

## Offentlighed i Norden

- Hvilke dokumenter og data skal være offentlige og hvilke kan holdes hemmelige?
- Spørgsmålet er relevant på alle områder af samfundet og ved alle offentlige organer
- Forskningsprojektet og bogen *Offentlighed i Norden (Nordicom-Information 3 2014)* sammenligner retsregler om acces i Sverige, Finland, Norge, Island og Danmark
- Internationale regler fra FN, Europarådet og EU bliver også belyst. Europarådets konvention om acces fra 2009 – *Tromsøkonventionen* – er endnu ikke ratificeret af Finland, Island og Danmark

## Retsgrundlag og formål

- Sverige (og Finland) fik regler om offentlighed i 1766
- Resten af verden kom med cirka 200 år senere
- Finland fik offentlighedslov i 1951, Norge og Danmark i 1970 og Island i 1996
- Offentlighed er afgørende for demokratisk kontrol og deltagelse
- Kravet om autenticitet giver retsreglerne mening

# Public or Secret

## *Access to Information in the Nordic Countries*

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Freedom of information, openness and transparency are words that are freely used in public discourse. Public bodies and politicians are referred to as ‘open’ if they give information and are willing to enter into dialogue with the outside world. Politicians demonstrate openness when they make themselves available for interviews, attend public meetings and take part in discussions. There is typically a high degree of openness in the Nordic countries.

In ‘Access to information in the Nordic countries’ the term ‘access’ has a more specific meaning than ‘openness’ and ‘transparency’. ‘Access’ refers to the right to have access to authentic information about the activities of public bodies, their researches and bases for decisions etc., without the information being mediated or controlled by some authority or by politicians.<sup>1</sup>

Secrecy is the opposite of openness. When there is no right of access information can be kept secret, and in some cases information should be kept secret. ‘Access to information in the Nordic countries’ deals with the rights of access for everyone to the official documents and data.<sup>2</sup>

### **The legal basis**

#### *Nordic rules*

For many years the Nordic countries have cooperated to develop regulations under the regime of the Nordic Council. Laws on access to information have not been part of this cooperation and, despite the close relations between the Nordic countries, there are many important differences between their provisions on access to information.

As the first country in the world, in 1766 Sweden introduced public access to official documents as part of its law on freedom of the press (*tryckfrihetsförordningen*). The other Nordic countries, like the rest of the world, followed a couple of hundred years later. Finland adopted a law on access to information in 1951, Denmark and Norway in 1970, and Iceland in 1996.

Provisions in the constitutions of Finland, Norway and Sweden emphasise that access to information is of fundamental importance for democracy. In Denmark and Iceland access to information on administrative authority is not based on the constitution, though a new constitution is being prepared in Iceland.

The basic rules on public access in Sweden are still to be found in its law on press freedom, while restrictions on access are contained in the law on access to information and secrecy (*offentlighets- och sekretesslagen*). The most recent major revision of the law was in 2009. The Finnish law on access to information (*offentlighetslag*) was thoroughly revised in 1999, the Norwegian law (*offentleglova*) in 2006, the Icelandic *upplýsingalög* in 2012, and the Danish *offentlighedslov* in 2013.

### *UN Conventions*

In 1966 the UN adopted the International Covenant on Civil and Political Rights, which is binding on the many States that have ratified it. The Convention is interpreted by the UN Human Rights Committee which, in a General Comment in 2011 stated that the right of access to information is an important part of freedom of information and freedom of expression.<sup>3</sup> The General Comment gives general guidelines on which bodies should be covered by the right of public access. The Human Rights Committee stated that the right should apply to:

‘All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.’ The Committee also added a functional criterion, stating that: ‘The designation of such bodies may also include other entities when such entities are carrying out public functions’.

The 1998 Aarhus Convention on Access to Information in Environmental Matters is of fundamental importance for access to information about the environment. The Convention, which was sponsored by the United Nations Economic Commission for Europe (UNECE) has been ratified by nearly all European States, including the Nordic countries and the EU.<sup>4</sup>

The UN Convention Against Corruption of 2003 focuses, among other things, on access to information about economic aid, public procurement and contracts. The Convention reinforces requirements for access to information where preventing and combatting corruption are particularly important.

### *Conventions of the Council of Europe*

In the European Convention on Human Rights (ECHR) Article 10 provides for freedom of expression as well as the right to impart and receive information; Article 8 on the right to the protection of private life is also relevant to the right of access to information.

