Public access to documents in Sweden and the EU

An examination and comparison of applicable law

Oliver Gavuzzi
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**Abbreviations**

When I make use of abbreviations, I will write the full phrase the first time, with the abbreviation that will be used within a parentheses. The time after the first time, I will simply use the abbreviation. The exception to this is the Principle of public access to official records, that I will occasionally write in full, and occasionally refer to simply as ”the Principle”. The abbreviations on this page are in descending alphabetical order.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>CBMC</td>
<td>Confederation des Brasseurs du Marche Commun</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>(European) Court of Justice</td>
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<td>EDPS</td>
<td>European Data Protection Supervisor</td>
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<td>FPA</td>
<td>Freedom of the Press Act</td>
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<td>TEEC</td>
<td>Treaty establishing the European Economic Community</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>”The Principle”</td>
<td>The Principle of Public Access to Official Records</td>
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**Notes on Translations**

While working on this thesis, I have come across several phrases in Swedish that are translated differently at different places in the legislation. Whenever possible, I have used the translation provided in the Glossary for the Courts of Sweden.\(^1\) In some cases, there are no official translations. In these cases, I have done my best to provide a coherent and fair translation. For these reasons, I judge it necessary to clarify what the translations in my thesis allude to, to avoid any potential confusion. In some cases, the Swedish translations are inconsistent with the vocabulary used in the EU. An example of this is the phrase "allmänna handlingar", which according to Swedish practice is translated to English as “official records”. In the EU, ”official documents” or just “documents” is used to describe the same thing. When coming across issues such as this one, I will use the translation that is considered correct in the context that I am discussing it. Hence, if I am discussing Sweden, I will be using "official records", and if I am discussing the EU, I will be using ”official documents” or just ”documents”. When I am discussing neither Sweden nor the European Union, or when I am discussing both, or simply the concept of public access, I will use the term ”documents”. The translations on this page are in descending alphabetical order.

<table>
<thead>
<tr>
<th>Authority</th>
<th>Myndighet</th>
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<tr>
<td>Business entity</td>
<td>Bolagsform</td>
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<td>Constitutional law</td>
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<td>Court of Justice of the European Union</td>
<td>EU-domstolen</td>
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<td>Dispatch</td>
<td>Expediera</td>
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<td>(European) Court of Justice</td>
<td>Högsta instans i EU-domstolen</td>
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<td>Government bill</td>
<td>Proposition</td>
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<td>Instrument of Government</td>
<td>Regeringsformen</td>
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<td>Judicial enquiry</td>
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<td>Official Reports of the Swedish Government</td>
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<td>Personal Data Act</td>
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<td>Principle of public access to official records</td>
<td>Offentlighetsprincipen</td>
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<td>Public bodies</td>
<td>Offentliga organ</td>
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<tr>
<td>Public Access to Information and Secrecy Act</td>
<td>Offentlighets- och sekretesslagen</td>
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<tr>
<th>English</th>
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<tr>
<td>The Authority Data Act</td>
<td>Myndighetsdatalag</td>
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<tr>
<td>The Freedom of the Press Act</td>
<td>Tryckfrihetsförordningen</td>
</tr>
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<td>The Information Processing Investigation</td>
<td>Informationshanterings-utredningen</td>
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1 Introduction

1.1 Why public access to documents is important

A guarantee for legal certainty and security, effectivity in the administration and effectivity in popular government.² This quote about the principle of public access to official records attests to the instrumental value of the principle and corresponding legislation. Its benefits to democratic societies is hard to overstate. It bears mentioning, however, that public access to documents by itself is rarely sufficient to accomplish meaningful change; rather, public access to documents is a means to an end.

First and foremost, public access to documents contributes to improve democracy. Information is the fuel of public debate, and access to all manner of information is thus extremely important. In addition, access to information allows voters insight into what elected officials are doing, and is therefore necessary to make an informed decision in deciding who to vote for. Public access to documents also contributes to accountability of officials, and makes it possible to seek legal action against them, should they do something illegal.³ This function is arguably extremely important in todays’ society, where surveillance is becoming the norm, and governments have been caught spying on their own citizens.

