

Niklas Vainio

Access to Documents Meets Data Protection

Do new developments in EU data protection threaten the Nordic tradition of access to public documents?

The Nordic countries have a long history of public access to official documents. In this respect, Nordic administrations are significantly more open than their non-Nordic counterparts in the European Union. In recent decades, the weight of the right to privacy and the right to protection of personal data has increased in European Union law. Data protection has been given the status of a fundamental right and the new General Data Protection Regulation came into effect on 25 May 2018. Taking into account the strict conditions that EU courts have defined for access to documents containing personal data, will the new Regulation limit the currently broad access in the Nordic countries?

Access to government documents is a feature specific to the Nordic administrative tradition that has a long history. The Nordic countries were the first in the world where the public's access to public documents was secured in legislation. Sweden adopted an information access law as far back as 1766, Finland enacted its own law in 1951, and Denmark and Norway in 1970. Elsewhere in Europe, Austria, France, Netherlands and Luxembourg passed such laws during the 1970s, and the rest of Europe during the 1990s and 2000s.¹ In Sweden, the law of 1766 was based on the "principle of publicity", which was founded on liberal ideas of the importance of access to knowledge. Access to information, knowledge and documents was seen as a prerequisite for informed participation in public life.²

Today these ideas of participatory and deliberative democracy are reflected in Nordic freedom of information laws. In Finland, the publicity principle has been made a consti-

tutional right: section 12 of the Constitution of Finland stipulates that "Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings." In Sweden, one of the constitutional laws, the Freedom of the Press Act (Chapter 2, Article 1), entitles all Swedish citizens to "free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information." Access to documents is also guaranteed by the Constitution of Norway (Article 100 paragraph 5), which stipulates that "It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse" (paragraph 6). In Finland and Sweden, the publicity principle is understood broadly as overall openness of public administration. According to section 3 of Finland's Act on the Openness in Government Activities (621/1999), the purpose of the act is "to realise openness and good information management in government and to give individuals and

Niklas Vainio, LL.M., M.Sc., is a doctoral candidate in constitutional law at the University of Turku and the University of Helsinki.

their associations possibilities to monitor the use of public power and resources, to freely form their opinions and influence the use of public power, and to safeguard their interests and rights.” A similar regulation can be found in Sweden’s Public Access to Information and Secrecy Act (SFS 2009:400). In Norway and Denmark, the laws are narrower, with a focus on access to documents and oversight over administration.³

Publicity principle in European law

The publicity principle has not gained an equally strong role at the European level. Although most EU member states have legislation granting access to documents, there is a difference in the way transparency is understood. While the core element of Nordic-style transparency is extensive public access to official documents, files and registers, in the European Union transparency is primarily directed at keeping the public informed of ongoing activities.⁴ The right to access in EU law is limited to documents of EU institutions (European Parliament, European Council and European Commission).⁵ The Charter of Fundamental Rights of the European Union, which is the “bill of rights” of the Union, recognises the right of access to documents in its Article 42, but only with regard to Union institutions.⁶

The European Convention on Human Rights is an international human rights treaty adopted in 1950 and ratified by all 47 member states of the Council of Europe. Article 10 of the Convention protects the right to freedom of expression. The European Court of Human Rights has recognised access to information and documents by the press and civil society organisations as an element of this right.⁷ The Convention does not, however, protect access to documents as an independent human right.

The era of data protection

The academic literature has recognised the right to privacy at least since 1890.⁸ Although it is difficult to provide a comprehensive defi-

nition of the concept of privacy, generally it can be said that the right to privacy refers to a person’s right to forbid or control the access others have to some aspects of his or her life such as body, home, activities, communication and thoughts.⁹

The rapid development of information and communication technology in recent decades has emphasised the importance of the protection of data related to individuals (*data protection*). In 1995, the European Union adopted the Data Protection Directive (95/46/EC). Respect for the right to privacy and protection of personal data are included in Articles 7 and 8 of the Charter of Fundamental Rights, which gives them special importance in legislation and legal interpretation. This is also one of the reasons for the drafting of the new General Data Protection Regulation (2016/679 EU) that came into effect on 25 May 2018. The new Regulation emphasises individuals’ privacy rights and comes with stronger enforcement mechanisms.

Under the data protection rules, companies, authorities and individuals can process (which includes collection, use and disclosure) personal data if they have a legal basis for doing this. Processing can be based on consent given by the individual, but the Regulation includes other legal grounds such as “legitimate interest”.¹⁰ The individual has specific rights to increase the transparency of the processing, for example the right to basic information about processing and its purposes, the right of access to data about them and the right to have incorrect data corrected or erased.¹¹ Data protection is therefore more about transparency of the process than limiting the power of others to interfere with one’s privacy (opacity).¹²

Access to information and documents in EU courts

With data protection having been promoted to the status of a fundamental right, how will this affect the publicity principle and the public’s right to access to information? Recent EU court cases illustrate the tension between data

protection and the right to access to information.

The *Google Spain* case (C-131/12) of the Court of Justice of the European Union concerned an individual's right to demand that a search engine remove a search result related to them. In this case, a Spanish citizen demanded that Google remove search results that come up when searching for his name. The results were linked to official newspaper announcements published 16 years earlier about a real estate auction organised for the recovery of social security debts. The person argued that inclusion of such links in the search results violated EU data protection legislation because the proceedings concerning him had been fully resolved a number of years earlier and that references to them were now entirely irrelevant.