The European Court of Human Rights (ECtHR) has not found that Article 10 provides the basis for a general right of access to information, but in several judgments since 2006 the ECtHR has ruled that Article 10 gives news media, researchers and NGOs a right of access to information about social circumstances if their purpose is to ensure the quality of democratic control and public debate.<sup>5</sup>

Article 8 ECHR, on the right to respect for private life, sets a limit to access to sensitive personal information. However, the protection of private life makes demands on public access to certain information. According to several decisions of the ECtHR, public authorities have a duty to take measures to ensure access to information about risks that can affect the lives and health of people. In its case law the ECtHR has given further support to the Aarhus Convention’s requirement for access to information that is relevant to the environment and health.<sup>6</sup>

The first international convention dealing exclusively with access to official documents was drawn up by the Council of Europe. The Convention was signed by 12 countries at Tromsø in 2009, and by a further 2 countries in 2010.<sup>7</sup> The Tromsø Convention enters into force when 10 countries have ratified it, but by June 2014 only 6 countries had done so, including Norway and Sweden. When ratifying the Convention a country can declare that it will not be bound by certain parts of it.

### *EU rules*

The Nordic countries have differing relations to the EU. Denmark, Finland and Sweden are Member States of the EU, while Iceland and Norway are not members of the EU but participate in the European Economic Area (EEA), known in short as the ‘single market’.

In 2009 the Lisbon Treaty made the fundamental rights formulated in the Charter of Fundamental Rights in 2000 legally binding. Accordingly the EU may not give weaker protection to human rights than the ECHR.<sup>8</sup>

An EU Regulation on access to the documents of the EU institutions was adopted in 2001. Under the Regulation and the Charter, the right of access to information of the EU institution applies to Union citizens and persons resident in a Member State.<sup>9</sup> By the Charter’s reference to Article 10 ECHR, people from non-Member States also have access to information if their purpose is to contribute to informing the public about social circumstances.

The EU Directive on the protection of personal data applies to the EEA as well as the EU Member States. The Directive allows some scope for national laws, and does not restrict the right to access to information under national laws on freedom of information.<sup>10</sup> A Regulation on the protection of personal data applies to the EU’s own institutions.

The EU Directive on public sector information (PSI) also applies to the EEA. The purpose of the PSI Directive is to promote the re-use of data held in the public sector for commercial and general purposes. The idea behind the Directive is that authorities should promote the re-use of data by making documents and data available in digital formats.<sup>11</sup>

The EU Directive on public access to environmental information, which is based on the Aarhus Convention, also applies to the EEA. A Regulation on environmental information applies to the EU institutions. The EU’s ratification of the Aarhus Convention means that the EU cannot overrule the Convention by adopting special rules on confidentiality about environmental information in directives or regulations, for example on trading in emission quotas or the marketing of chemicals. Other directives, including the Directive on industrial emissions, supplement the requirements of the Directive on public access to environmental information with regard to access to information during deliberations.<sup>12</sup>

## **The varied Nordic openness**

### *The weight of tradition*

For hundreds of years Sweden was the dominant power in the eastern part of the Nordic region, including Finland until 1809. Under Russian rule in Finland from 1809 to 1917 the old Swedish fundamental laws still applied in Finland. Finland became an independent republic with its own constitution from 1919.

### Hvilke organer og opgaver

- Offentlige organer er omfattet, men ikke administrative opgaver ved parlamenter og domstole i Island og Danmark
- Bolag (selskaber), hvor offentlige organer ejer mere end 50 % er omfattet. Det gælder ikke i Finland og ikke statsligt ejede bolag i Sverige. I Danmark er grænsen 75 % ejerskab
- Offentlige opgaver, der outsources, er omfattet i Island og Finland

### Registrering og accesformer

- Finland og Norge stiller de stærkeste retskrav til registrering og sikring af autenticitet ved logning af ændringer i elektroniske dokumenter
- Sverige sikrer ikke ret til acces i elektronisk form
- Norge er i front med udvikling af elektroniske redskaber til offentlighed: Det offentlige elektroniske postjournal – [www.oep.no](http://www.oep.no)

At the time when freedoms were introduced in the Swedish-Finnish State, the western part of the Nordic region was subject to autocratic monarchical rule. For hundreds of years Denmark was the dominant power in the western part of the Nordic region; its union with Norway lasted for more than 400 years up to 1814. The Swedish-Norwegian union of 1814-1905 was limited to the two countries having the same king and a joint foreign policy. The union of Denmark and Iceland was gradually dissolved and finally came to an end in 1944, when Iceland terminated the union and became an independent republic.

