THE DANISH SYSTEM OF OPEN FILES IN PUBLIC ADMINISTRATION

BY

NIELS EILSCHOU HOLM

Head of Division,
Danish Ministry of Justice

1. By a statute (no. 280) of June 10, 1970, which entered into force on January 1, 1971, the Danish legislature enacted general rules concerning public access to documents in administrative files. In Norway, almost simultaneously, there was passed closely similar legislation, which entered into force on July 1, 1971. Just as had been the case when the Ombudsman system was introduced in Denmark and Norway some ten to twenty years earlier, Swedish legislation served as the main source of inspiration for innovations in Danish and Norwegian administrative law.

Legislation on public access to official documents is deeply rooted in Swedish constitutional law. The Swedish rules at present governing these questions depend in the main on provisions of 1937 and 1949. But the fundamental principles may be traced back for more than 200 years to the first Act on Freedom of the Press of 1766, and they have been in force in Sweden without interruption since 1812.[1]

In Finnish law, too, the principle of public access to documents is laid down. The present Finnish legislation, which was passed in 1951, has a common ancestry with the Swedish legislation. On a number of points, however, there are important differences between the Finnish and Swedish rules.

The laws on public access to official documents of the four countries are in no way uniform. Even so, there is reason to underline the fact that the Danish and Norwegian acts have done away with what was previously a rather fundamental difference in the public-law systems of the Nordic countries.[2]

With the disappearance of this difference, there exists a uniformity of principles which has formed the basis for an amendment in 1974 of the

[1] On Swedish legislation in this field and its historical foundations, see, e.g., Nils Herlitz, "Publicity of Official Documents in Sweden", *Public Law,* London 1958, pp. 50 ff.

[2] See Nils Herlitz, *Elements of Nordic Public Law,* Stockholm 1969, pp. 196 ff.

In Icelandic law there is no legislation on public access to documents in administrative files, but a Bill modelled on the pattern of the Danish and Norwegian Acts is at present before the legislature.

Outside the Nordic countries, only the United States of America appears to have experience of general legislation on open files. A comparative survery of Scandinavian and American law in this field is given by Stanley V. Anderson, "Public access to government files in Sweden", 21 *A.J.C.L.,* pp. 419 ff. (1973), and by Bertil Wennergren, "Civic information—administrative publicity", 36 *International Review of Administrative Sciences,* pp. 243 ff. (1970).

Treaty of Helsinki of 1962, governing the international cooperation between these countries. Art. 43 of this Treaty, as amended, provides that publicity shall to the greatest possible extent be applied in the cooperation between the Nordic countries. In order to implement this provision, a working party composed of representatives of the Member Governments and of the appropriate organs of the Nordic Council has prepared a set of Draft Regulations providing for public access to documents in the archives of the organs of the Nordic Council.[3] These drafts are at present being considered by the competent organs of the Nordic Council.[4]

2. Immediately after the end of the second world war, there started in Denmark as well as in Norway a general debate on the need for improved protection of the individual against acts of administrative authorities.

This discussion arose out of the fact that the demands on governments for control, regulation, subsidization, and provision of services in an increasing number of fields had made necessary legislative enactments whereby wide discretionary powers were delegated to administrative authorities, powers not only to issue rules and regulations having the force of law, but also to make decisions in individual cases (adjudication, licensing, awards of public health benefits, etc.).

From the point of view of legal principles, this trend inevitably gave rise to serious concern, since the traditional methods of legal control of the exercise of administrative powers seemed to be inadequately equipped to meet this situation.

It is one of the cornerstones of Danish public law—expressed in the so-called principle of legality, *legalitetsprincippet*—that administrative authorities are subordinate to the legislature: an administrative authority may only issue rules and regulations or individual decisions when this is warranted by law, and the contents of such acts must be kept within the limits laid down by law. And under the general provision on judicial review in art. 63 of the Danish Constitution, the ordinary courts of law are given the power to review the decisions of administrative bodies with a view to ensuring that they shall observe this fundamental limitation of their authority.

[3] See *Offentlighetsprinsippets Anvendelse på Nordiske Samarbeidsorganer, Nordisk Utredningsserie* 14/74.

[4] In 1973, a Danish member of the European Parliament, Mr Knud Bro, tabled two written questions to the Commission of the European Communities and to the Council of the European Communities, respectively, on whether there were any plans to introduce rules within the EEC in line with Danish law on public access to administrative records, see *Bulletin of the European Parliament* 1973–74, no. 30/73, pp. 9 f. (Written Question no. 346/73 and no. 347/73). The reply of the Council was noncommittal, see *Official Journal of the European Communities*, no. C 114, December 27, 1973, p. 11. The reply of the Commission, on the other hand, was rather negative in spirit, see *ibid.*, no. C 22, March 7, 1974, p. 12.

This legal guarantee, however, will not be very effective from a practical point of view when the legislature delegates wide discretionary powers to administrative authorities. In cases where the administrative authority concerned observes the limitations which are laid down by statute or which are inherent in general legal principles (particularly the doctrine of *détournement de pouvoir* and the principle of equality before the law), the individual confronted by an administrative act has no means—at least not under the doctrine on the scope of judicial review prevailing until recently[5]—of securing a review by a court of the way in which discretion was exercised by the authority. Such a review might also seem contrary to the intentions of the legislature. By conferring a discretionary power on an administrative authority, the legislature has, one might say, indicated that the discretion should be exercised by that authority, not by the judiciary. This means, however, that the fundamental principle of legality, the rule of law, is attenuated when administrative authorities are empowered by statute to act in vast and important areas with a considerable degree of discretion. And the lack of legal remedies may leave the individual in a state of frustration when confronted by administrative decisions which he considers to be unfair, unjust or unreasonable.

Against this background, one is impelled to raise the question whether new legal guarantees, supplementary to the traditional legal safeguards, should not be designed in order to protect the individual more completely against acts of administrative authorities.

