Public Access or Data Protection as a Guiding Principle in the EU's Composite Administration? - An Analysis of the ReNEUAL Model Code in the Light of Swedish and European Case Law

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1 Introduction

Information management has become a central part of the cooperation between EU institutions, authorities and official bodies and national authorities, usually called the European integrated, or composite, administration. A large part of the contacts made between the cooperating authorities concern the gathering, sharing and dissemination of information, both in the authorities' general administration and as input in individual matters. As the legal situation looks today, these issues are handled either in a splintered or decentralised manner; there may be special rules in sector-specific EU legal acts, but the issues are otherwise determined in each legal system separately.

One aspect of the information management is however regulated quite intensely, and increasingly so, namely data protection. A powerful new General Data Protection Regulation (GDPR) was adopted in April 2016 and entered into effect in May 2018.[1] The regulation gave rise to significant legislative activity in the Member States (even though by name it involves a regulation and not a directive) and intensive adaptation work among authorities, companies and non-profit organisations. But already before the GDPR's enforcement date, the Court of Justice of the European Union (CJEU) had in its practice developed and expanded the data protection law, primarily through an interpretation of the Data Protection Directive from 1995.[2] In legal cases such as *Google Spain*,[3] *Schrems*[4] and *Breyer*[5] central data protection law concepts and phenomena have been extensively interpreted. Even adjoining legal acts have been reviewed, as in *Digital Rights Ireland*,[6] when the Data Retention Directive[7] was declared invalid

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1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR).

2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

3 Case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317.

4 Case C-362/14 Schrems v. Data Protection Commissioner, EU:C:2015:650.

5 C-582/14, Patrick Breyer v. Federal Republic of Germany, EU:C:2016:779.

6 Case C293/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General, EU:C:2014:238.

7 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

and in *Tele 2/Watson*[8] where Sweden's and the UK's implementation of the Directive on privacy and electronic communications[9] was partially rejected. Other parts of information management may be more regulated in the future. In 2015, the Commission adopted a strategy for an internal digital market,[10] within which further legislative work is under way to strengthen data protection and facilitate the flow of information in the internal market.[11] The regulation of information management has thus developed into an important area of policy for EU legislators.

The importance of information management has also been identified within the European Research Network ReNEUAL (Research Network on EU Administrative Law). The project has drafted a set of model rules, ReNEUAL Model Rules on EU Administrative Procedure, tentatively functioning as a basis for an EU administrative procedural act for the EU.[12] The Model Rules have been divided into six separate books, of which one, the sixth, is devoted to administrative information management (book 1 – 5 deal with administrative rule-making, single case decision-making, contracts and mutual assistance). The sixth book is focused on one aspect of information management, cross-border aspects of information management, referred to as inter-administrative information management activities, i.e. information management that concerns multiple jurisdictions.[13] The focus is what could be described as horizontal

8 Joined cases C-203/15 and C-698/15 Tele2 Sverige AB v. Swedish Post and Telecom Authority and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, EU:C:2016:970.

9 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe COM(2015 192 final.

11 *See* e.g. the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 – 2015/0287(COD)), generally called the e-content directive, and Proposal for a regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union COM (2017) 495 final. The Directive on privacy and electronic communications is furthermore proposed to become a regulation, *see* Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

12 The model rules were published in ReNEUAL *Model Rules on EU Administrative Procedure*. Paul Craig, Herwig Hofmann, Jens-Peter Schneider & Jacques Ziller red) Oxford University Press, 2017 and are also available online; ReNEUAL.eu. *See* further, Henrik Wenander En förvaltningslag för EU? – *ReNEUAL Model Rules on EU Administrative* Procedure, Förvaltningsrättslig tidskrift 2018, s. 39-57. [An administrative procedure for the EU?]

13 Article VI-1 ReNEUAL Model Rules on EU Administrative Procedure, book VI, above note 12, where in point 1 it is stated that the following situations are covered: (a) exchange of information according to a structured information mechanism, (b) exchange of information under a duty to inform without prior request, (c) establishment and use of a database. In the point, it is expressly stated that information management that only concerns one Member

administrative law issues regarding information management, i.e. how authorities within the EU and the Member States should handle the legal situations that arise in the composite administration. Book VI in the model rules therefore aims to establish a clear structure for the allocation of responsibility for information management and a transparent information management.[14] Another important goal is to integrate data protection in the general regulation of information management.[15] However, rules regarding access to official documents are not targeted by the model rules.[16]

Even if the ReNEUAL model code does not actively address access to document, it is difficult to see how transparency as we know it could remain unaffected. Already in the state of law as it stands today, the Swedish principle of public access to official documents (public access principle), as it is expressed in the Freedom of the Press Act, is being challenged.[17] The question can thus be raised if Sweden can continue to have the public access principle as the leading principle for its administration when the administration increasingly collaborates and shares information with European and national bodies within the EU's composite administration. That the public access principle could be left unaffected by the EU cooperation was set as a prerequisite for Swedish entry into the EU[18] and within the legal doctrine, lively discussions have been held on whether or not this prerequisite has been able to be maintained.[19] In this article,

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State is not covered by the model rules. Also refer to point 1 and 4 in the introduction to part 1, p. 209, f.

14 Ibid, point 24 in the introduction, p. 214.

15 Ibid, point 5 in the introduction, p. 210.

16 Ibid, article VI-1 and point 9 in the introduction, p. 211.

17 Carl Fredrik Bergström & Mikael Ruotsi, *Grundlag i gungning – en ESO-rapport om EU och den svenska offentlighetsprincipen*, 2018:1. [Constitution in swing – an ESO-report on the EU and the Swedish public access principle.]

18 *See* the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded and on the amendment of the treaties, OJ No C 241, 29/08/1994 p. 9-404 and the Parliamentary Standing Committee on the Constitution's report 1993/94:KU21 Constitutional changes prior to a Swedish membership in the European Union. *See* regarding this Inger Österdahl '*Openness v Secrecy: Public Access to Documents in Sweden and the European Union*', ELRev. 37 (1998) 336–56 and Inger Österdahl, *Transparency versus secrecy in an international context: a Swedish dilemma*, in Anna-Sara Lind, Jane Reichel & Inger Österdahl, *Freedom of Speech, Internet, Privacy and Democracy*, Liber 2015.