There are still certain differences between the eastern and western parts of the Nordic region. The rules on access to information in Finland and Sweden are based on the concept of 'public transactions' (*allmänna handlingar*) and do not include internal memoranda. The administrative courts are important reviewing tribunals which also make decisions in cases on access to information. However, the Finnish law on access to information has moved away from the Swedish tradition, especially with its 1999 revision. Differences have also opened up between the laws of the western part of the Nordic region – Denmark, Iceland and Norway – in the most recent revisions of the laws.

Another pattern is that the older nation states – Denmark and Sweden – tend to be more traditional than Finland, Iceland and Norway. The Danish and Swedish traditions for state administration and legislation have an influence on the rules on access to information.

The Swedish regulations are still based on a number of fundamental rules in its law on freedom of the press and the many detailed provisions on its law on access to information and secrecy. Even though the Danish law on access to information was given additional provisions in its 2013 amendment, it still has many fewer provisions than the Swedish law. The most distinct difference is in the regulation of access to personal data, where the Danish law suffices with a few words on the protection of individuals' private lives. The Swedish law on access to information and secrecy regulates access to and protection of personal data in a great many of its more than 400 sections.

The Swedish constitutional tradition emphasises the sovereignty of the people, and the decisions of the people's representatives cannot be set aside by the courts or other reviewing instances. It is paradoxical that a constitutional tradition that attaches so much weight to the sovereignty of the people does not allow the people to request the review of a decision of the government to keep certain information secret.

It is also paradoxical that a modern country such as Sweden has not introduced access to information by electronic means. There appears to be a connection between the Swedish openness about much of personal data and a fear that electronic access could lead to the spread of personal profiles. There has been much debate and many deliberations but strangely enough Sweden has not found a form of regulation to solve the problem.

Under the autocratic monarchy in Denmark, civil servants and royal advisers could rule in privacy, with the king placed above them on a pedestal. That secrecy was the guiding principle was evident in the name of the highest state council, the Privy Council (*Gehejmekonseil* 1660-1770) and subsequently the Privy Council of State (*Gehejmestatsrådet* 1772-1848). In modern times the exceptions to the law on access to information mean that documents from civil servants in the highest levels of the administration forming the basis for political decisions, can be kept secret.

It is very strange that Denmark, which is otherwise characterised by openness, should maintain and even reinforce the secrecy of documents that are important to the political

### Offentlig eller hemmelig

- Undtagelser for oplysningstyper er angivet i lovene og typisk med krav til konkret vurdering. Mange forskelle
- Sverige har mange specifikke regler om personoplysninger. Flere personoplysninger er offentlige i Sverige end i andre lande
- EU behandler forslag til forordning om persondata, der skal afløse direktivet. Vigtigt at undgå påvirkning af nationale regler om acces

### Miljøoplysninger

- De stærkeste internationale krav om offentlighed gælder miljøoplysninger ifølge *Aarhuskonventionen* og EU-direktiver
- Sverige, Finland, Island og Danmark opfylder ikke helt de internationale krav om at sikre stor vægt på offentlighed
- Norge er gået længere end de internationale krav med *miljøinformasjonsloven* og *produktkontrolløven*, der sikrer accesret til vigtige miljøoplysninger i alle tilfælde. Disse norske love gælder også for private virksomheder

decision-making process. After its amendment in 2013, the Danish law on access had both a broad exception for ministerial advice and a special exception for documents exchanged between government ministers and individual members of parliament as a basis for political agreements. Among other things these exceptions mean that the professional basis for decisions can be kept secret.

### *Nordic rules take the lead*

Apart from the historically based patterns, many of the differences between the Nordic rules on access to information have no clear pattern. There are examples of Nordic rules that are in advance of international developments:

The Finnish law ensures a high level of access to information about political power in the highest state bodies, and this was the aim with the amendment to the law in 1999. The Finnish law ensures general access to information about the basis for decisions, as a rule before decisions are taken.

In respect of environmental information, the Norwegian law on environmental information is clearly the most open in the Nordic countries as it also covers private undertakings and contains clear requirements to make information public. Norway has gone further than its international obligations, while the other Nordic countries have not fully complied with the requirements for making environmental information public.

Norway is also clearly in the lead with internet access to registers of documents and good searching facilities. The Electronic Public Records are under development to give direct access to documents.

There is a Nordic tradition for allowing access to information about the tax payments of citizens and companies. Denmark has not followed this route since 1960, but has re-introduced access to information about companies' taxation.