At first glance, the most obvious solution to this problem would seem to be a further development of the system of *subsequent control* of administrative action. And the first measures of reform undertaken in Denmark were, indeed, designed to pursue precisely this aim. Thus, over the years a number of administrative appellate tribunals have been established; the ombudsman system was introduced in 1955, as provided for in the revised Constitution of 1953; and that Constitution also contained a new provision, not yet utilized, under which administrative courts may be set up by statute.

There is, however, a strong case for the view that a satisfactory protection of the individual can be achieved even more effectively by elaborating a system of *preventive control,* i.e. through legislation laying down standards on fair administrative procedures: legislation on the rule against bias (*nemo judex in causa sua*) would aim at counteracting

[5] A critical analysis of traditional Danish legal doctrine on the scope of judicial review of administrative action is presented by Ole Krarup, "Judicial review of administrative action in Denmark", 33 *International Review of Administrative Sciences*, pp. 9 ff. (1967), and *idem*, "Judicial control of administrative powers", 15 *Sc.St.L.*, pp. 143 ff. (1971).

administrative decisions motivated by improper considerations. Legislative rules on the rights of parties to a hearing before an administrative decision is arrived at (*audiatur et altera pars*) would provide for a better understanding, and thereby a greater possibility for a party to accept the outcome of an administrative proceeding, and they would also guarantee a fuller presentation of opposing views on matters at issue before the authority. An obligation for administrative authorities to give reasons for their decisions would tend to make them more thorough and complete in their examination of pending cases; furthermore, a party who has received an adverse decision is more likely to accept it when the decision is accompanied by a statement of findings of fact and reasons for the decision, or at any rate he is thereby afforded a better basis for his considerations as to whether he should appeal the decision to a superior administrative authority, lodge a complaint with the Ombudsman, or seek to bring about a judicial review of the decision.

In this context the Act on Public Access to Documents in Administrative Files may be regarded as an element in such a system of preventive control. This is particularly so as regards those rules of the Act which govern the rights of parties to an administrative proceeding. "But organizations which aim at representing the interests of small or large groups of the population likewise have a legitimate interest in obtaining knowledge of how particular kinds of cases are handled by administrative authorities. And representatives of the mass media, in particular, obviously have an interest in obtaining a first-hand knowledge of the conditions within particular fields of public administration—whether they call for further examination or give rise to criticism—in order that the public debate on such issues may be conducted on a proper and well-founded basis."[6] Furthermore, the knowledge that the public has access to the documents may very well prove to enhance the care which administrative authorities and individual civil servants generally take when handling pending cases, regardless of whether access to the documents will actually be requested in the case at issue. In this way, legislation on public access to documents acts as a prophylactic against maladministration.

But legislation on public access to documents is to a considerable extent based upon considerations of a much wider scope. It may be regarded as a further development of the system of government by representation: "Public administration is a public function which concerns all members of society; and as it is the people who, through elections or otherwise, have the decisive power in central and local government, the people should

[6] *Report of the Committee on Publicity* (*infra*, section 4) at pp. 43 f.

have to the largest possible extent the means of obtaining knowledge of what is going on in central and local government, and of discussing and taking a stand on issues of public interest. . . . Open files in public administration would assist in creating and maintaining an interest of the citizenry in matters of public interest. Such an effect is particularly desirable in the modern complex society at a time when otherwise a general indifference towards politics might well develop. Legislation on public access to documents will tend to provoke public debate on matters of general concern just as it affords a firm basis for popular reactions to legislative and administrative measures and practices."[7]

Under the assumptions of this philosophy, public access to documents in administrative files may be regarded as an elaboration of freedom of expression and freedom of the press. It should be noted that art. 19 of the United Nations Covenant on Civil and Political Rights when defining freedom of expression expressly provides that this includes freedom not only to receive and impart but also to seek information. This latter item is not included in art. 10 (1) of the European Convention on Human Rights. However, the Committee of Ministers of the Council of Europe has decided, in response to a Recommendation (no. 582/1970) of the Consultative Assembly, to instruct the European Committee of Experts on Human Rights to consider and make recommendations on, *inter alia,* a proposal for "the extension of the right to freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (which is included in Article 19 (2) of the United Nations Covenant on Civil and Political Rights); there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations".

3. In Denmark, provisions on publicity form a fundamental element in the procedural rules governing the work of the legislature and the judiciary. Thus, the first Danish democratic Constitution of 1849 provided that the two chambers of the Legislative Assembly (*Rigsdagen*)[8] should meet in public, and under the Administration of Justice Act, which entered into force in 1919, the sittings of the law courts must as a general rule be public.

In most areas of public administration, publicity in the sense of public sessions or meetings would not be feasible, for the simple reason that most

[7] *Ibid.* at p. 42.

[8] Under the Constitution of 1953, now in force, the Legislative Assembly, *Folketinget,* is unicameral. The provision on public meetings (now art. 49 of the 1953 Constitution) does not cover meetings of parliamentary committees.

administrative decisions are taken without a preceding oral hearing or conference. Consequently, rules on publicity must be given a different form, designed to meet the peculiarities of the administrative process, if publicity is to be adopted as a general principle governing the executive as well as the other branches of government.

