds of the Court of Appeal cases studied,⁴⁴ the complainant was a party of an investigation. In these cases, the Court of Appeal emphasises that a special balancing of interests must be made between the party's right to transparency and opposing confidentiality interests.

In almost all cases, the court makes a distinction between, on the one hand, the assessments of confidentiality according to Chapter 17 or 30 of the Public Access to Information and Secrecy Act, and on the other hand the transparency of parties. That is true also with regard to Chapter 17, section 3, even though the requirement of *particular* importance is the same as Chapter 10, section 3, on parties' right of access to information. The courts also examine whether the parties have received enough information in anonymised or summarised form, or whether it would be possible to give them more information. In a few cases, the balancing of interests has taken place together with the assessment of confidentiality.⁴⁵

As to Chapter 30, the wordings of the provisions are not the same as Chapter 10, section 3. Thus, it may be that the Competition Authority considers that there is a *risk of harm*

⁴⁴ Above n 26, 27 and 34.

⁴⁵ Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 8289-14, 22 June 2015.

if information is disseminated and therefore declares it confidential under Chapter 30, Section 1, first paragraph, or that there is a *risk of considerable harm* and declares it secret under Chapter 30, Section 3, but that it is not of *particular importance* that the information is kept secret in relation to a party. However, there is no clear example of that in the appeal court cases.

Further, it is strikingly how often the complainants are referring to EU law or the European Convention on Human Rights to support of their claims. Parties have argued that they needed access to more material in order to exercise their rights of defence under Article 6 of the European Convention on Human Rights and a directive on the right to information in criminal proceedings.⁴⁶ However, the courts have considered that the rules on transparency have been applied in a way that give the parties sufficient opportunities.⁴⁷

For stakeholders other than parties, however, it has been useful to refer to EU law. Notifiers and competitors, who are not formal parties within the meaning of the Administrative Procedure Act, have invoked EU law to gain access to material. However, the court argued in one case – with reference to *Donau Chemie*⁴⁸ – that only undertakings intending to bring an action for damages against other operators fulfil a specific pro-competitive function. The court held that a notifier who did not declare such an intention was only entitled to the transparency provided by the general principle of public access to official documents.⁴⁹ On the other hand, when a notifier has expressed an intention to bring an action for damages, the court has held that EU case law requires the Competition Authority to balance the notifier's interest in obtaining access to the information against opposing interests. As examples of cases, the court again referred to *Donau Chemie*, but also to *Pfleiderer AG*.⁵⁰ Exactly how this balance relates to the regulation in the Public Access to Information and Secrecy Act is, however, not clear. Perhaps the courts deem that it follows directly from EU law.

5 CONCLUDING REMARKS

Many legal systems grant the public – and especially parties to administrative proceedings – access to public authorities' documents. In many ways the Swedish system is built on the same ideas as EU law. However, the Swedish system requires detailed statutory provisions enacted by the Parliament. These can in principle contribute to predictability, limiting the authorities' discretionary power, but they also constitute a complex patchwork that can be difficult to comprehend.

⁴⁶ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

⁴⁷ Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 1004-12, 29 June 2012 and case number 3602-09, 14 July 2009.

⁴⁸ Case C-536/11 *Bundeswettbewerbbehörde v Donau Chemie AG and Others* EU:C:2013:366. For a comment on that case see Ingrid Vandenborre and Thorsten Goetz, 'EU Competition Law Procedural Issues' (2013) 4(6) *Journal of European Competition Law & Practice* 506.

⁴⁹ Administrative Court of Appeal in Stockholm, case number 6265-13, 17 December 2013. Cf. case number 2990-05, 27 May 2005 and case number 49-12, 22 March 2012.

⁵⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, referred to in Administrative Court of Appeal in Stockholm, case number 6214-14, 17 September 2014, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015 and case number 9867-14, 13 February 2015.

The relatively small number of court cases on these provisions may indicate that the authority applies the provisions in a way that is not overly controversial to private stakeholders. An alternative explanation is, of course, that stakeholders do not consider it worthwhile to appeal. However, even though the majority of the court cases ended in favour of the authority, a considerable share of the applicants won at least in part.

As shown above, companies and courts have referred to EU law to expand the right to access to documents beyond what follows from Swedish law, especially regarding companies that intend to bring action for competition law damages. This is not problematic in relation to the Swedish constitution, since it stresses the interest of transparency.

A much more difficult situation would arise if a document were confidential according to EU law, for example to protect trade secrets, but not confidential according to Swedish law. It would then constitute a direct conflict between EU law and the Swedish constitutional principle. On the one hand, EU law requires precedence over national legal systems. On the other hand, the principle of public access to official documents has a long tradition in Sweden and was considered so important that Sweden made a special declaration on it when joining the EU. The principle could thus perhaps be seen as part of the Swedish national identity, inherent in the fundamental constitutional structure.⁵¹ However, the same balances of interests are central in both EU law and Swedish law. Therefore, it would likely be possible to interpret EU law or Swedish law in ways that avoid that the situation comes to a head.

At present, digitalisation is probably a greater challenge to the principle of access to official documents. The current rules assume that documents in paper form are the norm. This is now largely a fiction. Digitalisation raises questions about what specifically constitutes a document to be disclosed and what is required of authorities to compile material. New opportunities to process large amounts of data also raise questions about the privacy of the information disclosed by public authorities.⁵²

⁵¹ Cf. Article 4(2) of the Treaty on European Union and article 53 of Charter of Fundamental Rights and e.g. Case C-399/11 *Melloni* EU:C:2013:107, Elke Cloots, *National Identity in EU law* (Oxford University Press 2015), and Giuseppe Martinico, 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU' (2021) 27(3) *European Public Law* 447.

⁵² Cf. for example Cecilia Magnusson Sjöberg, 'The Swedish Principle of Transparency in the context of e-learning' in Anna-Sara Lind, Jane Reichel, and Inger Österdahl (eds), *Transparency in the Future* (Eddy.se 2017). Regarding some kinds of online publication of personal data, the Swedish Authority for Privacy Protection (IMY) recently decided on a legal position in favor of the EU General Data Protection Regulation in relation to Swedish constitutional provisions. *Rättsligt ställningstagande IMYRS 2024:1 – Klagomål mot söktjänster med utgivningsbevis* (14 May 2024) <<https://www.imy.se/globalassets/dokument/rattsligt-stallningstagande/imyrs-2024-1-klagomal-mot-soktjanster-med-utgivningsbevis.pdf>> accessed 01 June 2024.

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