### *Other differences*

The Nordic countries have been considered a model for the development of freedom of information. Without looking too closely at the differences between the Nordic countries, in the Explanatory Report on the Tromsø Convention, on the preamble, it is stated that the right of access to official documents was first developed in the Nordic European States. It is true that Sweden started in 1766. On the other hand it is not true if one were to believe that freedom of information is a consistent characteristic in the Nordic countries in all areas of the administration. This article shows that the rules on access to information vary widely between the Nordic countries.

This comparison of the Nordic rules on access to information does not allow a general ranking to be made. Legislation which gives the best conditions for freedom of information in some respects will give worse conditions in other respects.

In Finland, Norway and Sweden freedom of information is rooted in their constitutions and is a fundamental principle for public authorities. Iceland is in the process of preparing a new constitution, but there is no prospect of constitutional change in Denmark.

Sweden has gathered together all the restrictions on freedom of information in its law on access to information and secrecy. In contrast Denmark and Norway have many exceptions to the right to information in legislative acts other than their laws on access to information.

### Arbejds- og beslutningsprocesser

- Undtagelser for processer - f.eks. interne dokumenter, minnesanteckninger og udkast – angiver ikke bestemte oplysningstyper
- Undtagelser, der ikke er afgrænsede til de første trin i en proces, bliver reelt til undtagelser for sager uden specifikation
- Finlands lovregler giver mest offentlighed om de øverste politiske beslutningsprocesser og stiller krav til offentlighed før vigtige beslutninger
- Sverige sikrer acces til sagsoplysninger, når beslutning er truffet

### Mere om arbejds- og beslutningsprocesser

- Norge, Island og Danmark har brede undtagelser
- Island og Danmark sikrer dog ret til acces for oplysninger om faktiske forhold. Det gør Norge ikke
- Hemmeligholdelse af de øverste politiske beslutningsprocesser er stærkest i Danmark med brede undtagelser for ministerbetjening og ministres udveksling med medlemmer af parlamentet. Ingen ret til endelige faglige vurderinger ved disse undtagelser

### Kontrolsystemer

- Forvaltningsdomstole er klageorganer i Sverige og Finland. Ingen klagemulighed i Sverige ved afslag fra regeringen/Regeringskansliet
- Norge og Danmark har almindelige administrative klageorganer. Ved afslag fra de øverste statsorganer findes ikke egentlige klageorganer, og ombudsmand og ordinære retssager er eneste mulighed for prøvelse
- Island har et særligt klageorgan for alle sager om offentlighed
- I Norge skal klageorganer handle lige så hurtigt som første instans

Companies in which public authorities own more than half the capital are covered by the laws on access to information in Iceland and Norway. This also applies to municipally-owned companies in Sweden, while state-owned companies are excluded, and the same applies to companies in Finland.

The law on access to information covers many public-private organisations in Denmark, but companies are only covered if a public authority owns for than 75 % of the capital.

In Finland and Iceland tasks that are outsourced by a public authority are covered by the law on access to information, while only specific outsourced tasks are covered in the other Nordic countries.

There is a right to make data compilations in Denmark, Norway and Sweden, but Sweden lacks rules on electronic access to ensure the practical implementation of this. Finland and Iceland have not provided for a right to make data compilations. Denmark is the only Nordic country to supplement this right with a requirement for authorities to give descriptions of data that can help the practical exercise of the right to make data compilations.

The Danish law on access to information makes general exceptions for some kinds of cases and an extra exception that is not limited to what kind of interest is protected. There are no corresponding exceptions in the other Nordic countries.

The Danish law on access has the most clearly expressed right to information about the factual basis of a case at any stage of the case. The Norwegian law on access does not ensure the right to information about the factual basis of a case.

Denmark is alone in having developed the practice of having one to three special advisers in each ministry who can work on behalf of a political party without being subject to the rules on freedom of information.

Of the Nordic countries, the Norwegian law ensures the most access to local government with access to documents that are exchanged between entities that have delegated independent decision-making authority.

All appeals against refusals of access in Iceland are sent directly to a special appeal board for freedom of information which has authority to make binding and enforceable decisions. Denmark and Norway have a number of ordinary administrative appeal bodies while Finland and Sweden have administrative courts.

## **International developments**

For a long time international developments in the field of freedom of information stood in the shadow of freedom of expression. For almost 200 years the Swedish law of 1766 on access to information was almost unique.

After World War II the international development of freedoms was strengthened and they were included as part of core human rights. Freedom of information was included in international conventions alongside freedom of expression, and it has gradually been developed as one of the essential characteristics of a democratic society.

Freedom of information concerns the right to seek and receive information and it has two elements. First, there is the right to seek and received available information, including access to independent media and the internet. Second, there is the right of access to documents and data which the authorities not make available on their own initiative.<sup>13</sup>

The Tromsø Convention of 2009 can be a turning point for the further development of the right to access, but is notable that only six countries had ratified the Convention by June 2014, when it was five years old.