The Court argued that even initially lawful processing of accurate data may, in the course of time, become incompatible with the Data Protection Directive where, having regard to all the circumstances of the case, the data appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.¹³ It also recognised the legitimate interest of internet users potentially interested in having access to such information and held that a fair balance should be sought between that interest and the person's fundamental rights, in particular the right to privacy and the right to protection of personal data. The court observed that, as a general rule, the person's rights override the interest of internet users, but in this balancing, one should take into account factors such as the role played by the person in public life.¹⁴ The rights of the general public to access to information can override data protection rights only if there are particular and substantial arguments to support that claim.¹⁵

The Court's judgment in *Google Spain* shows a hierarchical relationship between data protection, recognised as a fundamental right, and the public's interest in information, which is accepted as an argument but not as a right. An equally strict interpretation

of data protection can be seen in EU court cases relating directly to access to documents of public authorities. In *Bavarian Lager* (C-28/08), the Court of Justice of the European Union held that a person requesting documents containing personal data (in this case, names of persons participating in a meeting) has to *establish the necessity* of transferring that data.¹⁶ In *Dennekamp II* (T-115/13), the General Court of the European Union followed the same argumentation. A journalist requested information on Members of the European Parliament receiving a so-called additional pension and argued that this was necessary in order to make the European public aware of how the pension scheme operates and to exercise oversight over the MEPs who represent it. The court again followed a strict reading of the applicable Union law, setting the standard of necessity very high.¹⁷ In this respect, it is interesting that in the case of *ClientEarth and PAN Europe v European Food Safety Authority (EFSA)* (C-615/13 P), the EU Court accepted that it was necessary to grant two non-governmental organisations access to the names of external EFSA experts when there existed a "climate of suspicion" and claims of partiality of the experts. This was necessary to ensure the transparency of EFSA's decision-making process.¹⁸

A threat to openness?

In the light of the above developments, the right to data protection seems to pose a challenge to the Nordic tradition of publicity (with the exception of *ClientEarth*). Although the cases above are related directly only to European Union authorities, strict reading of data protection law and the strong necessity requirement may in the future also influence national laws. The requirement that citizens requesting access to official documents have to demonstrate the necessity of such access is completely contrary to the Nordic tradition, where access is usually unconditional. The new General Data Protection Regulation (GDPR) is directly applicable in the member states, which gives it a stronger position in the

hierarchy of EU norms, whereas the former Data Protection Directive allowed more room for national adaptation with regard to questions such as the publicity principle. The right to data protection is a right protected in the EU Charter of Fundamental Rights, while the Charter does not recognise a general right of access to documents like Nordic constitutions do, which leads to asymmetry between data protection and the right to access, as seen in the *Bavarian Lager* and *Dennekamp II* cases above.¹⁹

On the other hand, GDPR includes – at the request of Finland and Sweden – the specific Article 86 on public access to official documents. According to the article, personal data in official documents “may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data”.²⁰ What the nationally permissible limits are of such reconciliation still remains an open question.

Notes

1. Erkkilä (2012).
2. Pöysti (2007).
3. Pöysti (2007).
4. Grønbech-Jensen (1998).
5. Rossi and Vinagre e Silva (2017).
6. The Charter is legally binding since December 2009.
7. See the cases of *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26–36, 14 April 2009 and *Magyar Helsinki Bizottság v Hungary*, no. 18030/11, 8 November 2016. On the other relevant human rights instruments, see Neuvonen (2017).
8. Warren and Brandeis (1890).
9. For definitions, see Koops et al. (2016).
10. See GDPR Article 4(1)(2) and Article 6.
11. Articles 13–16.
12. De Hert and Gutwirth (2006).
13. Paragraph 93 of the judgment.
14. Paragraph 81.
15. Paragraph 98.
16. Paragraph 77 of *Bavarian Lager*.
17. In *Dennekamp II*, governments of Finland, Sweden were granted leave to intervene in the court process. Both argued for an interpretation allowing broader publicity. These countries intervened also in *Bavarian Lager*, together with Denmark.
 1. Oster (2016).
19. Koillinen (2016).
20. Recital 154 of the GDPR is relevant in the interpretation of this Article.

References

- De Hert, Paul & Gutwirth, Serge (2006). *Privacy, Data Protection and Law Enforcement: Opacity of the Individual and Transparency of Power*, pp. 61–104 in Claes, Erik; Duff Anthony, & Gutwirth, Serge (eds.) *Privacy and the Criminal Law*. Cambridge: Intersentia.
- Erkkilä, Tero (2012). *Government Transparency: Impacts and Unintended Consequences*. Hampshire: Palgrave Macmillan.
- Grønbech-Jensen, Carsten (1998). The Scandinavian Tradition of Open Government and the European Union: Problems of Compatibility? *Journal of European Public Policy* 5(1): 185–199.
- Koillinen, Mikael (2016). Oikeudesta anonyymiin julkisen vallan käyttöön. *Lakimies* 114(1): 26–52.
- Koops, Bert-Jaap; Newell, Bruce Clayton, Timan, Tjerk, Škorvánek, Ivan, Chokrevski, Tom & Galič, Maša (2016). A Typology of Privacy. *University of Pennsylvania Journal of International Law* 38(2): 483–575.
- Neuvonen, Riku (2017). *Oikeus julkiseen tietoon*. Helsinki: Kauppakamari.
- Oster, Jan (2016). Of Money, Poison and Secrets: Balancing Freedom of Information against Data Protection. *European Data Protection Law Review* 2(2): 272–277.
- Pöysti, Tuomas (2007). Scandinavian Idea of Informational Fairness in Law: Encounters of Scandinavian and European Freedom of Information and Copyright Law. *Scandinavian Studies in Law* 50: 221–248.
- Rossi, Leonor & Vinagre e Silva, Patricia (2017). *Public Access to Documents in the EU*. Oxford: Hart Publishing.
- Warren, Samuel D. & Brandeis, Louis D. (1890). The Right to Privacy. *Harvard Law Review* 4(5): 193–220.