As mentioned previously, Swedish legislation on public access to documents has served as a source of inspiration for such an adaptation of the principle of publicity to the administrative process. However, for a long time the Swedish system appears to have been completely unnoticed in Denmark. Half a century ago ". . . hardly anybody in Denmark had the slightest idea that in Sweden everyone may enter a public office and peruse the files".[9]

Interest in these matters was not aroused until the question of more publicity in public administration was entered as an item on the agenda of the 4th General Meeting of the Nordic Association for Public Administration (*Nordisk Administrativt Forbund*) in Helsinki in 1929. The subject was introduced by the late Professor C. A. Reuterskiöld of Sweden, and among the Danish participants in the subsequent discussion were two prominent civil servants who expressed themselves in favour of more openness in public administration.[1]

This discussion left its mark on the first edition of what is still regarded as the basic textbook on Danish administrative law, namely Poul Andersen, *Dansk Forvaltningsret* (1st ed. 1936, 5th ed. Copenhagen 1965). In the first edition, Poul Andersen, having briefly outlined the Swedish rules on public access to documents, made the following remark, which was repeated in the second and third editions: ". . . it was worthy of consideration whether the Danish legislature should not in limited fields provide for more publicity in public administration on the pattern of the Swedish system".[2]

In the post-war debate on the general need for better protection of the individual against acts of administrative authorities, attention was also paid to the question of legislation on access of the public to documents in administrative files.

Thus, in April 1945, a group of civil servants, closely connected with the underground movement, published a pamphlet entitled *Tjenestemaendene og Demokratiet* (The Civil Servants and Democracy), in which they called *inter alia* for consideration of ways and means of introducing legislation on

[9] Comment by Professor Poul Andersen, *op.cit. infra*, note 8 at p. 234.

[1] The proceedings of the Meeting are published in *Nordisk Administrativt Tidsskrift* 1929, pp. 153 ff.

[2] *Op.cit.*, p. 267 footnote 108.

public access to documents along the lines of the Swedish system. In his book *Hvorfor Demokrati?* (1946)[3] and in a pamphlet entitled *Grundlovsrevision–Hvorfor–Hvorledes?* (Revising the Constitution–Why–How?), 1948, Professor Alf Ross expressed himself in favour of more publicity in public administration. In a paper on problems currently confronting public administration, published in a volume issued by a union of higher civil servants in celebration of the centenary of the establishment of the ministerial departments in their modern form (1948), the idea received support in a somewhat different context.[4]

Publicity in the administration as a means of safeguarding the interests of the individual was also dealt with at a number of Nordic conferences on administrative law reform, such as the 9th General Meeting of the Nordic Association for Public Administration in Oslo (1949),[5] the 27th meeting of Nordic Parliamentary Delegates in Helsinki (1949),[6] the 10th Nordic Commercial Conference in Oslo (1950),[7] and last, but certainly not least, the 19th Conference of Nordic Lawyers in Stockholm (1951).[8]

However, as early as 1946 the question in Denmark had been taken up for consideration at the official level. That year a committee, *Forvaltningskommissionen,* was appointed by the Government to make an overall review of the executive branch of government. In its terms of reference the committee was instructed *inter alia* to study the question of the feasibility of introducing in some form or other the principle of publicity in public administration.

The committee reported on this question in 1950.[9] In this report a majority, eight members against a minority of seven, expressed the view "... that the Danish system of parliamentary government, with its inherent responsibility before the Folketing of the appropriate Minister for any administrative decision, made a general extension of the right of the public to obtain knowledge of administrative matters unnecessary, even undesirable, and that the introduction of such a system would entail

[3] *Op.cit.*, pp. 333 ff. The paragraphs dealing with this subject are not retained in the English edition *Why Democracy?*, Cambridge, Mass. 1952.

[4] Hans P. Gøtrik, "Aktuelle administrationsproblemer", *Centraladministrationen 1848–1948,* Copenhagen 1948, pp. 279 ff., in particular pp. 331 ff.

[5] The proceedings of the Meeting are published in *Nordisk Administrativt Tidsskrift* 1949, pp. 243 ff.

[6] The proceedings are published in *Berättelse över det 27. Nordiska Interparlamentariska Delegeradernötet 1949,* Helsinki 1950, see pp. 27 ff.

[7] The proceedings are published in *Beretning om det 10. Nordiske Handelsmøte* 1950, Oslo 1951, see pp. 72 ff.

[8] The proceedings are published in *Förhandlingarna å det Nittonde Nordiska Juristmötet i Stockholm,* Stockholm 1952, see pp. 218 ff.

[9] 7. *Betaenkning fra Forvaltningskommissionen af 1946,* Copenhagen 1950, pp. 19 ff. The Committee did not cover local government. The quotations in the text are from the conclusions of the Committee as regards this question at p. 28.

definite disadvantages and have only doubtful advantages". The majority did, however, add that "... it would seem that a satisfactory solution might be found by revising the Act of 1866 (subject to a number of limitations, this Act provided for access of parties to an administrative proceeding to the documents in the file of their own case) in such a way that an applicant whose application has been refused would be given the right to request information on the particular circumstances of apparently corresponding cases, including cases in which the application had been granted. By this means, an unsuccessful applicant would be able to acquaint himself with the administrative authorities' manner of handling applications, and with administrative practices governing the issuance of licences, etc., and would thus be in a position to judge whether arbitrariness had been committed in the decision of matters which should be governed by uniform considerations." The minority recommended that the whole question be submitted to a more thorough examination by a broadly composed committee. Professor Poul Andersen, who had been appointed counsel to the committee, joined with the minority.

Also in 1946 a committee, *Forfatningskommissionen,* was appointed to review the Danish Constitution. A subcommittee of this body studied the matter of publicity in public administration.[1] In its recommendation the subcommittee followed rather closely the views expressed in the report of the Committee on the Executive Branch of Government. The subcommittee found it "... desirable that this question be submitted to a thorough examination, which might also include the question of a revision of the Act of February 2, 1866, on Communication of Documents to Applicants and Complainants, as well as the question of requiring administrative authorities to give reasons for their decisions".[2]

However, several years were to elapse before these recommendations were acted upon. But on February 25, 1956, the Prime Minister appointed a committee to carry out the examination previously called for.[3]

[1] See the report of the Committee, *Betænkning afgivet af Forfatningskommissionen af 1946,* Copenhagen 1953, p. 7. In the autumn of 1949, the Swedish professor Nils Herlitz appeared before the full Committee, making a statement on the Swedish ombudsman system as well as on the Swedish principle of publicity of official documents, see *ibid.,* pp. 193 ff.