International rules play a special role for the development of freedom of information about the environment. The Aarhus Convention of 1998, which has been ratified by many countries and the EU, has laid a firm foundation.

EU law has a growing role in the development and regulation of freedom of information. The Nordic Member States – Denmark, Finland and Sweden – together with the Netherlands and more recently Estonia and Slovenia, have worked to develop freedom of information rules in the EU. Sweden has been particularly active. The EU Regulation on access to the documents of the EU institutions was adopted under a Swedish presidency, and Sweden has brought cases before the CJEU that have resulted in important decisions of principle.

The EU Commission has typically been restrictive, while the European Parliament has worked for greater openness. In a number of its judgments the CJEU has emphasised the importance of freedom of information. An important milestone was its judgment in 2007 which ruled that an individual Member State does not have a veto right on the publication of documents from its authorities. Other important milestones have been a judgment in 2007 on access to the advice given by the European Council's legal service, and a judgment in 2013 on access to a proposal that was included in the decision-making process of a working party of a Council of Ministers.<sup>14</sup>

In recent decades the right of access to information has been an important part of freedom of information and expression, but it cannot be taken for granted that this development will continue. At all times and in all societies the boundary between secrecy and openness is drawn in rules and in practice. There are many actors and interests pulling in different directions.

As stated above, in 2013 Denmark, which participates in EU initiatives for openness about political processes, adopted a law on access to information which involves significant restrictions on access to the highest levels of political decision-making in Denmark.

When it joined the EU, Sweden emphasised that the Swedish principle of openness must not be undermined. With membership of the EU, many situations that had previously been domestic matters have become foreign policy matters, and the Swedish rules on foreign policy matters have been changed so that there is a presumption of access to information. At the beginning of 2014 the Swedish rules on access to information were changed, and under the new rules access to information may be denied if it would complicate Sweden's participation in international cooperation.

The EU Directive on the protection of personal data does not restrict national rules that give a right of access. In 2012 the EU Commission proposed to replace the Directive with a regulation that has direct effect in the Member States.<sup>15</sup> In June 2014 it was not clear whether Parliament, the Council and the Commission could agree on its form and content. New rules could mean that the boundary between the protection of personal data and access to information will be affected.

The latest developments show how the EU Commission and the Council regard the systematic publication of information as a useful means of strengthening the control of companies and citizens in various areas. This does not prevent the Commission and the Council resisting other forms of access to information that could strengthen control of

the political decision-making process. The same contradictory tendencies can be seen in some of the national authorities, such as the State Administration in Denmark.

### **The purpose of the rules on access to information**

Many organisations, including public authorities, are happy to give information as long as they are able to control what information is given and how it is presented. This is done widely and extensively, often with the help of professional communications advisers. This openness is provided on the authorities' terms.

Openness does not just mean that an authority must inform about what it thinks is suitable, it must also allow access to documents without changing their form and content. Openness can only be assured by legal rules requiring authorities to allow access to authentic documents and data upon request or at the initiative of the authority. This requirement is the *raison d'être* of the rules on access to information.

The main purpose is to strengthen the basis for democratic control of the exercise of power, and for the participation of citizens in the democratic process. This is the basis for the rules on access to information in all the Nordic countries.

Openness can also support free and fair competition between commercial companies, for example in tendering for work, contracting, subsidies, environmental controls and taxation. From a narrow perspective openness can be difficult for the individual company. However, from a broader perspective it is important for stimulating competition, for commercial development, and to prevent competitive advantages being given to companies that do not live up to the standards of society.

The effectiveness of the administration of public authorities is a beneficial side-effect. Openness can reveal mistakes, neglect and abuse of power, and its preventive effect is at least as important. From a narrow viewpoint openness can cause difficulties for the individual authority, but seen more broadly openness is important for upholding the demand for impartial administration, for ensuring a broad basis for making decisions, and as inspiration for development.

The purposes of the Aarhus Convention and the EU Directive on public access to environmental information are to strengthen openness as an important part of the efforts to obtain a clean environment and improve health. Political and administrative measures are not enough to ensure effectiveness. Openness is necessary to reinforce, control and stimulate authorities and companies to do their bit.

Openness can also support the work of authorities in other areas where it is difficult or requires considerable resources to ensure proper administrative control. For example, this is one of the reasons for the EU's openness on agricultural subsidies. Openness about applications and decisions can support social responsibility and can stimulate companies and citizens to give correct information.