Public access to documents is also thought to increase the legitimacy of governmental authorities in the context of Sweden, and the institutions in the context of the European Union. By making official decisions accessible to the public, the publics’ trust in the institutions and authorities increases. This in turn makes people more sympathetic, and will make them more likely to accept the official decisions, thus increasing efficiency.⁴ Public access to documents may also contribute indirectly by making it easier to participate in the EU and local government, and giving private citizens a chance to influence the decision-making process, something that should be desirable in a democratic system. This in turn also increases legitimacy. In addition, data suggests that private citizens are more likely to accept an official decision when they know there has been public participation compared to an instance where the decision was based solely on expert and government input, even if they themselves have not participated.⁵

² SOU 1994:49 p. 15.
⁴ Banisar 2006, p. 6, Hood & Heald 2006, p. 76.
⁵ Arvai 2003, p. 284, see also Andersen 2013, p. 77-80.
Public access to documents allegedly also contributes to the quality of governance. It is said to promote good practices, and prevent harmful practices. It contributes to good governance in the sense that public access to documents has positive effects, and is a prerequisite for other concepts that help improve quality of governance, like participation and accountability. Public authority figures making decisions are also more likely to motivate their decisions, and arrive at the right conclusion if they know that the documents and the decision in question can be viewed by anyone. This is also thought to prevent corruption in government, for obvious reasons. There are several studies that show that public access to documents does indeed lead to better decision-making, by providing insight into governmental workings to citizens, thus prompting some to participate in the decision-making process.⁶

Additionally, public access to documents can also be seen as having a value by itself, as a fundamental right. Specifically, some argue that access to information is a part of freedom of expression-legislation, which includes the right to receive information.⁷ The reasoning seems to be that to be able to engage and participate in public debate, one needs to have sufficient information about public affairs, and the chance to build an informed opinion. Without public access to documents, building an informed opinion is impossible, as you do not have all the information. Hence, public access to documents must be seen as being part of the freedom of expression, some argue.⁸

1.2 Background

When discussing public access to documents in the manner I do in this thesis, it is important to remember that it does not exist in a vacuum. Increased access to documents affects a lot of things, not the least of which is privacy for private citizens and authority workers. In theory, the Swedish principle of public access to official records enables people to get copies of judgements for personal use, as well as authority decisions that they might be interested in. Recently however, a company has started amassing vast amounts of judgements, uploading it all into a database⁹ that has, among other things, map overlays with red dots for every person who has been convicted of a crime. You can also search for an address, and anyone who has been a plaintiff or defendant in a trial, criminal or civil, pops up. This is clearly not the

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⁶ Kaufmann 2005, p. 41-43.
⁷ See for example Hins & Voorhoof 2007, p. 114.
⁸ Ibid. Based on my understanding of the reasoning in the article.
⁹ Lexbase. [https://lexbase.se/]
intended use of the principle, and the company and database has been heavily criticised, and remains highly controversial. I bring this up because it is important to note that the principle of public access to official records and similar legislation can result in unintended effects that severely intrudes on areas of privacy. In cases such as these, public access to documents and privacy are opposed interests. How are these two important concepts balanced in legislation in Sweden and the European Union respectively? Do both legal systems value the concepts equally, or do they lean in any one direction?

1.3 Intent
In this thesis, I will compare the Swedish legislation on public access to official records to corresponding EU legislation by attempting to answer the following questions, with an aim to highlight differences and similarities in the legal systems:

- What records/documents are available to the public in Sweden, as well as the EU?
- What is required of an individual before he or she can share in official records/documents, and what is the general procedure for handling these requests in Sweden and the EU respectively?
- On what grounds can access to records/documents be restricted in Sweden and the EU?
- Would the outcome of the Bavarian Lager\textsuperscript{10} case have been different if Swedish legislation had been used in place of EU legislation?
- How does Sweden and the EU respectively deal with instances where public access to documents and privacy overlap, and have to be considered opposing interests? Do they lean one way or another, or consider both equally important?

1.4 Delimitations
When looking at the principle of public access to official records, my examination will be limited to the public access to records. I will not be looking at the parts of the Principle that has to do with public trials\textsuperscript{11}, as this is charted mainly, and more extensively in other legislation.\textsuperscript{12} Nor will I look into the freedom of speech- and the freedom of information-

\textsuperscript{10} ECJ judgement, Case C-28/08.
\textsuperscript{11} Bohlin 2015, p. 17.
\textsuperscript{12} 2\textsuperscript{nd} Chapter, 11§, Instrument of Government.
aspects of the principle to any degree larger than what is embodied in the legislation relating to public access to records, and thus occurs naturally during the course of writing about public access to records. As there are two constitutional laws that deal specifically with these issues, any attempt at an interpretation in a few pages by me would result in superficial conclusions at best. The freedom of communication-aspect of the Principle that has to do with whistleblowing, although very interesting, is irrelevant to the scope of this thesis. Therefore, I will not touch upon this aspect of the Principle either.