[2] The recommendation of the subcommittee has not been published, but the conclusions are reprinted in the *Report of the Committee on Publicity* (*infra,* section 4) at p. 41.

[3] The question of requiring administrative authorities to give reasons for their decisions was, however, not included in the terms of reference of the Committee on Publicity. This question was not submitted to a thorough examination until the autumn of 1963, when the Ministry of Justice appointed a committee to study the matter. The committee reported in 1972, *Betænkning om Begrundelse af Forvaltningsafgørelser og Administrativ Rekurs* (no. 657/1972). This report is at present under consideration within the Ministry of Justice in the broader context of drafting a Bill for an Administrative Procedure Act, see *infra,* section 8.

4. The Committee on Publicity in Public Administration, *Offentligheds-kommissionen,* was chaired by a Supreme Court Justice and composed of representatives of the major political parties, central and local government services, the mass media, the Bar Association, and the association of higher civil servants. Among the members were also the Ombudsman, Professor Stephan Hurwitz, and Professor Poul Andersen.

The terms of reference of the Committee were ". . . to consider and make recommendations on the question whether, and if so, to what extent and in what manner, publicity may be introduced in central and local government, including the question of a revision of the Act of February 2, 1866, on Communication of Documents to Applicants and Complainants".

The Committee submitted its report in December 1962, *Betænkning om offentlighed i forvaltningen* (no. 325/1963).

Once again, opinions on the principal question were evenly divided. A majority of 11 members found that the reasons put forward in favour of introducing such a sweeping reform were not persuasive, and that the disadvantages inherent in adopting and administering such a system outweighed the predicted advantages. A minority of nine members found that the arguments for introducing the principle of public access to documents in administrative files were of such weight that the hesitations voiced by the majority would have to yield. One member of the minority, however, expressed the view that the most expedient solution would be to pass, as a first step, legislation entitling a party to an administrative proceeding to request access to the documents pertaining to that particular case (i.e. general rules on discovery in administrative proceedings); then, at a later stage, there should be a reconsideration, on the basis of experience gained under such legislation, of the question of giving the public at large access to documents in administrative files. To provide for the contingency that the legislature might follow the advice of the minority, the report contained a Draft Bill, elaborated by the Committee as a whole, on Public Access to Documents in Administrative Files.

As regards the revision of the Act of 1866, the Committee unanimously considered the Act to be deficient in several respects. Thus under the Act only applicants and persons who had filed a complaint with an administrative authority, not other parties interested in the outcome of an administrative proceeding, were entitled to acquaint themselves with the documents concerning that particular case; and the right of access did not cover all the materials on which the decision was based. Furthermore, the party was entitled to peruse the file only *after* a decision had been made, and only if the decision had been against him. Accordingly, the Committee also produced a Draft Bill on Access of Parties to Documents in Administrative Files.

5. The Government followed the advice of the majority. A Bill on Access of Parties to Documents in Administrative Files was submitted to the Folketing. In most respects this Bill followed the lines of the Committee Draft. A statute was adopted (Act no. 141) on May 13, 1964, and entered into force on October 1 of that year.

When introducing this Bill in the Folketing, the Minister of Justice expressed the view that the recommendations of the minority of the Committee on Publicity deserved consideration, and he pointed out, following the suggestion by one member of the minority, that experience gained under the Bill would provide a better basis for such further considerations. The parliamentary committee appointed to examine the Bill pursued the Minister of Justice's recommendation. On the committee's proposal, a provision was inserted, providing that the Act should be reconsidered in the parliamentary session 1969/1970, at the latest.

Under the Act of 1964, applicants and complainants, as well as any other party to an administrative proceeding, were as a general rule entitled—at any stage during the proceedings or after a decision had been made—to request access to the documents relating to that matter. If the request was put forward while the case was under consideration, a decision on the case should be postponed until the party had had the opportunity to study the documents. And a party might at any stage of the proceedings request (further) postponement with a view to allowing him to submit his observations on the matter, orally or in writing.

These provisions are now—with minor amendments which are irrelevant in this context—included in the Act of 1970 on Public Access to Documents in Administrative Files, cf. in particular ch. 2 of that Act. The Act of 1964 has consequently been repealed.

6. In compliance with the revision clause of the Act of 1964, the Government in the autumn of 1969 submitted to the Folketing a Bill on Public Access to Documents in Administrative Files.[4] The Bill was drafted on the joint basis of the Act of 1964 and the Draft Bill contained in the Committee Report of 1963. With a few minor amendments, the Bill was

[4] In the autumn of 1967, members of the Conservative Party, the Liberal Party, and the Radical Liberal Party, these parties then being in opposition, jointly submitted a Private Members' Bill on Public Access to Documents in Administrative Files, closely similar to the Committee Draft of 1963. This Bill lapsed, like other unfinished business before the Folketing, when a General Election was called in January 1968. At the election the three parties in question won a majority of the seats in the Folketing and formed a coalition government. The Government Bill submitted to the Folketing in 1969 was prepared by this government. The question did not, however, give rise to much political controversy, and the Bill was adopted unanimously by the Folketing, with some minor amendments.

adopted (Act no. 280 of June 10, 1970), and it entered into force on January 1, 1971.[5]

Under sec. 1 of this Act, everyone—regardless of whether he is a citizen of or resident in Denmark—is entitled, upon request, to examine documents in cases which are or have been under consideration by an administrative authority.

The Act covers administrative authorities only. Thus the Folketing and its committees and other organs (e.g. the Ombudsman) are exempted from the provisions of the Act, as is the judiciary.[6] The exemption as regards the judiciary covers only courts of law *strictu sensu.* Thus the administrative tribunals—there are a great number of these—are covered by the Act, and this is, of course, also the case regarding government departments, directorates, the various kinds of administrative boards, and central as well as local government bodies.