Openness can thus serve important purposes and there will usually be a synergistic effect between different purposes. Openness aimed at strengthening social responsibility and openness about companies and citizens can together contribute to openness about the measures taken by authorities and politicians.

However, the beneficial side-effects of openness do not alter its fundamental purpose. It is a characteristic of a genuinely democratic society that everyone has a right to access to authentic information about the political and administrative exercise of power.

## **Recommendations**

This concluding section contains a number of recommendations. These are set out below in ultra-short form. Some recommendations concern things that can be ensured by the public authorities or supervisory bodies without the need for new rules, but most of the recommendations would require legislation. Many of the recommendations are inspired by existing rules in one or more of the Nordic countries or by international rules.

Legislation to establish good conditions for access to information could be achieved by selecting the best from the various Nordic rules. The development of common Nordic legislation on access to information could be a fine idea, but it is unrealistic because of the major differences of form and content between the Nordic countries. However, hopefully this can be an inspiration for change.

### **The foundations**

1. Access to information should be rooted in a country's constitution in order to emphasise the fundamental importance of freedom of information and freedom of expression. The constitutions of Finland, Norway and Sweden can be models for this.
2. The Council of Europe Convention on Access to Official Documents (the Tromsø Convention) should be ratified in order to strengthen national and international development of democratic rights. Nordic countries that want to be models of democratic societies should be able to ratify the Tromsø Convention without any reservation. If, exceptionally, a reservation is necessary, it should be stated that the national rules will be amended as soon as possible so as to fulfil the requirements of the Convention.
3. National governments and parliaments should work to ensure that Union law protection of personal data continues to be based on rules that ensure the right of access to public documents.
4. Rules that restrict access to official documents should only be adopted by parliament following public consultation. Rules on secrecy should only apply when strictly necessary in a democratic society.
5. The conditions for restricting access to public documents should be consolidated in a single legislative act. Many current special rules, particularly in Denmark and Norway, are inadequate. Inspiration can be drawn from the Swedish law.
6. In specific cases supervisory bodies should make it clear that national and international rules on access to documents may not be set aside by agreement, including international agreements on trade or the protection of investments.

### **Bodies and tasks**

7. The rules on access should cover public law bodies, including the administrative tasks of parliaments and courts that are not currently subject to the rules on access to information in Denmark and Iceland.
8. The rules on access should cover companies which are more than half-owned by state or communal authorities. The Icelandic and Norwegian rules can be models for this.
9. The rules on access should cover other private law entities established by law or under the authority of law, and entities that perform more comprehensive public tasks under supervision and control. The Danish rules can be a model for this.
10. The rules on access should cover tasks carried out under contract by private undertakings on behalf of a public body. The Finnish and Icelandic rules can be models for this.

11. The rules on access should cover information about important functions for society, whether carried out by public bodies, public-private bodies or private undertakings. This applies to society's infrastructure for energy supply, water supply, public transport, payment systems and telecommunications. This also applies to charitable trusts' administration of their funds that have been wholly or partly obtained via contributions from public bodies or tax relief, and to information about banks and other financial institutions that are important for the financial arrangements of individuals and society as a whole, e.g. the total holdings of financial instruments of individual institutions and their use.
12. Information about matters that are significant for the environment and peoples' health should be subject to a requirement for openness, regardless of whether the information is derived from public bodies, public-private bodies or private undertakings. The Norwegian rules on environmental information and product control can be models for this.

### **Documents and registers**

13. Either supervisory bodies or legislation should make it clear that communications to and from politicians in their public capacities are covered by the rules on access to public information. Communications exclusively relating to their party-political roles are not. Clear criteria should be established to distinguish between communications that exclusively relate to party-politics and communications relating to official roles as head of an authority or as a member of a political body.
14. The rules on access to information should cover documents drawn up by or communicated by employees of public authorities, whether they are employed because of their political or professional qualifications. The Danish practice relating to special advisers in ministries does not fulfil this requirement.
15. The rules on access to information should provide for the registration of information to give an overview of the information available and for searching. Electronic registers should protect documents from amendment or deletion. The Finnish rules can be a model for this.