When looking at the EU in this thesis, I will focus on the legislation that I think is the most important to explore in order to fulfill this thesis’s intent. For the purposes of this thesis, this means a focus on Regulation No 1049/2001 in particular. While public access to documents is touched upon in other parts of EU legislation, the Regulation remains the most thorough source when it comes to public access to documents. As such, I will not go into detail, or even mention, every piece of legislation that influences public access to records, but rather try to focus on producing a generalized summary.

When examining and charting public access to documents-legislation in both Sweden and the EU, it is not my intent to provide an all-encompassing judicial enquiry. Rather, I will attempt to provide a generalized summary of the rules and regulations relevant to the purposes of this thesis. As such, I will rarely go into extensive detail, and will only investigate what I will reasonably need to be able to compare the two systems in an informed manner.

In both the case of the EU and of Sweden, there are quite extensive registers established solely for the purpose of access to documents and records. These registers normally contain dates, registration numbers, and a short summary of what the document or record relates to. The idea is that individuals should be able to gain insight into what the documents they want to access relate to, and that ready information should be available at a glance. Knowledge of what these registers contain, and how extensive they are is undoubtedly important when discussing access to documents, as what information is stored in the registers will have an impact on how effectively individuals can share in documents. In this thesis, however, I will not investigate said registers, or even discuss them in any way, except for when the registers

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13 Bohlin 2015, p. 18.
14 Ibid., p. 19-20.
15 See for example Article 42 of the Charter of Fundamental Rights.
16 See for example 5th Chapter 1-2§ Public Access to Information and Secrecy Act.
are specifically mentioned in the relevant legislation, and even then I will not go into detail about the registers specifically. It is, however, important to know that these registers exist, and to be aware of the fact that they can severely aid (or hamper, when the information is lacking) public access to documents or records.

1.5 Methodology & Materials

In a legal context, the term "method" usually entails a way to apply existing legal sources to a particular legal issue in a given situation. A legal method answers questions regarding the style of lawmaking, who applies and interprets the law, which factors are taken into account in the application and interpretation of said law, and how these factors are ranked. In order to fulfill the intent of this thesis, I will need to look at two different methods and their corresponding theories. As I aim to compare Swedish and EU legislation, I first need to examine the relevant legislation in both Sweden and the EU. When examining current legislation, I will make use a legal dogmatic theory and method. In addition, a comparative theory and methodology permeates the entire thesis.

A dogmatic methodology can be said to mean that the basis of the knowledge is not questioned, that some dogmas are considered true, and are therefore not to be doubted. In law, the dogmatic method means that the law is taken at face value, and does not need to be proven in any way, shape or form. What distinguishes the dogmatic method is that it uses a practitioners perspective; the recipient is often the judge, whose job it is to apply the law, whether in court or in official decisions. When using the dogmatic method, current provisions and legislation is the subject of research. The focus on a practitioners’ perspective has made questions of which sources can be used vital to the dogmatic method. The aim of dogmatism, to determine applicable legislation, can only be achieved if researchers and practitioners agree on which sources are appropriate for authoritative statements on applicable law. Hence, the sources of knowledge deemed suitable for use when applying a dogmatic method are limited to sources that can be considered authoritative. In addition, the dogmatic method clarifies in which order these legal sources should be used. The dogmatic method has recently been criticised for only being interested in clear-cut legal norms, and is occasionally considered

17 Vogenauer 2012, p. 869, 885.
18 Ibid., p. 886.
20 Ibid., p. 91-94.
21 Ibid., p. 92-94.
inherently harmful to legal research, as things are rarely as clear and obvious as a dogmatic method makes them out to be. In this thesis, however, where my focus will lie on a comparison between two legal systems, the dogmatic method is undoubtedly sufficient to research applicable law. The materials used while applying this method are the widely accepted ones, namely legislation, case law, preparatory works, and doctrine. When it comes to case law, I have decided to focus on the Bavarian Lager case as this is the only instance I have found where the interests of privacy and public access to documents clash in the EU.