19 *See* Olle Abrahamsson & Henrik Jermsten, *Om behovet av en ny tryck- och yttrandefrihetsrättslig regleringsmodell* [On the need for a new legal regulation model for the freedom of speech and the press], Svensk Juristtidning 2014 p. 201; Göran Lambertz, "*Grundbultarna kan behållas* "[The cornerstones can be kept], Svensk Juristtidning 2014 p. 440; Magnus Schmauch, "*Tryck- och yttrandefrihetsgrundlagarna och EU-rätten —en kommentar till en kommentar* "[Constitutional laws on freedom of speech and the press and EU law –a commentary on a commentary], Svensk Juristtidning 2014 p. 520; Olle Abrahamsson & Henrik Jermsten, "*Myter och missförstånd om TF och YGL i ett EU-perspektiv —replik* "[Myths and misunderstandings about the Freedom of the Press Act and the Fundamental Law on Freedom of Expression from a European perspective –remark], *Svensk Juristtidning* 2015 p. 8; Magnus Schmauch, "*Fler besynnerligheter —slutreplik till*

book VI in the ReNEUAL project is analysed in the light of a number of cases from the CJEU and the Supreme Administrative Court where the issue of the relationship between public access and data protection has been brought to a head. Hence, the issue that the article intends to analyse is how the interest in public access and data protection or, in other words, the right to protection for personal data, are weighed up in different parts of the European composite administration.

The article has been structured as follows. By way of introduction, the European composite administration is presented very briefly, as well as something on the Swedish public access principle and division of competence between the EU and the Member States and current EU legislation on information management (section 2). Thereafter, case law from the CJEU (section 3) and the Supreme Administrative Court (section 4) is analysed. In section 5, the relationship between public access and data protection in ReNEUAL's book VI is analysed. In section 6, some concluding opinions are expressed.

2 Regulation of Information Management within the European Composite Administration

Both public access and data protection are regulated in the EU's fundamental sources, in the treaties and in the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights). In Article 1 of the Treaty on European Union (TEU), it states that decisions shall be made as openly and as close to the citizens as possible and in Article 42 in the Charter of Fundamental Rights, it states that "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium". What this entails is developed in Article 15 of the Treaty on the Functioning of the European Union (TFEU). With the intention "to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible", it is stated among other things in point 3 that secondary legislation shall be enacted to decide on the forms for the release of official documents from EU's institutions. Such legislation has been enacted through the Public Access Regulation 1049/2001.[20] In terms of access to documents of Member State authorities, this is regulated in national law, hence in Sweden in the Freedom of

Olle Abrahamsson och Henrik Jermsten "[More oddities –closing remark to Olle Abrahamsson and Henrik Jermsten], Svensk Juristtidning 2015 p. 199 and Inger Österdahl, *Offentlighetsprincipen och den svenska tryck- och yttrandefrihetsmodellen –en ytterligare kommentar* [Principle of public access to official documents and the Swedish model for the freedom of speech and the press –another commentary], *Svensk Juristtidning* 2016 p. 503. The debate is not new, however; *see* e.g. Ulf Öberg, *Sura svenska krusbär* [Sour Swedish gooseberries], ERT 2001:2, pp. 234-237.

20 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

the Press Act and in the Public Access to Information and Secrecy Act.[21] This means, very briefly, that every Swedish citizen has a constitutionally protected right to access to public documents:[22]

> ”Every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information”

Further, the right of access to official documents can be limited only if restriction is necessary having regard to the specific grounds listed in the Freedom of the Press Act, for example the security of the Realm and the protection of the personal or economic circumstances of individuals. All exceptions must be specified in a specific act, namely the above-mentioned Public Access to Information and Secrecy Act, or referred to in the act.[23] A specific trait in Swedish law is that there is no rule on authorship, which normally means that it is the author of a document who decides how the document is to be shared. This follows from the fact that it is the authority holding the document that decides on its release, no matter who produced it, and that it is only the person who requests the document that can may appeal a decision to refuse.[24]

Another relevant international source is the Aarhus Convention, which the EU has acceded to and which gives both individuals and environmental organisations a right to environmental information.[25] The EU has also adopted extensive secondary legislation that implements the convention, the rules of which have direct effect and precedence in the Member States’ legal systems in accordance with the rulings of the CJEU.[26]

Data protection, or rather the right to protection for personal data, is regulated in Article 8 in the Charter of Fundamental Rights, as well as Article 16 of TFEU. In Article 8 of the Charter, it states that personal data shall be handled according to law for set purposes and on the grounds of the consent of the person concerned or some other legitimate and legal grounds, and that everyone has the right to gain access to gathered information that concern him or her and have them corrected. In Article 16 of TFEU, it is stated that he EU legislators shall have competence to adopt secondary legislation in the area, which has taken place among other things through the GDPR.[27] In contrast to what applies to the Public

21 SFS 2009:400. Also *see* Österdahl, 1998 and 2015, above note 18.

22 Chapter 2, section 1 The Freedom of the Press Act.

23 Chapter 2 section 2 The Freedom of the Press Act.

24 Chapter 2 section 14 and 15 The Freedom of the Press Act.

25 UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998 (Aarhus Convention).

26 For example, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

27 Article 16 was introduced first in connection with the Treaty of Lisbon and the previous Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal

Access Regulation 1049/2001, the EU has competence to regulate data protection in general; both on an EU level and in the Member States, as well as both in relation to the public and between individuals. This may naturally mean that national rules on public access are affected. In Article 86 in the GDPR, a rule has been included that allows the Member States to maintain their national law, even within the area of application of the GDPR:

> "Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest 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 pursuant to this Regulation."

Both Article 8 of the Charter and Article 16 of TFEU also indicate that an independent authority shall check that data protection rules are complied with. Below, I get back to what significance this treaty-established administrative network has in the interpretation of the rules.

Besides fundamental rules, there is an extensive EU regulation that affects public access and data protection directly or indirectly. As pointed out by way of introduction, EU legislators have initiated both new legislation and reforms of current legislation within the framework of the strategy for an internal market. Also of particular interest to this study is secondary legislation specifically focused on how administrative authorities handle information within the scope of the European composite administration. There are a countless number of EU legal acts that contain requirements on the Member States to report information to other authorities or to databases and to provide information in individual cases. As stated above, Book IV in the ReNEUAL project's model rules addresses two forms of inter-administrative information management activities*;* information exchange between authorities or through databases to which authorities have direct access.[28] Mentionable as examples of the first category are general tools such as the Internal Market Information System that connects together competent authorities within different internal market regulations,[29] and more targeted information exchanges, such as the RASFF system for rapid warning for food and feed.[30] In terms of databases, there are, among others, the

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data and on the free movement of such data) was adopted as an internal market directive, with the then Article 100a of the EC Treaty as the basis.

28 ReNEUAL Model Rules, above note 12, point 1 and 3 p. 209.

29 Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation). Regarding this, *see* Gustaf Wall, Information systems, cooperation, transparency and its limits Anna-Sara Lind, Jane Reichel & Inger Österdahl (eds) *Transparency in the future –Swedish openness 250 years*, Ragulka 2017.