Access may be requested to documents pertaining to any and all matters which are being or have been considered or otherwise handled by an administrative authority, regardless of whether the documents serve or have served as the basis for the exercise of administrative, quasi-judicial or quasi-legislative functions of the administrative authority in question, concern central or local government contracts, or activities of a purely practical nature. However, a recent judgment of the Supreme Court has called into question the scope of the coverage of the Act in this respect. The Court held that the Act should not be interpreted to cover relations between a patient and a public hospital where the patient had been treated; consequently the patient could not under the Act request copies of the case records, pertaining to this treatment, held by the hospital.

Sec. 6, subsec. 1, expressly exempts some categories of cases from the coverage of the Act, among them cases handled by the public prosecution, and cases concerning appointments and promotions in the civil and military services.[7] Other categories may, under conditions specified in sec. 2, subsec. 4, be excepted by administrative regulation; up to now, however, this latter provision has only once been utilized. An exception was made for documents pertaining to certain government contracts.

[5] The text of the Act is appended to this paper.

Shortly before the Act entered into force, the Ministry of Justice issued a Circular Letter to all administrative authorities on the application of the Act, *Justitsministeriets Vejledning om Lov om Offentlighed i Forvaltningen,* no. 279 of November 10, 1970.

Eilschou Holm, *Offentlighedsloven,* Copenhagen 1971, is a full-length commentary on the Act.

[6] The Swedish legislation covers the legislature and the judiciary as well. In principle this also holds true of the Finnish Act. The Norwegian Act—like the Danish—covers only administrative authorities.

[7] However, under sec. 10, subsec. 2, of the Act, an applicant who so requests is entitled to be apprised of documents, etc., concerning himself.

Under sec. 3, the right of access includes all documents relating to the matter in question, including copies of communications sent by the authority concerned when these may be presumed to have reached the addressee.

In the daily work of administrative authorities, it frequently happens that oral information, supplementary to that contained in the file of a particular case, is received, indeed solicited. This often facilitates a more speedy and flexible processing of pending cases than would be possible if all information were required to be submitted in writing, and it would be unfortunate if the Act were to exclude or seriously to impede such informal procedures. On the other hand, it is obviously important to make sure that the Act is not thereby limited or even evaded. It is therefore provided (sec. 4) that, if an authority receives oral information of considerable importance for a decision, it must record this information so that it can be available in accordance with the rules laid down in the Act.[8]

Of course, the principle of public access to documents cannot be adopted without any limitations, and the Act contains a number of exceptions to the general rule, outlined above, on what documents are open for inspection.

Thus, sec. 5 enumerates certain types of documents, in particular various kinds of internal working documents, which are not accessible under the Act. And sec. 7 exempts documents containing information covered by specific statutory provisions on secrecy, binding on persons engaged in public service or activities.

Sec. 2 contains a number of other exceptions from the general rule. One of these exceptions covers, out of consideration for the right of the individual to have his privacy respected, information relating to a private individual's personal or economic circumstances; and another provision makes exception for information on trade secrets, etc., but only to the extent necessary to protect the economic interests of the individual or legal person concerned. Other provisions warrant restrictions in particular cases, such as when required by consideration for the security of the state or for its international relations, *or* in connection with the execution of official activities for inspection, planning, control, or other supervision, or to protect the legitimate economic interest of central and local government, *or* if required in order to protect ". . . other interests where the

[8] On this point the Danish Act appears to go further than Norwegian and Swedish law on *public* access to documents in administrative files. However, as regards the rights of *parties* to an administrative proceeding to obtain access to documents pertaining to their own case, a somewhat similar rule prevails in Norway and Sweden by virtue of the Administrative Procedure Acts of the two countries.

special circumstances of the matter make secrecy necessary". This latter general clause has been used only sparingly.[9] If the contents of a document come only in part under one of the exceptions laid down in sec. 2, the person requesting access to the file is to be allowed to examine the remaining parts of the document.[1]

A person who has requested access to the documents in a file may as a general rule obtain transcripts or photocopies of any of the documents. Under an administrative regulation, issued under sec. 8, subsec. 3, of the Act, a certain fee is charged for this service. However, a party to a particular case may receive copies of the documents free of charge.

A request to examine the documents of a particular case must be put before the administrative authority which under the law is authorized to decide the substantive issues of that case. If a request is refused, the decision may upon appeal be taken to a superior administrative authority, if there is one, or submitted to the Ombudsman for consideration, or brought before the courts for judicial review, in accordance with the ordinary rules on these legal remedies.

Under the Swedish legislation, the contents of a document exempted from the general rules on access must be kept secret. By contrast, the Danish Act on Public Access to Documents in Administrative Files does not regulate the question of which matters should be kept secret. The Danish Act restricts itself to a regulation of the extent to which administrative authorities are obliged to open their archives, and administrative authorities are free to make documents available to members of the public, even if not required to do so under the Act. This has happened quite often in administrative practice, e.g. as regards documents which are not accessible under the Act, because they were filed before the Act entered into force, cf. sec. 13, subsec. 2, of the Act. This power to afford more

[9] While the exemptions in sec. 5 for various kinds of internal working documents also apply in regard to parties to an administrative proceeding, the provisions of sec. 2 do not, cf. sec. 10, subsec. 1, of the Act. Under the latter provision a request from a party to the proceeding may only be rejected to the extent that it is found that the party's interest in using knowledge of the documents in the matter for the safeguarding of his interests should be subordinated to vital considerations involving official or private interests. See also sec. 10, subsec. 3, which makes sec. 7 of the Act inapplicable when a request for access is put forward by a party to the proceeding.