A comparative legal methodology can be described as the study of the relationship between two legal systems. The aim of comparative law is to compare legal systems to each other, in order to determine similarities and differences. Comparative studies are useful for widely different reasons, ranging from helping to find new legislative solutions to given problems, helping guide legal reforms and unifying law, and simply aiding the legislator in acquiring a better understanding of their own legal system. While there is no clear method of comparative law, some theories and considerations can be discerned. These include:

1. **Functionalism**, only rules and legal institutions that fulfill the same function can and should be compared.

2. **Legal culture**, law being a social subsystem that includes legal culture, the law cannot be understood without first understanding the legal culture. In cases where the comparatist is studying his or her own legal system and comparing it to another, it is particularly important to study the legal culture of the foreign system, as the comparatist is likely to already possess insight into the own legal system.

3. **Law in books, action and practice**. Studying law in books and action is not always sufficient. Occasionally, it is also necessary to study relevant legal history and legal culture.

4. **Taking context into account**.

5. **Language barriers, secondary sources, non-existent patterns and subjectivism**. Language barriers can be a problem in comparative studies, and might lead to

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22 Bogdan 2013, p. 45.
24 Zweigert & Kötz, p. 15-17.
25 The following list is presented in Leidö 2014, p. 59-61.
erroneous conclusions. The use of secondary sources and a desire to see patterns that might not exist are also risks when using a comparative methodology. Comparative studies are subjective; the selection of what is studied will be based on arbitrary decisions taken before the comparatist has "full knowledge of relevant facts."  

1.6 Disposition
In my introduction, I will start by describing my choice of topic and explaining why public access to official documents is important. I will then outline my thesis’ intent, which is meant to clarify what I will be doing in my thesis. Finally, I will explain the methods I will be using. As such, my introductory chapter seeks to answer the questions “why, what and how”.

In my 2nd Chapter, I will examine the Swedish legislation relating to the principle of public access to official records with an aim to provide a generalized summary of relevant legislation, in which I draw some conclusions usable in my comparison.

In my 3rd Chapter, relating to the EU, I will start off by investigating how public access to documents has looked historically. This is important as it helps us understand the legal culture and landscape of the EU, and puts relevant legislation into context. A corresponding look at history is not done for Sweden, however, as anyone reading this essay is likely to already be adequately familiar with the Swedish legal culture. In my 3rd Chapter, I will also examine EU legislation relating to public access to official documents, with an aim to provide a generalized summary of relevant legislation for use in my comparison later on.

In my 4th Chapter, I will go over the Bavarian Lager case extensively, as it provides valuable insight into both the legal culture of the EU, and the interaction between the two Regulations relating to public access to documents and the treatment of personal data mentioned in the Chapter on the EU.

In my analysis, I will compare Swedish and EU legislation on the subject of public access to official documents, specifically by answering the questions posed in my intent for each legal system, and then comparing them in order to determine similarities and differences. This

30 Leidö 2013, p. 60.
includes answering whether the outcome of the Bavarian Lager case would have been different if Swedish legislation had been used in place of EU legislation, which I will examine in my analysis. I will answer where the two legal systems stand regarding the balancing of interests evident between the areas of public access to documents and the privacy and integrity of the individual, and which concept the respective legal systems tend to value higher.

2 Public access to records in Sweden

In Sweden, insight into governmental procedures is mainly provided by openness. In accordance with the principle of public access to official records, any person can get his or her hands on almost any official document, usually completely free, and in the worst case at cost price.\(^{32}\) The person does not need to give his or her name, nor indicate what he or she intends to do with the document.\(^{33}\)

2.1 The principle of public access to official records

The principle of public access to official records dates back to 1766, where it was introduced in the first installment of the (1949:105) Freedom of the Press Act (FPA).\(^ {34}\) Today, the FPA is a constitutional law, and the 2nd chapter in its entirety is dedicated to paragraphs relating to public access to official documents. The main principle states;

> To contribute to a free exchange of thought and comprehensive enlightenment, every Swedish citizen should have the right to share in official records.\(^ {35}\)

So, every Swedish citizen can share in official records. What, then, constitutes an official record?

2.1.1 What is an "official record"?

A "record" is any production in writing or imagery, as well as any recording that can be read, listened to or by other means perceived with technical aids. A record is official, if it is stored

\(^{32}\) 2nd Chapter, 12-13§ FPA.

\(^{33}\) Ibid., 14§

\(^{34}\) Nordin 2015, p. 11.