30 Commission Regulation (EU) No 16/2011 of 10 January 2011 laying down implementing measures for the Rapid alert system for food and feed.

VIS database,[31] a common information system regarding visas, the SIS database,[32] a system for border control within the Schengen area and the TIS database,[33] which contains information on customs and agriculture related issues.

A special category of rules concerns secrecy clauses or other rules that limit how information can be used. Even if the principle of public access to official documents and the right to study documents is regulated at a national level, there may be an interest from the EU (and the Member States) in the competent authorities handling information that the authorities gain access to as a result of the EU cooperation with caution. Within several areas, there is therefore secondary legislation that regulates how a receiving authority shall handle information that is shared within the composite administration.[34] Also in other contexts, EU legal acts can regulate how information is used in individual cases or matters. In the use of the aforementioned information management tool IMI, competent authorities will largely review information, documentation and input from authorities in other Member States.[35] As asserted in the preamble, IMI has promoted the protection of personal data since the beginning.[36] A large part of the regulation's articles contain rules on how personal data shall be handled in a secure way.[37] In terms of secrecy rules, or with the regulation's terminology, professional secrecy or other corresponding obligations regarding confidentiality, Article 10 point 1 in the IMI Regulation states that each Member State shall apply its own rules. In point 2, however, it is stated that the IMI actors are obliged to ensure that all IMI users respect other IMI actors' request for confidential treatment of information that is exchanged within IMI. A version of

31 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

32 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006, on the establishment, operation and use of the second generation Schengen Information System (SIS II).

33 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

34 *See* Article 14 in Regulation (EU) No 996/2010 of the European Parliament and of the Council on the investigation and prevention of accidents and incidents in civil aviation, which is analysed by Allison Östlund & Jonas Hallberg Allison Östlund & Jonas Hallberg *Konsekvenser av EU:s institutioner genom direkt tillämplig sekundärlagstiftning begränsar rätt att ta del av allmänna handlingar i Sverige* [Consequences of EU's institutions through direct application of secondary legislation limits the right to access official documents in Sweden], FT 2013, pp. 457 –478. Also *see* Article 25 in Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms, which was relevant in the two rulings from the Supreme Administrative Court that concerned Greenpeace's request for access to documents on GMO experiments, RÅ 2005 ref 87 and RÅ 2007 ref. 45, which are discussed below (section 6).

35 Regulation (EC) No 1024/2012, above note 25.

36 Ibid, report line 7.

37 Ibid, primarily Article 13-22.

the rule on authorship in EU law, that it is the author of a document that decides how the document will be shared, is accordingly applicable.[38]

In a directive on individuals' rights to compensation for damages upon violations of EU competition law, there is also a rule that limits the possibility for individuals to use a suspected cartel company's statements within the framework of the competition authorities' so-called leniency programmes as evidence in a later trial.[39] Further examples are directives on commercial secrets[40] and tobacco advertising,[41] both of which contain rules on how information may be used.

3 Court of Justice of the European Union Rulings Regarding Public Access and Data Protection

By way of introduction, the CJEU case law was mentioned with regard to individuals' right to protection for personal data in cases, such as *Google Spain,*[42] *Schrems*[43], *Breyer*,[44] *Digital Rights Ireland*[45] and *Tele 2/Watson*,[46] where data protection has been given a prominent role. On the other hand, in terms of public information and the right to access to documents, this was long restrictive within the EU.[47] In the period after Sweden's and Finland's entrance

38 Wall, above note 29, p. 351. *See* for a corresponding discussion in the social insurance area, Henrik Wenander, *Informationsutbyte i internationellt myndighetssamarbete –e-förvaltning, sekretess och personuppgiftsskydd i Försäkringskassans samverkan med utländska socialförsäkringsorgan* [Information exchange in internal authority cooperation –e-administration, secrecy and personal data protection in the Swedish Social Insurance Agency's cooperation with foreign social insurance bodies], FT 2013, 423-456.

39 Article 7 in the Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

40 Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

41 Directive 2014/40/EU of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC. Regarding this *see* Ulrik von Essen, Neutrala tobaksförpackningar och den svenska tryckfriheten [Neutral tobacco packaging and the Swedish freedom of the press], FT 2016, pp. 357- 376.

42 Case C-131/12, Google Spain, above note 3.

43 Case C-362/14, Schrems, above note 4.

44 C-582/14, Breyer above note 5.

45 Case C293/12 Digital Rights Ireland, above note 6.

46 Joined cases C-203/15 and C-698/15 Tele2 Sverige/Watson, above note 8.

47 *See* for example C-170/89 BEUC v Commission and Inger Österdahl, '*Openness v Secrecy: Public Access to Documents in Sweden and the European Union*', ELRev. 37 (1998) 336–56.

to the EU in 1995, the importance of public access was increasingly recognised with the adoption of the Public Access Regulation 1049/2001 and several progressive rulings from the Tribunal and the European Court of Justice, where Sweden acts as an intervener in several cases.[48] In the past decade, the development towards openness appears to have come to a standstill, not least in the Court of Justice's rulings.[49]

In this section, focus will be on cases where the CJEU balanced the interest of openness against the interest of data protection, or the protection of personal data. The latter has long been considered to be an interest worthy of protection in the CJEU's rulings, which became current in several cases concerning the interest to not present one's name in sensitive contexts. The first case where the CJEU referred to the protection of fundamental rights within EU law, *Stauder*, addressed the issue of whether or not it could be required of recipients of a special discount card for food that they have their name printed on the card.[50] In the *Stauder* case, there was, however, no opposing public interest of any weight, such as in the cases *Österreichischer Rundfunk* [51] and *Schecke & Eifert*.[52] In the first case above, the question was reviewed of whether or not authorities that were under the supervision of the Austrian national audit office were obliged to notify it of certain highly paid employees' names, salaries or pensions, as a basis for a report that was issued to the parliament and made available to the public. The CJEU found that the right to data protection under the EU Data Protection Directive would be decided in observation of Article 8 of the European Convention on Human Rights (ECHR) and the right to a private life.[53] A processing of the personal data in question, i.e. name and income level, was only permitted if it could be considered established that the processing was both necessary and appropriate to achieve the legislator's intent, that public funds are managed well.[54] Since it was a matter of a preliminary ruling, the final ruling was left to the national court. The latter case, *Schecke & Eifert*, was however a

48 T-14/98 Hautala v. Council of the European Union, EU:T:1999:157, case C-39/05 P, Sweden and Turco v. Council of the European Union, EU:C:2008:374 and case C-64/05 P Sweden et al. v. Commission (IFAW) EU:C:2007:802. *See* also Cecilia Malmström, *Sveriges agerande i öppenhetsmål inför EG-domstolen - politik och juridik hand i hand, ERT tio år* [Sweden's action in openness cases before the CJEU - politics and law hand in hand, ERT ten years].