[1] As pointed out by Bertil Wennergren, "Civic information—administrative publicity", 36 *International Review of Administrative Sciences,* pp. 243 ff. (1970), at p. 248, there is, as a matter of drafting technique, theoretically a choice between the general-clause technique and the technique of enumeration. The Nordic Acts all use techniques that include elements of both. However, as appears from the foregoing and from a study of the text of the Act, appended to this paper, the emphasis in the Danish Act is on the former alternative. By way of contrast, it may be mentioned that the very comprehensive body of regulations governing exceptions from the general rule in Swedish law contains a catalogue with over a hundred items covering different categories of documents.

publicity than required by the Act is discretionary, and it is limited by a number of provisions in other legislation on secrecy binding persons engaged in public service and activities.

In another respect as well, the Act of 1970 contains only a minimum standard. Before the Act, it was a generally prevailing practice for administrative authorities, when so requested, to give interested parties as well as journalists and others oral information on matters which were or had been under consideration by that authority. The Act, of course, does not impose upon administrative authorities a duty to extend this service, but it certainly means that as a general rule an administrative authority should not hesitate to give information over the telephone, when such information is contained in documents accessible to the public at large under the Act. In accordance with this view, the Ministry of Justice in a Circular Letter to all administrative authorities, issued shortly before the Act entered into force, pointed out that an administrative authority, when receiving requests—particularly from representatives of the mass media—for oral information on pending or finished matters, should consider this means of a more flexible implementation of the Act.

Finally, it should be mentioned that the Act only lays down under what circumstances a member of the public may obtain access to documents in administrative files, and does not regulate the uses the public may make of information obtained under the Act. The philosophy underlying the Act does, however, imply that everybody should be free to publish such information, and the silence of the Act on this point intimates that this freedom is limited only by particular statutory provisions in other legislation to this effect. In actual practice, the most important—albeit not the only—example of such limitations is the provisions of the Penal Code on the protection of privacy.

7. When the Act on Public Access to Documents in Administrative Files was passed in 1970, there was general agreement that its predecessor, the Act of 1964, had not caused any difficulty in administrative practice. But it was also the general feeling that the Act had not in fact been utilized to the extent envisaged in 1964, and that the main reason for this was that the public had been insufficiently informed of their rights under the Act.

From the point of view of principles, this lack of public awareness of the provisions of the Act of 1964 was unsatisfactory. The Act aimed at enhancing the protection of the individual against acts of administrative authorities, and in order to fulfil this purpose it should be felt by the man in the street as an element in his general conception of justice. Just as any Danish citizen, at least broadly speaking, knows that he may lodge a

complaint with the Ombudsman, everybody should also be familiar with his right to examine the documents underlying administrative decisions likely to encroach on his interests.

To familiarize the Danish citizen with this right, the Ministry of Justice put advertisements in a great number of newspapers just before and after January 1, 1971, when the new Act entered into force. These advertisements called attention to the new piece of legislation, and in particular to its provisions on the rights of parties to an administrative proceeding, taken over from the Act of 1964. These provisions were also the subject of a number of radio broadcasts at the same period, examining and illustrating by way of concrete examples the uses which might be made of them. And in the Circular Letter from the Ministry of Justice mentioned above, it was emphasized that administrative authorities should, whenever appropriate, inform and advise members of the public—parties as well as other interested persons, including representatives of the press—of the contents of the new Act.

It is, of course, difficult to prove the effects of such measures. But the fact is that the provisions of the Act on the rights of parties to an administrative proceeding are now utilized to a considerably greater extent than was the case under the Act of 1964, albeit not to the extent one might wish for.

As regards the provisions on public access to documents in administrative files, the same pattern as that experienced with the Act of 1964 has emerged: the provisions have not caused difficulties, mainly owing to the fact that they are only sparingly utilized. However, this does not mean that the Act has had no impact on the administrative process.

The Act aimed at bringing about a change of attitude on the part of administrative authorities, to make civil servants more minded for openness, for better relations with representatives of the mass media, and for accepting the public's right to know what is going on in central and local government. In this respect, the Act has undoubtedly provided a firmer basis for the more informal seeking of information by journalists, a technique extensively employed even previous to the Act. Before the enactment of the new provisions, individual civil servants, in particular the more junior ones, might often be in doubt as to the scope of their obligation to keep matters secret. Now, as mentioned before, the civil servant need not hesitate when requested to give information, orally or over the telephone, which is contained in documents accessible to the public at large under the Act. Information supplied orally also tends to be more accurate and complete than before the Act, since the very fact that the receiver of such information may at any time choose to check the

accuracy and completeness of the information supplied will result in greater care in the handling of such informal requests.

Furthermore, there is no doubt that the Act and the public debate preceding and following its adoption have contributed to bringing about a number of extremely interesting experiments in providing better information and in increasing the participation by the population in the preparatory stages of administrative decisions. The experiments have mainly been at the local level and have concerned matters of town and country planning and environmental protection.

On the whole, however, the fact remains that the provisions of the Act on *public* access to documents in administrative files have been utilized only sparingly in practice. The explanation for this is not—as was the case regarding the Act of 1964—ignorance of these provisions. Actually, the principal beneficiaries of these provisions are the representatives of the mass media, and journalists who cover administrative matters should be presumed to know of the Act. At least part of the explanation is that journalists prefer the more informal means of gathering information, improved indirectly, as mentioned above, by virtue of the Act. In most cases they want a particular piece of information—and some official or semi-official oral comments—on a matter, and such pieces are more easily obtained in this way than by the more tedious and time-consuming perusal of the complete file of the case.

However, the main reason why so little use has been made of the Act in all probability lies within the Act itself.