\(^{35}\) 2nd Chapter, 1§ FPA.
at an authority, and if it has been received\textsuperscript{36} by or produced at an authority.\textsuperscript{37} A recording is to be considered stored at an authority, if the recording is accessible to the authority using technical aids that the authority itself uses for transfers of records in a form it can be read, listened to or by other means perceived.\textsuperscript{38} A compilation of data taken from a recording for automatic processing is not to be considered stored at the authority if the compilation contains personal data, and the authority in accordance with law or regulation lacks the authority to make the compilation available. Personal data refers to all kinds of information that can be directly or indirectly attributed to a physical person.\textsuperscript{39} In addition, a letter or other message that is personally addressed to someone that holds a position at an authority is to be considered an official record, provided the letter applies to matters within the authorities’ jurisdiction, and it is not intended for the recipient solely based on him or her holding another position.\textsuperscript{40}

A record is considered received by an authority when it has arrived at the authority, or it has reached a competent official.\textsuperscript{41} An official is to be considered competent, if part of the officials’ job is to accept documents and records, and the official can exert influence over the matter the record relates to.\textsuperscript{42} A recording is considered received when it has been made accessible to the authority.\textsuperscript{43} A record is considered to have been produced by an authority when it has been dispatched to anyone outside of the particular authority. Dispatching the record can consist of sending it to a recipient, or personally handing it over to a competent official.\textsuperscript{44} A record which has not been dispatched is nonetheless considered produced by the authority when the matter to which it belongs is finalized. A record which does not refer to a specific matter, and which has not been dispatched is considered produced by the authority when it has been adjusted by the authority, or in another way finalized.\textsuperscript{45} If a public body that is linked to authorities submits a record to the authority which it is linked to, the record is not to be considered received or produced by the authority, unless the authority and the public organ can be seen as acting independently from one another.\textsuperscript{46}

\textsuperscript{36} in accordance with the 2\textsuperscript{nd} Chapter, 6-7§§ FPA.
\textsuperscript{37} 2\textsuperscript{nd} Chapter, 3§ FPA.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., 4§.
\textsuperscript{41} Ibid., 6§.
\textsuperscript{42} Prop. 1971:30, p. 368-371.
\textsuperscript{43} 2\textsuperscript{nd} Chapter, 6§FPA.
\textsuperscript{44} Ibid., 7§.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid., 8§.
The FPA also lists a couple of instances where records are not considered produced by or received by an authority. These exceptions include memorandums which have not been dispatched. The memorandum is considered produced by the authority, however, if it is archived. A memorandum in this context includes notes, as well as other records or recordings which have only been created to further the preparation of a matter. A record that is stored at an authority only for the purposes of technological processing or storage on behalf of others is not considered an official record at that authority. Letters, telegrams or other such records which have only been received or produced to extend a message are not considered official records. Neither are messages or other records that have been received or produced by an authority for the purposes of publication in periodicals published by the authority. Records and recordings that are part of a library, or that have been added to public archives by an individual solely for the purpose of storage and care or research and study are not considered official records. Neither are private letters, writings and recordings that have been turned over to an authority for the same purposes.

It would seem the vast majority of documents relating to cases are considered official records. Even letters personally addressed to employees can be considered official records for the purposes of the principle. All of the above comes with one giant caveat, though. It is all dependent on the fact that the entity processing the records or recordings is considered an authority. In this context, what is an authority?

2.1.2 What is considered an authority in regards to the principle?

In the Instrument of Government (1974:152) constitutional law, the term “authority” is used to describe all organs of government and the municipalities, except for Parliament and municipal assemblies. Authorities thus include the actual government, the Courts, and all governmental and municipal authorities. For the purposes of the principle, however, even more entities are equated with authorities. Who these entities are is specified in the Public Access to Information and Secrecy Act (2009:400).

47 2nd Chapter, 9§ FPA.
48 Ibid., 10§.
49 Ibid., 11§.
50 Hirschfeldt & Eka 2012, commentary accompanying 1st Chapter, 8§.
The Acts 2\textsuperscript{nd} Chapter regulates when the Act as a whole is applicable, and what it applies to. In the chapter, the Act specifies that Parliament and municipal assemblies are to be considered authorities for the purposes of the principle.\textsuperscript{51} In addition, corporations (or companies) where municipalities and counties exercise a controlling influence are to be equated with governmental authorities for the purposes of the principle and all accompanying rules. Municipalities and counties should be seen as having a controlling influence if they own more than half the corporations’ shares, if they have the right to appoint or remove more than half of the corporations’ board members, or if they themselves constitute all of the responsible partners in a corporation.\textsuperscript{52} In addition, many entities,\textsuperscript{53} some of whom have been assigned tasks that would normally fall under the authorities’ responsibility are to be considered governmental authorities for the purposes of the Act.\textsuperscript{54} A private entity, as well as the Swedish Church is equated with a governmental authority for the purposes of the principle when the entity or the church processes or stores public records.\textsuperscript{55}

For the purposes of the principle, then, a lot of entities are to be considered authorities. It seems important to the legislator to provide access into authority matters to the private citizen, so he or she can examine all the information, and take part in the democratic process. How does a private citizen take part in this examination, though? What is required of the private citizen before he or she can share in official records? Let’s take a look.