49 C-612/13 P Client Earth v. Commission, EU:C:2015:486 and Herwig C.H. Hofmann , *Individual rights and information in EU public law Transparency in the future - Swedish openness 250 years*, Anna-Sara Lind, Jane Reichel & Inger Österdahl (eds), Ragulka 2017, p. 73 ff.

50 Case 29/69 Stauder v City of Ulm, EU:C:1969:57.

51 Joined cases C465/00, C138/01 and C139/01, Österreichischer Rundfunk and others, EU:C:2003:294.

52 Joined cases C-92/09 and C-93/09 Schecke & Eifert, EU:C:2010:662. Also *see* Anna-Sara Lind & Magnus Strand, *A New Proportionality Test for Fundamental Rights? The Joined Cases C-92/09 and C-93/09 Volker and Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen*, Sieps 2011:7epa.

53 Joined cases C465/00, C138/01 and C139/01, Österreichischer Rundfunk and others, p. 74-81.

54 Ibid, p. 90.

directly filed case that the CJEU made a final ruling on. The issue concerned whether recipients of EU assistance in the form of agricultural support were obliged to report their names. According to the applicable regulation, information on support recipients and the amount that each support recipient received would be published, which according to the preamble was intended to "enhance transparency regarding the use of Community funds in the common agricultural policy".[55] Schecke and Eifert held that there was a lack of interest in publication of their names, and the CJEU partly agreed with them. In the case, the interest of data protection was consequently posed against the interest of public information, where by the CJEU upon weighing the two interests against one another[56] gave precedence to the former when it concerned natural persons.[57] Applicable regulations were declared invalid in their relevant parts.[58] With regard to legal entities, there was no enough protection interest for data protection, which is why the public information interest weighed heavier in this case.[59]

In the cases *Borax*[60] and *Bavarian Lager*,[61] the issue instead concerned access to documents in a legislative process and a case concerning an infringement proceeding, respectively. The *Borax* case was decided by the Tribunal, and is an unusually transparency-friendly case. The Commission had refused to give out recordings in a legislative matter, with reference to Article 4.1.b. of the Public Access Regulation 1049/2001, i.e. on the individual's privacy and integrity, especially the protection of personal data, as the grounds for its refusal. The issue concerned sound recordings from a working group meeting with invited experts under a directive on the classification, packaging and labelling of hazardous substances. The Tribunal did not consider the interest of the participants' privacy could weigh over the interest of public information and stated the following:[62]

> "It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution."

This conclusion distinguishes itself from the one arrived at by the CJEU in *Bavarian Lager*. In contrast to *Borax*, it was not an issue of a legislative matter,

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55 *See* the reasons 13 and 14 in Regulation No 1437/2007 amending Regulation No 1290/2005 and Article 42 point 8b an Article 44a in Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (EUT L 209, p. 1) and joined cases C-92/09 and C-93/09 Schecke & Eifert, p. 17.

56 Cases C-92/09 and C-93/09 Schecke & Eifert, p. 77.

57 Ibid, p. 86.

58 Ibid, p. 89 and 91.

59 Ibid, p. 88.

60 Case T-121/05 Borax, EU:T:2009:65.

61 Case C-28/08 P, Commission v. Bavarian Lager, EU:C:2010:378.

62 121/05 Borax, para, 105. The case is not available in Swedish.

but rather the requested documents were comprised of meeting minutes within the scope of an infringement proceeding against the UK regarding conditions for selling beer in the country. The Commission had released a redacted version of the minutes, where the participating individuals had been anonymised, with the motivation that it could not disclose the names of the persons who had participated in the meeting without first obtaining their consent. In the case, these persons' right to protection of personal data under Regulation 1045/2001 on data protection at Community institutions[63] was accordingly posed against Bavarian Lagers right to access to documents under the Public Access Regulation 1049/2001. Also in this case, the Tribunal found that the requested documents should be released,[64] as did the Advocate-General after the case was appealed to the CJEU.[65] Even the European Data Protection Supervisor intervened on behalf of Bavarian Lager and held before the CJEU, together with Finland, Denmark and Sweden, that the appeal should be denied in its entirety.[66] The CJEU, for its part, arrived at the opposite decision. The Court held that it was incumbent on Bavarian Lager to show the necessity of disclosing personal data for the person who had not provided their express consent.[67] The CJEU further stated:[68]

> "As Bavarian Lager has not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission has not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001."

If named persons do not expressly consent to documents being released, anyone requesting the documents must accordingly show that the transfer of personal data is necessary to fulfil the interest of public information. The presumption is that the protection of personal data in the form of proper names weighs heavier even for persons who participate in the decision making of public bodies.

4 Supreme Administrative Court Rulings Regarding Public Access and Data Protection

As presented in Section 3, the CJEU tends to assign greater weight to the interest of protecting personal data than public information. In Sweden, the situation can be described as the opposite; the principle of public access to official documents

63 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

64 Case T-194/04, The Bavarian Lager Co. Ltd v. the Commission, EU:T:2007:334.

65 Advocate-General Elenor Sharpston's statement in case C-28/08 P, EU:C:2009:624.

66 Case C-28/08 P, Commission v. Bavarian Lager, note 61 above, p. 34.

67 Ibid, p. 77.

68 Ibid, point 78.

has long had a strong position, while the protection for privacy, data protection, and perhaps even personal integrity as such have traditionally been assigned less importance.[69] Sweden was indeed the first country in the world to adopt a data act, which among other things regulated how personal data could be used,[70] but this law never entailed any restriction of the public access principle. In the following section, some cases on the weighing of the right to protection of personal data and public information, in a broad sense, are discussed; HFD 2015 ref 57 on the right to access to information on decision-makers' names, HFD 2015 ref 71 on the right to change information in archived documents, and HFD 2014 ref 66 on protection of personal data as grounds for secrecy under the Public Access to Information and Secrecy Act, particularly regarding the area of application of the Personal Data Act (PDA).[71]