Thus, under sec. 1, subsec. 2, of the Act, a request for access to examine documents must specify the case to which the documents pertain. And under sec. 3, subsec. 2, the right of access includes entries in journals, registers, and other lists of documents kept by the administrative authority, but only entries relating to cases thus specified. The effect of these provisions is that the Act does not give access to a perusal of the bulk of incoming and outgoing mail, nor does it entitle journalists or others to carry out "fishing expeditions" in the journals or registers of administrative authorities. An administrative authority is not obliged under the Act to comply with a request to examine all cases of a particular kind, or all cases registered over a certain period of time. Those who wish to avail themselves of their rights under the Act must specify the case or cases the documents of which they want to examine. The provisions mentioned above in fact imply that interested individuals must obtain knowledge of the existence of such cases before addressing the administrative authority in question.

On this point the Danish Act differs from the Norwegian as well as from

the Swedish legislation. Under both of the latter statutes, the journals or registers of all incoming mail kept by the authorities covered by the acts are generally open for inspection.

This difference has been greatly increased by certain trends in Swedish administrative practice. Thus, a number of central government authorities in Stockholm have established a general practice under which incoming letters—and in some cases copies of outgoing ones as well—are exhibited daily for public inspection, usually from 10 a.m. to 3 p.m., after the registrar has sorted out documents excepted from publicity, but before the mail is distributed to the various divisions, sections, etc., for action. The piles of documents are placed in special anterooms, where visitors may inspect the documents; in actual practice a systematic inspection is carried out by a private news agency, *Tidningarnas Telegrambyrå*, which on the basis of reports prepared by its staff distributes the material to the press enterprises associated with the agency. However, as already indicated, this is not a general practice; it covers in the main only the major departments and directorates of the central government in Stockholm, but not any local government authority.

The difference between Danish law and Norwegian and Swedish legislation was, of course, examined and considered at great length in the report of the Committee on Publicity (1963), when preparing the Danish Bill on Public Access to Documents in Administrative Files, and in the parliamentary debates on that Bill.[2] The reasons for preferring the more limited Danish version were mainly of a practical and technical nature. The traditional system of registering incoming and outgoing mail by Danish administrative authorities differs considerably from that prevailing in Norway and Sweden and does not readily lend itself to "fishing expeditions" aimed at obtaining knowledge of what cases are pending before administrative authorities. Furthermore, the very advanced Swedish practice outlined above, which has been adopted by some central government bodies in Stockholm, would seem to require a much more elaborate and detailed catalogue of exceptions than that envisaged by the Committee Draft,[3] and it was thought that the compiling of such a catalogue would lead to almost insurmountable difficulties, since the drafters could not fall back on any previous experience.

The parliamentary committee appointed to examine the Bill agreed that it would be most expedient to make a start with the somewhat limited

[2] Thus a delegation from the parliamentary committee appointed to examine the Government Bill visited Stockholm in order to obtain a first-hand impression of Swedish experience in this field.

[3] See *supra*, p. 167, note 1.

version of the principle of public access to documents proposed in the Bill. However, an amendment to the Bill provided that this question, among others, should be reconsidered in the 1974/75 parliamentary session on the basis of experience gained under the Act. By an amendment of 1975 the revision was postponed until 1976/77.

In order to provide an appropriate basis for such a reconsideration of the Act in general, the Government appointed in 1973 a new committee to consider and make recommendations on amendments to the Act. One item in the terms of reference of this committee, and probably the most important one, is precisely the question whether the Danish Act should on this point follow the Swedish (and Norwegian) legislation more closely. The Committee is expected to report in 1975.

8. The Act of 1970 on Public Access to Documents in Administrative Files, and in particular its predecessor, the Act of 1964, represent the first steps in Danish law to enhance the protection of the individual against acts of administrative authorities by laying down some general standards for fair administrative procedures.

In this general field Danish law is somewhat deficient as compared with its legal counterparts in Norway and Sweden, where Administrative Procedure Acts have been enacted in recent years, entering into force in 1971 and 1972, respectively.[4] However, there is under way a development in Danish law which in all probability will diminish this difference. In 1972, members of the Conservative Party, then in opposition, submitted in the Folketing a Private Members' Proposal, requesting the Government to prepare a Bill for an Administrative Procedure Act. During the parliamentary debates on this proposal, the Minister of Justice declared that the Ministry of Justice, in conjunction with the work to be undertaken by the new Committee on Revision of the Act of 1970, would carry out an examination of most of the items included in the proposal. He intended in connection with a coming revision of the Act of 1970 to have included in that Act general provisions, *inter alia* on impartiality, the right to a hearing in administrative proceedings, and the requirement that administrative authorities should give reasons for their decisions.

This is, certainly, an undertaking of considerable proportions, but experience gained under the two acts on access to documents may, it is hoped, prove to assist the accomplishment of this task in various ways.

In this context it will suffice to point to the clarifications, obtained in the

[4] On the Norwegian Administrative Procedure Act, see J. A. Farmer, "The Norwegian Administration Acts of 1967 and 1969", 39 *Nordisk Tidsskrift for International Ret* (*Acta scandinavica juris gentium*), pp. 93 ff. (1969).

course of implementing the two acts in administrative practice, of a number of concepts on which the structure of these acts is based. A criticism that is frequently levelled is that the texts of the acts, by utilizing in key provisions vague wordings and imprecise concepts, give too much freedom in the application of the acts to the very administrative authorities which they were intended to supervise. The fears underlying this criticism have, however, not materialized. The provisions of the acts have been applied and interpreted in a very liberal spirit, fortified by opinions delivered by the Ombudsman on individual cases. This considerable body of case law, clarifying a number of concepts which are fundamental to any statutory regulation of administrative procedures, constitutes an important contribution to Danish administrative law.

APPENDIX

The Danish Act on Public Access to Documents in Administrative Files[1]

Chapter 1
Public access to documents in administrative files

Section 1

1. Everyone shall have the right to request that he may examine documents in matters which are or have been under consideration by the public administration.
2. The request shall specify the matter regarding which the person concerned wishes to examine the documents.

Section 2

1. The right of access to information shall not include documents containing:

(1) information relating to a private individual's personal or economic circumstances;
(2) information relating to technical devices or processes or to work or business conditions, in so far as it is of considerable economic importance for the person or activity with which the information is concerned that the request should not be granted.