### **Access in a variety of forms**

16. The rules on access to information should require public bodies to supply documents and data in electronic form when requested. The Swedish rules do not ensure such quick and easy access to information.
17. The rules on access to information should enable data comparisons to be made. This right is not the case in Finland or Iceland. The right to make data comparisons can be supplemented by a requirement for public bodies to provide data descriptions. The Danish rules on data descriptions can be a model for this.
18. The rules on access should provide for on-line access to registers with document summaries and effective search functions. The government and/or parliament should adopt an action plan to develop electronic systems giving direct access to documents and data. The Norwegian system (oep.no) can be a model for this.
19. The rules on access to information should require public bodies to implement the Aarhus Convention and the EU directives on access to information on environmental matters. The Swedish legislation does not ensure this.
20. The rules on access should require public bodies to systematically publish information about matters that are important for reinforcing social responsibility, for example payments for performing public tasks and financial support for undertakings and associations. The EU rules on publishing information on agricultural support and the EU's web portal on payments made by EU institutions can be models for this.

## **Open or secret**

21. Exceptions to the rules on access to official documents should respect the Tromsø Convention's list of interests that can justify exceptions to access to information. The Convention's explanatory report can be a model for specifying the exceptions. In the Danish law on access to information the exceptions in favour of public and private interests do not specify what interest is protected and it does not meet the Convention's requirement.
22. The rules on access should require exceptions to public access to be based on concrete evaluations. Evidence of probable harm to important protectable interests should be given and weighed against the interests of publication. The Tromsø Convention can be a model for this. The general exceptions for certain categories of cases in the Danish legislation on public access are clearly contrary to a requirement to make concrete evaluations.
23. The rules on access should take into account that many important decisions are made by international bodies. Exceptions made to protect foreign relations should be restricted to where they are essential for protecting important foreign policy interests. The Norwegian rules for the development of international norms can be a model for this.
24. Exceptions to the rules on access to information on commercial companies should be restricted to specific information about product development, marketing strategies and suchlike when it has been evaluated that an exception is necessary in order to avoid unfair competition. Inspiration for drawing the boundary between what should be made public and what kept secret can be obtained from the Norwegian guidelines for publication.
25. The rules on access should exclude sensitive information about individuals' private lives, and should lay down criteria for identifying such information.
26. The rules on access should require public authorities to publish information about tendering, offers and contracts. The rules in Finland, Norway, Sweden and the EU can be models for this.
27. When new employee is appointed by a public body, the rules on access to information should require information be published about the application of the person appointed. The Swedish rules on the appointment of top state officials can be a model for this.
28. The rules on access to information should require access to information on disciplinary proceedings against public employees, other than sensitive information about private matters. Inspiration can be drawn from the rules in Finland, Norway and Sweden.
29. The rules on access to information should require access to the tax authorities' information about the taxable incomes, tax payments, tax deductions for investments and general purposes of individuals, undertakings, companies and trust funds.
30. The rules on access to information should provide openness of information on both direct and indirect effects on the environment (emissions). The rules should ensure unconditional access to public bodies and private companies of information about effects that can be harmful to health or damage the environment. Inspiration can be drawn from the Norwegian law on environmental information.
31. The rules on access to information should ensure publication of information on the effects of products for health and the environment. Inspiration can be drawn from the Norwegian law on product control which applies both to public bodies and private companies.

### **Work processes and decision-making processes**

32. The rules on access to information should cover finalised documents, regardless of whether they are internal or external. Documents that have not been finalised can be expected or excluded from the rules. Clear criteria should be laid down for distinguishing between finalised documents and non-finalised documents.
33. The exceptions in the rules on access to information for non-finalised documents should not cover documents exchanged between entities that have an independent right to make decisions by law or by delegation. The Norwegian rules for municipal government can be a model for this.
34. The rules on access to information should provide for access, at any time, to information about the facts of a case, including all information that helps illuminate the facts of a case and the methods and assumptions used. Inspiration can be drawn from the Danish obligation to provide extracts of documents.
35. The rules on access to information should require access to background data for analyses and calculations made for a public body, regardless of whether they are made by the authority itself, by some other public body, researchers or a private company.
36. The rules should require access to professional advice, include internal professional advice in its final form when proposals, plans etc. are made public. This should not include internal political/tactical advice. Supervisory bodies and, if necessary, legislation should make it clear that contents in a document that combines professional and political/tactical advice should be covered by the obligation to give access.
37. Authorities should adopt ethical guidelines for their employees, making clear the distinction between professional advice and political/tactical advice. Political bodies should adopt equivalent ethical guidelines for politicians. The guidelines in Iceland for ministers and employees in ministries can be a model for this.
38. The rules on access should require public authorities to publish plans and proposals, including their factual and professional bases, in good time before binding political agreements are entered into or formal decisions are taken on matters that are important for society. The Finnish rules can be a model.
39. The requirements in the rules on access to documents prior to meetings of political bodies in municipalities and regions should include the agendas and presentations of proposals and their attachments. Inspiration can be drawn from Finland and Norway.
40. The rules on access should require publication of agendas prior to meetings in the government and decision-making government committees. The decisions on cases and the annexes to them should be published soon after meetings. Inspiration can be drawn from Finland.
41. The rules on access to information should ensure publication of a high level of information on legislative processes. There should be openness about finalised reports and the responses to consultations. This should also apply to documents given by civil servants to members of parliament who are involved in decision-making that leads to political agreements or formal resolutions. The Danish law on access to information does not meet this requirement, nor does Norwegian law to some extent.