In the first two cases, HFD 2015 ref 57 and HFD 2015 ref 71, the interest of protection for personal data and public information are posed against one another in a way similar to that in the cases from the CJEU discussed above, *Schecke & Eifert* and *Bavarian Lager*, i.e. the extent to which individuals mentioned in documents may have the right to limit how their personal data is used. In HFD 2015 ref 57, the issue was whether a driver who had received a parking citation had the right to find out the name of the person who issued the citation. Umeå Parkeringsbolag AB, a wholly owned municipal company, refused to disclose the information with reference to personnel administrative secrecy, the special conditions that exist with regard to parking attendants and that the name of the parking attendant was not necessary for an appeal. The Administrative Court of Appeal rejected the appeal and stated that there was a well-founded reason to assume that the parking attendant in question could be subjected to threats or other serious harm if the information was disclosed. The Supreme Administrative Court made a different assessment. First, the Court confirmed that the issue of the identity of the decision-maker is not an issue that is covered by personnel administrative secrecy. The Court then emphasised the importance that public law decisions are not made by anonymous persons. Through an extensive interpretation of the requirements placed in the Government Agencies and Institutes Ordinance and the Local Government Act, decisions made in wholly owned municipal companies also came to be subject to the requirement:[72]

> "A fundamental requirement in decision-making by authorities is that the responsible decision-maker is not anonymous. For the state authorities' part, such a requirement as per Section 21 of the Government Agencies and Institutes

69 Johanna Chamberlain & Jane Reichel, *The Swedish Understanding of Privacy as a Fundamental Right in a Comparative Perspective –Overview and Possibilities*, Russell L. Weaver, Jane Reichel, Steven I. Friedland, *Comparative Perspectives on Privacy in an Internet Era*, The Global Papers Series, Volume VII, Carolina Academic Press of Durham, North Carolina, USA, to be published in 2018.

70 Data Act (1973:289), repealed in 1998 in connection with the adoption of PDA.

71 1998:204. PDA is the Swedish legislation that implements the Data Protection Directive in Swedish law. The act is being repealed in May 2018 in connection with the GDPR entering into effect.

72 Translation by the author.

> Ordinance (2007:515) applies as a main rule and, for the municipal authorities, such a requirement as per Chapter 6 Section 30 of the Local Government Act (1991:900) applies as a main rule.
>
> Umeå Parkeringsbolag AB is a municipal company and is accordingly not covered by the requirements of the Government Agencies and Institutes Act or the Local Government Act. A parking attendant's decision regarding a parking citation rests, however, on a public law basis and constitutes an exercise of authority. The same requirements should accordingly be made on such decisions as on authority decisions."

The information on who had made the decision on a parking citation should therefore be released. An issue of protecting personal data according to EU law does not appear to have become current.

In case HFD 2015 ref 71, the issue was whether or not a person could demand that an official document that was stored by the National Archives should be destroyed as it contained information about him. Both the Administrative Court and the Administrative Court of Appeal held that the appellant's motion should be interpreted as a request for correction under PDA and referred the case back to the National Archives for handling. The Supreme Administrative Court came to the opposite conclusion. The Court particularly highlighted the close connection between the Archives Act[73] and the principle of public access to official documents:

> "The archives legislation has a strong connection to the principle of public access to official documents (see Chapter 2 Section 18 of the Freedom of the Press Act). In the regulations of the Archives Act regarding preservation and removal, there is no room to take into account the individual's interests in e.g. protection for personal integrity and the legislation does no entail any rights for individuals even if information about them occurs in the archived documents (compare SOU 2015:39 p. 526 and 534). An individual accordingly does not have the right to have official documents removed with support of this legislation."

Individuals' interests of protection of personal data can accordingly not be taken into account in the review of whether or not a document shall be removed. The legislation does not entail rights for the individual even if this information occurs in the documents. According to the Supreme Administrative Court, this also means that the National Archives' decision to not remove a document cannot be seen as having "any factual effects for him other than that he was given information on the National Archives' handling of received documents and how the National Archives views the application mainly of the regulations of the Archives Act". The decision was therefore not subject to appeal. The Supreme Administrative Court therefore quashed the Administrative Court's and the Administrative Court of Appeal's judgements and rejected the appeal. The difference between the Supreme Administrative Court's way of reasoning and the CJEU's in the cases referred to above is striking.

The last case that will be discussed here, HFD 2014 ref 66, concerns the handling of the right to data protection in relation to the principle of public access

73 SFS 1990:782.

to official documents from a different perspective. The issue in this case concerned a request by a Norwegian company to gain access to official documents from the National Board of Health and Welfare, which contained information on all registered nurses in Sweden. The National Board of Health and Welfare rejected the request with reference to Chapter 7 Section 7 of the Public Access to Information and Secrecy Act, which states that secrecy applies to information if it can be assumed that personal data will be processed in conflict with PDA. The Supreme Administrative Court found, however, that the secrecy grounds in Chapter 7 Section 7 of the Public Access to Information and Secrecy Act were not applicable. According to Section 3 of PDA, the law is only applicable to personal data controllers who are established in Sweden and accordingly not to Norwegian companies. There were therefore no legal grounds for restricting the right to access to documents under the Freedom of the Press Act and the documents should therefore be released. Also in this case, the Supreme Administrative Court expresses itself categorically, without weighing in the interest of the protection of personal data. The court findings are brief and can be rendered in their entirety here:

> "According to Chapter 21 Section 7 of the Public Access to Information and Secrecy Act, secrecy applies for personal data if it can be assumed that a disclosure would mean that the data would be processed in conflict with the Personal Data Act. The review that shall be done pertains to the processing of the data after disclosure (compare RÅ 2001 ref. 68 and RÅ 2002 ref. 54).
>
> Accurate Care AS is established in Norway. The Personal Data Act therefore does not apply to this company (Section 4 of the Personal Data Act). The company's processing of the data in question can accordingly not be in conflict with the law. Secrecy pursuant to Chapter 21 Section 7 of the Public Access to Information and Secrecy Act accordingly does not apply to the company.
>
> It has not come forth that secrecy applies to the data on any other grounds. The appeal shall therefore be granted."

Hence, the problem appears to lay in the fact that Chapter 21 Section 7 of the Public Access to Information and Secrecy Act in its wording refers to the Personal Data Act and not to the interest of protecting individuals' personal data. If PDA is not applicable, there is no room, according to the Supreme Administrative Court, to take into account the interests the law intends to protect. This interpretation may have far-reaching effects. The same method for requesting documents was tried by a person who wanted to get access to documents from the Swedish Council for Higher Education, i.e. he stated that he was registered in Norway and that Chapter 21 Section 7 of PDA could not therefore be cited as grounds for making the documents secret. The requested documents were comprised of a list that the Swedish Council for Higher Education had prepared with people who had not been given their results on the Swedish Scholastic Aptitude Test on the grounds that they were discovered to have cheated. When the issue was reviewed by the Administrative Court of Appeal, the Norwegian connection was dismissed and the Court stated that the appellant "had not shown that he is not established in Sweden, which means that the Administrative Court of Appeal in its review presumes that he is covered by

the Personal Data Act". [74] In light of the fact that previous years' lists had been published on the Internet, the Administrative Court of Appeal found that secrecy applied pursuant to Chapter 21 Section 7 of the Public Access to Information and Secrecy Act. In this case, the trick did not work, but for anyone who can actually show that he or she is registered outside Sweden's borders, there accordingly does not appear to be any obstacle to accessing official documents that are covered by secrecy with reference to the mentioned persons' protection of personal data. However, as the GDPR enters into force, the legislative situation changes, at least in connection to states applying the GDPR.