\subsection*{2.1.3 Requesting to share in official records}

Well, first, you request to share in the official record. The request in question should be made at the authority that stores or possesses the record, which then processes and examines your request.\textsuperscript{56} Official records that can be shared with the public shall, on request, be immediately, or as soon as it is possible, made available to he or she who wishes to share in the record. The record shall be made available on location, in a way that it can be read, listened to or in another way perceived, without cost to the person requesting to share in it. The person who wishes to share in the record may also transcribe a text, depict an image, or temporarily claim a recording for sound transfer.\textsuperscript{57} The authority is not obligated to provide the record on

\begin{itemize}
\item \textsuperscript{51} 2\textsuperscript{nd} Chapter, 2§ Public Access to Information and Secrecy Act.
\item \textsuperscript{52} Ibid., 3§. Different rules for different business entities.
\item \textsuperscript{53} specified in the Annex to the Public Access to Information and Secrecy Act.
\item \textsuperscript{54} 2\textsuperscript{nd} Chapter, 4§, and the Annex to the Public Access to Information and Secrecy Act.
\item \textsuperscript{55} Ibid., 5§.
\item \textsuperscript{56} 2\textsuperscript{nd} Chapter, 14§ FPA.
\item \textsuperscript{57} Ibid. 12§.
\end{itemize}
location if significant obstacles are present. For a nominal fee, a person who wishes to share in an official record has the right to get a copy of the official record in question. However, an authority is not obligated to provide a copy other than by printing, nor is it obligated to produce copies of maps, drawings, pictures or other images if it is deemed sufficiently difficult, and the record can be made available on location. A request for a copy of an official record should be processed in all haste. Records that are of paramount importance to national security can be subject to regulation, and the decision to share the records have to be made by a specific authority. An authority is expressly forbidden from investigating who the person requesting an official record is, and for what purpose he or she is requesting the record. If an authority other than Parliament or government declines a request to share in an official record, or if a record has been made available with a reservation that prevents the revelation of its contents or the applicants’ right to fully dispose of the record, the applicant may sue.

### 2.1.4 Exceptions

As with every main principle, there are exceptions to the rule. The publics’ access to official records can be restricted by the following circumstances, if it is deemed warranted:

1. **National security, or the documents’ relation to another state or international organization**
2. **The nations’ central fiscal or monetary policy**
3. **Authorities’ official business of inspection, control or other supervision**
4. **In the interest of prosecuting crime**
5. **The publics’ economic interest**
6. **In the protection of individuals’ personal or economic circumstances**
7. **In the interest of preserving animal and plant species**

No other restrictions can be put on the principle of public access to official records than those specified in the list, the list is exhaustive. In addition, the restriction of the right to share in official documents needs to be thoroughly specified in law. This law is the Public Access to

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58 2nd Chapter, 12§ FPA.
59 Ibid., 13§.
60 Ibid., 14§.
61 Ibid.
62 Ibid., 15§.
63 Ibid., 2§.
Information and Secrecy Act. The Act is split into sections, each section pertaining to a specific set of issues. The exceptions to the principle can be found, and are elaborated upon in sections four and five. Section four contains regulations about secrecy in the interest of protecting public interests, specifically national security, fiscal and monetary policy, authorities’ business of inspection, the publics’ economic interest, to preserve animal and plant species, and secrecy in the interest of prosecuting crime. Section five regulates secrecy in the interest of protection of individuals’ personal or economic circumstances. Of particular importance to this thesis is section five. While all of the other exceptions have a corresponding chapter in the Public Access to Information and Secrecy Act, section five is elaborated upon in nineteen separate chapters.

Most of these chapters deal with very specific issues, for example the whole of Chapter 23 deals with secrecy in the interest of protecting the individual in educational activities, and the legislation within does not apply to any other area. There are, however, some general rules regarding the protection of an individuals personal circumstances and relationships that apply regardless of in what context the information occurs. These rules can be found in Chapter 21 of the Public Access to Information and Secrecy Act.