2. Furthermore, the rules laid down in section 1 shall not apply if it is found that the right to examine the documents in the matter should be subordinated to important considerations involving:

[1] Act no. 280 of June 10, 1970.

(1) national security, defence of the realm and relations with foreign powers or international institutions;
(2) the execution of official activities for supervision, control or planning, or of measures contemplated in regard to tax and excise legislation;
(3) public economic interests, including the carrying out of business activities of public authorities;
(4) the protection of other interests where the special circumstances of the matter make secrecy necessary.

3. If a document comes only in part under the rules laid down in subsections 1 and 2, the person concerned shall be allowed to examine the remaining parts of the document.
4. The competent Minister may decide that certain types of matters or kinds of documents for which the rules laid down in subsections 1 and 2 would normally lead to refusal of a request under section 1 shall be exempted from the rules laid down in section 1.

Section 3

The right of access to information, with the exceptions listed in sections 2 and 5, includes:

(1) all documents relating to the matter in question, including copies of communications sent by the authority concerned when these may be presumed to have reached the addressee;
(2) entries in journals, registers and other lists, concerning the documents on the matter in question.

Section 4

If an authority receives factual information of considerable importance for a decision in a matter orally, this information shall be recorded in such a way that it can be made available in accordance with the rules laid down in this Act.

Section 5

The right of access to information shall not include:

(1) minutes of meetings of the Council of State, records of meetings between Ministers and documents drawn up by an authority for use at such meetings;
(2) letters exchanged by ministries with regard to legislation, including appropriation acts;
(3) an authority's working materials for internal use, e.g. memoranda, drafts, outlines, proposals and plans;
(4) letters exchanged within the same authority;
(5) letters exchanged between a local government council and its departments, committees or other administrative branches or internally between these branches;
(6) documents concerning questions of foreign policy or foreign trade;

(7) letters exchanged between authorities and experts for use in court proceedings or when considering whether such proceedings should be instituted;
(8) material furnished as a basis for drawing up official statistics.

Section 6

1. The right of access to information shall not include matters involving the prosecution of criminal offences or matters relating to appointment or promotion in public service.
2. As far as legislation, including appropriation acts, is concerned, a request under section 1 shall only be granted when the Bill has been introduced in Parliament.

Section 7

The obligation to make information available shall be limited by the statutory provisions on secrecy binding persons engaged in public service or activities. This shall not apply, however, with regard to the general obligation to observe secrecy under the Penal Code, the Public Servants Act and regulations concerning local government officials.

Section 8

1. Questions relating to access to information shall be decided by the authority which is otherwise competent to decide on the matter in question, unless the Minister concerned stipulates otherwise.
2. The authority concerned shall decide, with due regard to the dispatch of the matter in question, whether a request under section 1 can be granted immediately or at some later date and whether the person who has made the request should be given access to the documents by allowing him to examine them on the spot or by providing him with a copy or photocopy of them.
3. The Minister of Justice may determine rules with regard to payment for copies or photocopies.

Section 9

The competent Minister may decide that information concerning specified documents can be made available after a certain number of years, regardless of the rules laid down in this chapter.

Chapter 2
Special rules applicable to parties in an administrative matter

Section 10

1. Applicants, complainants and other parties in a matter which is or has been under consideration by the public administration shall have the right to

request that they may examine documents relating to that matter, regardless of the rules laid down in section 2. This, however, does not apply when it is found that the party's interest in using knowledge of the documents in the matter for the safeguard of his interests should be subordinated to vital considerations involving official or private interests. If such considerations only apply to part of the document, the party shall be allowed to examine the remaining parts of the document.

2. Any person who is applying or has applied for appointment or promotion in public service may, regardless of the rules laid down in section 6, subsection 1, request to examine the documents etc., relating to his situation.

3. Rules on secrecy binding persons engaged in public service or activities do not affect their obligation to make information available to a party in a matter.

4. If it is important in order to safeguard a party's interests that he should receive a copy or photocopy of the documents in the matter, his request for such copies shall be granted.

Section 11

1. If, while a matter is under consideration, a party requests to examine the documents concerned and this request must be granted under this Act, a decision on the matter shall be postponed until the party has been given the opportunity to study the documents.

2. This shall not apply, however, if postponement would involve exceeding a statutory time-limit for the administrative decision concerned or if it is otherwise found that the party's interest in a decision on the matter being postponed should be subordinated to important considerations involving official or private interests which are opposed to such postponement.

Section 12

1. A party to a matter under consideration by the public administration may at any stage in the proceedings request that a decision on the matter be postponed until he has submitted his observations on the matter.

2. The authority may determine a time-limit for the submission of such observations.

3. The rules laid down in section 11, subsection 2, shall be correspondingly applicable.

Chapter 3
Entry into force, etc.

Section 13

1. This Act shall enter into force on January 1, 1971.

2. This Act shall not apply to documents drawn up by an authority or having come into an authority's possession before the Act comes into force.

3. Act no. 141 of May 13, 1964, on access of parties to documents in administrative files shall cease to have effect. It shall, however, continue to apply with regard to the documents mentioned in subsection 2.

4. Provisions contained in other Acts relating to access to information in administrative files or to the right of parties to submit observations to the administration before a matter is decided shall continue to be valid. This shall not, however, apply to provisions which, to a more limited extent than this Act, give parties access to information in documents or the right to submit observations, unless such provisions came into force on October 1, 1964, or later.

5. Proposals for revision of this Act shall be submitted to Parliament during the 1976–77 parliamentary session.

Section 14

This Act does not apply to matters involving the Faroe Islands. It may be extended to such matters by Royal Decree with such exceptions as special conditions on the Faroe Islands may require. This only applies, however, to matters which are or have been under consideration by the State administration.