5 Public Access or Data Protection in ReNEUAL's Proposed Model Rules

The next issue to investigate is how the issue of weighing between public access and data protection is handled in the ReNEUAL project's model rules. Already in the introduction, it has been noted that Book VI in ReNEUAL's model rules on information management identifies two overall principles as central: the importance of transparent information management and data protection for individuals, but that access to official documents is not addressed. However, the term *transparency* occurs frequently in Book VI, but in the sense of a clear and predictable information management in a composite administrative structure:[75]

> "First, such rules must ensure the transparency of composite information management actions. When confronted with such composite administrative procedures, natural and legal persons should be in a position to identify the actors, their duties and to allocate responsibility accordingly."

This interpretation of the term transparency, or openness, has close ties to the right to data protection. It is a central data protection principle that personal data shall be "processed lawfully, fairly and in a transparent manner in relation to the data subject", as it is expressed in Article 6.1 in the GDPR. In the preamble, it states that this so-called transparency principle means that "it should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed."[76] To be able to maintain this obligation, have control over the personal data and how they are used, personal data must be kept organised in such a way that the data subject's rights can be safeguarded.[77] Thus far, there

74 Stockholm Administrative Court of Appeal ruling on 12 April 2017, case no. 8316-16.

75 *See* ReNEUAL's model rules, Book VI above note 12, point 11, p. 212.

76 Point 39 in the preamble of the GDPR.

77 In Article 12 of GDPR, it is stated that "the controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child". Companies with 250 employees or more shall also keep a register over their processing of personal data, Article 30 GDPR.

are no conflicts between transparency in the sense of the Freedom of the Press Act, where the principle of public access to official documents also requires authorities to keep official documents organised so that the right of access to documents can be guaranteed.[78]

In Book VI in ReNEUAL's model rules, it is clear, however, that the foremost purpose of having control over the information is to ensure that it is not processed in an improper manner. As stated by way of introduction, Book VI is only applicable to cross-border information management; when authorities gain access to information by an authority in a different EU country transferring it, or when the authority gains direct access through a database. One example is rules on the tagging of information that an authority has gained access to through an information management activity in a cross-border context if it takes place through an IT system. Under the heading principle of transparency, data tagging, the following is stated in Article VI-9:

> "(1) Information management activities are undertaken in accordance with the principle of transparent and retraceable data processing.
>
> (2) Data processed as a result of an information management activity performed through an IT system shall be tagged. In the absence of detailed regulation within the basic act or implementing acts, the tag shall contain:
>
> (a) a record of the data supplying authority, the source of data collection, the authority which collected the data if this is not the data supplying authority, and whether restrictions on the exchange or subsequent use apply to that item,
>
> (b) a record of each information exchange between competent authorities or access to data stored in a database, the subsequent use of that data, as well as the corresponding legal basis for each of these information management activities,
>
> (c) a flag as provided for in Article VI-19(5) or Article VI-14(3).
>
> (d) Where various data are linked, the tag shall identify such linkage, the authority having requested it, and the corresponding legal basis."

By tagging information with where it comes from, who have contributed to its collection and how it shall be used, it becomes possible to follow how the information is used, it becomes retraceable. The flagging of information in Article VI-19 (5) and VI-14 (3) pertains to situations when the accuracy of the information has been called into question in some respect. Through the flagging, it becomes clear to everyone who accesses the information that it may be uncertain.

The tagging of information is also related to how the information may be processed and if it may be forwarded. In Article VI-24, under the heading restrictions on the use of data and information, there are rules on restrictions to how "data and information" may be used:

78 Chapter 2 Section 12 of the Freedom of the Press Act, Chapter 4 of the Public Access to Information and Secrecy Act and the Archives Act.

> "1) Competent authorities shall exchange and process data only for the purposes defined in the relevant provisions of EU law providing for the exchange of such information.
>
> (2) Processing for other purposes shall be permitted solely with the prior authorisation of the competent authority supplying data and subject to the applicable law of the receiving or retrieving competent authority. The authorisation may be granted insofar as the applicable law of the supplying authority permits.
>
> (3) The dissemination of data and information shared between public authorities to third parties requires a specific legislative authorisation."

Here, the difference compared to Swedish public access becomes evident. As a main rule, information may not be processed for purposes other than those stated in the relevant EU legal acts and if an authority wants to process the information for other purposes, the authority that provided the information must allow it and the processing must be consistent with applicable legislation. Transfer of the information to a third party in turn requires express legal support. It is particularly remarkable that the article sets its sights on all kinds of information and not just personal data. Article VI-24 accordingly has a significantly broader area of application than the EU data protection rules.

In summary, it can be confirmed that Article VI-24 contains a form of authorship rule and an inverted version of Chapter 2 Section 2 of the Freedom of the Press Act, that a document shall only be possible to be released if this is expressly prescribed. The protection of the information is further supplemented by Article VI-28, which contains a rule that authorities, their officials and other employees including independent exporters, etc. shall be obstructed from disclosing information that they have received access to through an *information management activity* and that is covered by secrecy rules or the equivalent. It is not explicitly stated, but it is probably also intended that applicable secrecy rules at the authority that provides the information shall be transferred to the receiving authority. The secrecy protection for the processed information can accordingly become comprehensive. It is difficult to see how the stipulation in Article VI-1.3, that rules on access to documents shall not be affected, will be able to be maintained in practice.

6 Concluding Remarks

From the examination of the case law from the European Court of Justice and the Supreme Administrative Court, a clear picture emerges that the two courts make different prioritisations when weighing between the interest of public information and protection for personal data. The two courts have indeed never decided on the same issue; to my knowledge, no Swedish court has requested a preliminary ruling from the CJEU in this area, and as always, it is difficult to establish with certainty the extent to which the circumstances in the individual cases have played a role. However, it seems clear that the Supreme Administrative Court provides a stronger protection than the CJEU with regard

to issues that in Swedish law fall under the principle of public access to official documents, while the CJEU gives precedence to data protection. It can also be noted that in virtually all of the cases discussed, the lower courts of each have arrived at different conclusions, while the highest court has prioritised "its" interest fully.