Secrecy applies to any data that corresponds to an individuals health or sex life. This includes data about diseases, addiction, sexual orientation, sex change, sexual crimes or other similar data, if it has to be presumed that the individual or someone related or intimate with the individual would be caused harm as a result of the data being disclosed. For data in an official record, the secrecy applies for up to seventy years. Secrecy also applies to data specifying an individuals home address and other similar data that can be used to find out where the individual is living, long-term or temporarily. This includes the individuals phone number, e-mail address and other similar data that can be used to come into contact with the individual or someone related or intimate with him or her if there is a particular reason to assume that the individual or someone related or intimate with him or her could be subjected to threats or violence or suffer other harm as a result of the data being disclosed. General secrecy also

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64 The ones specified in the 1st Chapter of the Act.
65 Chapters 15-20.
66 1st Chapter, 5§ Public Access to Information and Secrecy Act.
67 Chapters 21-40.
68 21st Chapter, 1§ Public Access to Information and Secrecy Act.
69 Ibid., 3§.
70 Ibid.
applies to data that corresponds to a foreign national, if it can be assumed that the disclosure of the data would result in an increased risk of someone being subjected to abuse or suffering other significant harm occasioned by the relationship between the foreign national and a foreign state or authority or organization of foreigners.\textsuperscript{71} Secrecy applies to personal data, if it can be presumed that the disclosure of the data would result in the data being treated in contravention of the Personal Data Act (1998:204).\textsuperscript{72} This last condition, however, can not be used to infringe upon the principle of public access to official records. This is clarified in the Personal Data Act:

\textit{The conditions in this Act are not to be applied in a way that would restrict an authorities’ obligation to grant access to personal data in accordance with the 2nd Chapter of the Freedom of the Press Act.}\textsuperscript{73}

2.1.5 Summary

To summarize, a lot of things can be considered official records. Any writing or imagery is an official record, provided it has been produced or received by an authority. There are special rules that govern when a record is to be considered produced or received by an authority, and is thus to be considered official. A record is received when it has reached the authority, or a competent official. The record does not necessarily need to reach the competent official while he or she is at work, as long as the record in some way reaches the competent official. Going to the officials’ residence, and leaving it with them in person does fulfill the criteria, as does leaving the record in their residences’ mailbox.\textsuperscript{74} Recordings are even easier to get your hands on as a private person; it only has to have been made accessible to the authority. A record produced by an authority is any record that has been dispatched, or any record where the matter it relates to is finalized. Drafts and memorandums to official decisions are only considered produced or received by an authority when they are archived or dispatched. Security copies stored at another authority are not considered official records, although the original should still be considered official provided it meets the criteria.

Government, Courts and all governmental and municipal authorities are considered authorities. The two public organs that are usually not considered authorities, Parliament and

\textsuperscript{71}21\textsuperscript{st} Chapter, 5§ Public Access to Information and Secrecy Act.
\textsuperscript{72}Ibid., 7§.
\textsuperscript{73}8§ Personal Data Act.
\textsuperscript{74}Prop. 1971:30, p. 368-371.
municipal assemblies, are specifically stated to be considered an authority for the purposes of the principle. Corporations where counties and municipalities exercise a controlling influence are also equated with authorities, and are thus subject to the principle. Many entities are specifically named in the Annex to the Public Access to Information and Secrecy Act, a classification that equates them with authorities for the purposes of the principle. The entities present in the Annex are mostly ones that have taken on tasks that are normally an authorities’ responsibility, or that have been entrusted to distribute public funds. Private entities, as well as the Church are to be equated with authorities, if they process or store public records. My personal conclusion is that any entity that acts under colour of authority, or has been assigned tasks that are generally considered an authorities’ responsibility, seems to be subject to the principle, and thus examination by the public.

When requesting to share in official records, your request should be submitted to the authority that possesses the record. Provided the record is indeed an official record, the entity you are at is considered to be an authority, and access to the record in question is not restricted by any reason specified in the exhaustive list of exceptions, the record should be immediately made available to you for free. If immediate retrieval is not possible, it should be shown to you as soon as possible. You have a right to transcribe anything you read, see or hear, as well as temporarily take into your possession a recording for sound transfer. You also have the right to gain a copy of any official record that meets the above criteria, for a nominal fee (usually at cost price), provided a copy can be produced by printing alone. If a copy can not be produced by printing alone, or if the record is a map, drawing or other form of image and found sufficiently difficult to print, the authority is not obligated to give you a copy, and can fulfill their obligation to you by making the record available to you on location.