### **Procedures and controls**

42. The rules on access to information should have requirements that contribute to good and effective processing of documents and data. The authorities should ensure that employees have the necessary knowledge, that there is quick processing of demands for access to

information, and that appropriate IT systems are developed. The Finnish rules on information processing can be a good model.

43. The rules on access to information should require public bodies to publish on the internet periodical reports of the number of applications, the number of rejections and the waiting time for decision on access to information.
44. The rules on access should ensure that appeals can be made against rejections of applications for access to an independent body whose decisions are binding. This should apply to all public bodies, including the highest bodies in the state. The requirement is not met in Denmark, Norway or Sweden.
45. The rules on access should establish an effective appeal system with high professional skills and rapid responses to requests. The systems in Finland, Iceland and Sweden can be models for such an appeal system, and a decision (April 2014) of the Civil Ombudsman in Norway can be a model for rapid process.
46. The law should ensure that it is possible to enforce the decisions of the appeal body. The systems in Finland, Iceland and Norway can be models.
47. The rules on access to information should provide for claiming payment from a public body that loses a case before an appeal body.
48. The rules on access to information should require public bodies to visibly publish information on their websites if they lose a case before an appeal body.
49. The rules on access to information should require appeal bodies to give regular information explaining their main decisions and giving good advice to applicants and authorities about forthcoming cases.

### **The ideal and the reality**

50. Research should be carried out to find out about the robustness of the rules on public access to information and their effect in practice. The Norwegian evaluation of its law on public access to information can be a model for this. The many and major differences between the rules on access to information in the Nordic countries give a unique opportunity for research that can throw light on the effects of various elements of legal regulation and their interaction with other factors. It is an obvious task for the Nordic Council to encourage joint Nordic research projects that can both provide information about the effects of the rules on access to information and contribute generally to knowledge of the effects of legal regulation.

### **Notes**

1. The explanation of the word is inspired by Tim Knudsen, *Offentlighed i det offentlige*, 2003, Aarhus University Press; and by the European Parliament paper ‘Openness, transparency and access to documents and information in the EU’, 2013.
2. For a more comprehensive publication in Danish see Olof Jørgensen, ‘Offentlighed i Norden’, 2014, *Nordicom Information No 3/2014*, University of Gothenburg. Links to laws and rules are available at: [www.dmjx.dk/offentlighed-i-norden](http://www.dmjx.dk/offentlighed-i-norden).
3. Human Rights Committee, 2011, General comment No 34. p. 18
4. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), signed in Aarhus, Denmark on 25 June 1998.
5. *Matky v Czech Republic*, 10 July 2006; *Társaság a Szabadságjogokért v Hungary*, 14 July 2009; *Kenedi v Hungary*, 26 August 2009; *Youth Initiative for Human Rights v Serbia*, 25 June 2013; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria*, 28 November 2013.
6. *Guerra and others v Italy*, 9 February 1998; and *Vilnes and others v Norway*, 5 December 2013.

7. European Convention on Access to Official Documents, signed on 18 June 2009 in Tromsø, Norway.
8. Treaty on European Union (TEU), Article 6(1) states that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (2000/C 364/01). Article 11 of the Charter corresponds to Article 10 ECHR, and Article 7 of the Charter corresponds to Article 8 ECHR.
9. Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In 2008 the EU Commission published proposals to amend the Regulation (COM(2008) 229 final), but the negotiations are ongoing.
10. Directive 95/46/EC and Regulation (EC) No 45/2001. In 2012 the EU Commission published a proposal for a regulation that would have direct effect in the Member States, IP/12/46 25/01/2012.
11. Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information, as amended by Directive 2013/37/EU.
12. Directive 2003/4/EC of 28 January 2003 on public access to environmental information. Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention applies to the EU institutions. Directive 2010/75/EU of 24 November 2010 on industrial emissions.
13. Kyrre Eggen, *Ytringsfrihet* (2002), Oslo: Cappelen, pp. 171-182 and 650-660.
14. Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council; and Case C-280/11 P Access Info v Council.
15. European Commission IP/12/46 25/01/2012.

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