In ReNEUAL's model rules, the proposal seems to go one step further in prioritising the protection of personal data, or rather, a secure and traceable processing of information as such. The model rules shall indeed only be applied to cross-border information management, but in these situations, all information and data gathered from IT systems from other Member States shall be tagged and flagged if it appears unreliable. There are also rules on how the information may be used and spread. Compared with the Swedish principle of public access to official documents, the model rules seem to have a restrictive attitude to free access to documents and information, to say the least. Even if access to official documents is not in itself addressed in the model rules, it is difficult to see that the model rules would not have a negative impact on the access to documents covered by the regulations. Other Swedish administration traditions would also be affected, such as the administrative authorities' and the courts' obligation to investigate and the principle of free assessment of evidence. If an authority has access to information in a matter that could also be relevant in another matter at the authority, the rules prevent the information from being used in the later matter.

What significance does it then have for Swedish law that EU law makes a different prioritisation? The model rules are not applicable law, and it does not appear to be particularly likely that this discussed proposal or anything equivalent would be adopted within a foreseeable future. The issue of a harmonisation of national administrative processes is still very controversial.[79] In addition, the upcoming GDPR expressly permits national rules for access to official documents being maintained within its area of application.[80] Since it is the Freedom of the Press Act and the Public Access to Information and Secrecy Act that are applicable to issues of access to documents in Sweden, and the Supreme Administrative Court clearly protects the values that this legislation expresses, it could very well be held that EU law is not of any major significance in this area. From an EU law perspective, the issue is hardly so simple. To what extent can the Swedish principle of public access to official documents be applied to Swedish parts of the composite administration? It is after all hardly possible to have different access to the same document in the different Member States.[81] Hence, the issue is not primarily whether or not it is constitutionally possible for Sweden to maintain the Freedom of the Press Act in its current form, but rather if it is practically possible in the scope of a European information

79 *See* for example Niels Fenger's article *Fordele og klemper ved en yderligare harmonisering af medlemstaternes forvaltningsrett,* Förvaltningsrättslig tidskrift, 2018 p. 59. [Pros and cons of a further harmonisation of member state's administrative law.]

80 *See* Article 86 in GDPR and Section 2 above.

81 Jane Reichel, *Svensk offentlighet i en integrerad förvaltning* [Swedish public access in an integrated administration], ERT, 2015, pp. 54-60, p. 59.

management cooperation to maintain a view that clearly deviates from that of others. And, it might be added, how conflicting interests should be balanced in the individual cases. Another aspect is if the Swedish principle of public access to official documents as it is now constructed can provide enough protection for personal data in the complex reality of information management that we live with today.

In terms of the first issue, it can be confirmed that Sweden already handles a larger number of documents with EU ties for which the public access principle is applied more restrictively than would have been the case if the documents concerned an internal, national situation. This is illustrated well through two cases from the Supreme Administrative Court RÅ 2005 ref 87 and RÅ 2007 ref 45. In these cases, Greenpeace, in two rounds, had requested documents on genetically modified organisms (GMO) that originated from a case handled in a joined decision process with agricultural authorities from the Member States. In the first case, the documents were considered to be able to be released, but in the latter case, the Court made a more restrictive assessment, with reference to the interest for Sweden to participate in the EU cooperation. Swedish courts have accordingly not been averse to using the room that exists in the Public Access to Information and Secrecy Act to make EU documents secret, in any case not within areas other than data protection. In 2013, amendments to Chapter 15 of the Public Access to Information and Secrecy Act were adopted that entailed expanded possibilities to decide on secrecy, with the aim of making it possible for Sweden to fully participate in the EU cooperation.[82] Furthermore, Swedish authorities are a part of extensive and close cooperation where EU authorities store documents that are also relevant to the Swedish administration. The Finnish researchers Leino and Korkea-aho have investigated how documents stored at EU authorities are handled.[83] They draw three conclusions from their study.[84] First, EU authorities often take a central role in the handling of documents in areas, such as the regulation of chemical substances, food and medicines, where applicants provide the authorities with extensive information on their products in permit proceedings. Second, these private actors are viewed as "owners "of the documents, and are given extensive influence over how the information is used, even within the framework of the authories' decision-making. Third, this form of "private ownership" of information in the authorities' files is at risk of making insight impossible into central, and often sensitive, parts of the EU authorities' dcision-making processes. How documents are handled at EU authorities should naturally fall outside the area of application for the Freedom of the Press Act and Public Access to Information and Secrecy Act, but the example nonetheless clearly shows that Swedish authorities that act within the framework of a joined decision-making process are affected by how other jurisdictions handle documents that are of common interest.

82 *See* Government bill 2012/13:192 Secrecy in the international cooperation regarding amendments to Chapter 15 of the Public Access to Information and Secrecy Act.

83 Emilia Korkea-aho & Päivi Leino, *Weed killers, commercially sensitive information and transparent and participatory governance*, CMLRev54: 1059–1092, 2017.

84 Ibid, pp. 1089.

The second issue identified above is if the Swedish principle of public access to official documents as it is now constructed can provide adequate protection for personal data in a complex administration organisation like the European one. The model rules discussed above regarding tagging and flagging of information may seem overly invasive, but at the same time, it cannot be denied that information that is handled in the EU's common IT systems and databases may leak out in an improper manner. Data in itself can be moved in an imperceptible manner from one place to another in a manner that is hard to control.[85] Curtin has analysed the EU's collections of security information and what is called "*interstitial data secrecy*", i.e. secret information that is in the "space between "the various databases and IT systems, data that leaks out and is thereby processed outside the law's control and political systems for accountability:[86]

> "An important part of the challenge relates to the inter-operability of ever more European level databases that are set up for different purposes with access being granted to an ever increasing range of (street-level) actors and bodies. The secrecy is interstitial and thus largely unassailable for outsiders."

New technology tests both the EU data protection law and the Swedish public access principle.

From a Swedish perspective, one question is if the legal framework that the Freedom of the Press Act and the Public Access to Information and Secrecy Act provide is so rigid that it cannot be adapted to new and unforeseen situations that may arise. A distinguishing characteristic in the Supreme Administrative Court's rulings as presented in Section 4 is that the argumentation is brief and one-sided. By establishing at a constitutional level that the principle of public access to official documents can be limited through a specific law, i.e. the Public Access to Information and Secrecy Act, other legally relevant interests that fall outside the specific law's area of application or material regulation can never be taken into account, regardless of the circumstances in the individual case. The interests of individuals have nothing to do with the matter. How this related to EU law, or other international commitments, is not commented on at all. In spring 2017, the Supreme Administrative Court decided another case regarding access to documents, although without data protection being made current. This time, the Court also found that the documents should not be released; the issue was if documents concerning the Nuon deal that were held by the Ministry of Enterprise and, under Chapter 2 Section 15 of the Freedom of the Press Act, decisions by the Government (and Swedish Parliament) to refuse to release an official document may not be appealed. Greenpeace and another person, who

85 Regarding the difficulties of knowing where data is stored and who has access to it, see: Liane Colonna, *Legal Implications of Data Mining. Assessing the European Union's Data Protection Principles in Light of the United States Government's National Intelligence Data Mining Practices* , Tallinn, 2016, inter alia p. 23.

86 Deirdre Curtin, *Interstitial data secrecy in Europe's security assemblages*, in Anna-Sara Lind, Jane Reichel & Inger Österdahl (red) Transparency in the future –Swedish openness 250 years, Ragulka 2017.

had requested the document, requested a review under the Judicial Review Act[87] and cited both ECHR and the Aarhus Convention as European directives in support of their cause. The Supreme Administrative Court was just as brief as usual, and the reasons for the Court's decision to reject the request for judicial review can be rendered in its entirety:[88]

> "According to Section 1 of the Act (2006:304) regarding Judicial Review of Certain Government Decisions, an individual may petition for a judicial review of such decisions by the Government that includes a review of the individual's civil rights or obligations in the sense noted in Article 6.1 of ECHR.
>
> Pursuant to case law in the Supreme Administrative Court, decisions to not release official documents cannot be considered to include any review of the individual's civil rights in the sense referred to in the Judicial Review Act (see RÅ 2007 note 202). Subsequently pronounced decisions from the European Court of Justice do not give reason for the Supreme Administrative Court to now make any other assessment. There are thereby no grounds for judicial review in accordance with Section 1 of the Judicial Review Act.
>
> Föreningen Greenpeace Norden and AA also do not have the right to bring action against the Government's decision on the alternative grounds cited by them."

For my own part, I would have appreciated a more detailed discussion around why in "a review of the individual's civil rights in the sense referred to in the Judicial Review Act" it is not relevant to take into account the case law of CJEU, or why the Aarhus Convention or EU law did not have any significance in the case. Does the Supreme Administrative Court mean, in this case and those discussed above, that the Freedom of the Press Act always takes precedence over all international commitments Sweden may have? If so, on what grounds has the Court arrived at this conclusion? In relation to EU law, it can be noted that the CJEU already in 1970 in the case *Internationale Handelsgesellschaft* declared that EU law –in the Court's opinion –has precedence over the constitutional laws of the Member States.[89] Does the Supreme Administrative Court think that the Freedom of the Press Act's precedence over the EU treaties, the Charter on Fundamental Rights and secondary legislation can be founded on an argumentation around the room for national identity in accordance with Article 4.2 of TEU? Or does the Supreme Administrative Court believe that the Swedish principle of public access to official documents was not included in the decision-making process that Sweden transferred to the EU in connection with joining, corresponding to the argumentation that the Danish Supreme Court presented in the *Ajos* case, when the Court chose not to follow a preliminary ruling from the CJEU in contravention of Danish legal tradition and the courts' constitutional position presupposed an interpretation of Danish law *contra legem*?[90] Regardless

87 Act (2006:304) regarding Judicial Review of Certain Government Decisions.

88 Supreme Administrative Court ruling on 16 May 2017 in case no. 5670-16 (translation by the author).

89 Case 11/70 Internationale Handelsgesellschaft, EU:C:1970:114.

90 Ruling of 6 December 2016 in Case 15/2014, available at www.hoejesteret.dk, where the Danish Supreme Court chose not to follow a preliminary ruling pronounced by the CJEU in

of the grounds of the argumentation, the question should be asked if there are any limits to the claims of precedence of the Freedom of the Press Act. What happens if a larger amount or very sensitive personal data are at risk of being spread out in the world due to a technicality in the Freedom of the Press Act or the Public Access to Information and Secrecy Act?

The Freedom of the Press Act seems, due to its rigid construction, in some contexts to have been developed into an unreasoning trump card whereby an issue of access to official documents can be decided without consideration of the surrounding world otherwise. This does not appear to be a particularly appropriate point of departure if the ambition is to defend public information as a guiding principle in European administrative law that is now under development. A more constructive debate on how access to documents and information can be ensured in the EU's composite administration would be preferable. The Supreme Administrative Court could contribute to this debate in a better way.

There is otherwise a risk that other bodies will decide in the matter and thereby put the Swedish legal system in a tricky situation. As mentioned above in Section 2, it is apparent from Article 15 TFEU that an independent authority shall check that data protection rules are complied with. In the new GDPR, there are well-developed rules for how national supervisory authorities shall cooperate with each other and with the new European Data Protection Board that will also be established.[91] Of particular interest in this context is the consistency mechanism[92] that according to the GDPR shall be used when a national supervisory authority intends to make a decision in a number of appointed case categories,[93] partly at the request of a supervisory authority, the Board's chair or the Commission, in the review of "any matter of general application or producing effects in more than one Member State".[94] If the issue is in dispute, there is a special procedure for dispute resolution through the Board, where the Board can make a binding decision that the national supervisory authority must subsequently use as the basis of its decision in the matter.[95] Even if Article 86 of the GDPR allows national rules for access to official documents to be maintained within the regulation's area of application, it is hardly likely that the article can be interpreted as a blank permission to always give precedence to

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Case C-441/14 Dansk Industri (DI) v. Sucession Karsten Eigil Rasmussen (Ajos) EU:2016:278. Regarding this, *see* Ruth Nielsen & Christina D. Tvarnø, *Danish Supreme Court infringes the EU Treaties by its ruling in the Ajos case, ERT 2017* pp. 303-326.

91 Chapter VI and VII in the GDPR.

92 For an analysis of the earlier version of the mechanism for uniformity that was in the Commission's proposal on a new data protection regulation, *see* Jane Reichel & Anna-Sara Lind, *Den svenska förvaltningsmodellen som en del av en integrerad europeisk förvaltning –en fallstudie om dataskyddsförvaltning* [The Swedish administrative model as a part of an integrated European administration –a case study on data protection administration], Förvaltningsrättslig tidskrift 2014, pp. 503-525, at p. 515.

93 Article 64.1 of the GDPR.

94 Article 64.2 of the GDPR.

95 Article 65. 1 and 6 of the GDPR.

public access no matter what. If the Freedom of the Press Act's, the Public Access to Information and Secrecy Act's and the Archives Act's rigid construction for the protection of personal data in official documents were to be reviewed in the scope of the mechanism for uniformity and dispute resolution through the Board, the outcome may be difficult to predict. The question is how the Swedish legal system would handle a situation where the European Data Protection Board made a binding decision that the Data Inspection Board was expected to implement, with the implication that the Swedish principle of public access to official documents would need to give way to the EU's GDPR in some respect. The outcome of such a process would also be hard to foresee.