Records that are of paramount importance to national security can be subject to restrictions. You still have a right to share in the records, provided they are not classified due to one of the reasons specified in the exceptions, however the regulation can dictate that any request made to share in the records should be sent to and processed by a specific authority. All authorities are expressly forbidden from asking you who you are or what you intend to do with the record; in fact, they can’t even ask your name. If your request to share in an official record is denied, or if enough of the record is blacked out to make impossible an interpretation of its

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75 See the Annex to the Public Access to Information and Secrecy Act.
contents, you can appeal against the decision by suing. It is also important to note that while the legislative text specifies that all Swedish citizens may share in official records, the lack of citizenship is not an obstacle when applying to share in official records. A foreigner is equated with a citizen for all purposes, unless it is specifically specified otherwise in the FPA.\textsuperscript{76}

The exceptions are fairly straightforward. Public access to records can be restricted in reference to national security, or the documents relation to another state or international organization. They can also be restricted in reference to the nations central fiscal or monetary policy, an authorities official business of inspection, control or other supervision, in the interests of prosecuting crime, in the publics economic interest, in the protection of an individuals personal or economic circumstances, or in the interest of preserving animal or plants species. Any restriction in access must be specified in law. Secrecy applies to data that corresponds to an individuals sex life, health or other similar data if it the disclosure of said data could cause the individual in question, or someone close to him or her harm. Data that makes someone easy to find is also classified, if there is reason to assume that the individual or someone to close to him or her would be subjected to violence or threats as a result of the data being disclosed. Secrecy also applies to data corresponding to a foreign national, if it can be assumed that the disclosure would result in increased risk of abuse or harm. If it can be assumed that the disclosure of personal data would result in said data being treated contrary to the Personal Data Act, secrecy applies to that data. This, however, does not prevent a disclosure of the personal data in accordance with the principle of public access to official records.

\section*{3 Public access to documents in the EU}

The Law in the European Union is made up from three main sources; the primary law, the secondary law, and the supplementary law. The primary law consist mainly of the Treaties of the EU, and accompanying commentary and protocols. Secondary law is comprised of unilateral acts and agreements; regulations, directives, decisions, opinions, recommendations, communications, international agreements, agreements between member states, and interinstitutional agreements. Supplementary law mainly consists of case law from the Court

\textsuperscript{76} 14\textsuperscript{th} Chapter, 5§ FPA.
of Justice, but also includes international law and general principles of law developed by the ECJ. 77

### 3.1 Public access to documents in the EU prior to 1995

While public access to documents in Sweden dates back to the 18th century, the EU only started talking about public access to documents in the 1980s, along with increased interest in freedom of information legislation. 78 In fact, historically the EU has a tradition of confidentiality. Just as openness, and access to records is assumed in Sweden, confidentiality has been assumed historically in the EU, unless a specific exception has applied. 79 In 1990, no principle of public access to documents existed in the primary law. In fact, there was no general rule at all that governed private citizens’ access to EU-documents. 80 Since the 1990s, the EU has taken steps towards more open administration. The first steps towards a principle of openness were taken by the Treaty on the European Union (TEU) in 1992, in the form of a declaration attached to the treaty. 81 The Declaration states:

*The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to information available to the institutions.* 82

In addition, the TEU states that *[...] decisions shall be taken as openly and as closely as possible to the citizen.* 83 As a result of this, a Code of Conduct concerning public access to Council and Commission documents 84 was adopted in 1993. The Code, which was secondary law, was meant to be a principle of openness, in which the Council and Commission committed themselves to providing "the widest possible access to documents". 85 In the same year, detailed conditions for this access to information was implemented by the Council,

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78 Hood 2006, p. 3.

79 Östlund & Hallberg 2013, p. 459.

80 Axbger 1994, p. 11.

81 Augustyn & Monda 2011, p. 17.

82 TEU, Declaration No 17, on the right of access to information.

83 TEU, Art. 9(3).


85 Augustyn & Monda 2011, p. 17.
Commission and Parliament. At first glance, the “widest possible access” appears fairly generous. However, it was interpreted to mean that EU citizens do not have a right to all of the information that the institutions hold, but was rather a right to some information; namely that which it is “possible” to allow public access to. It turned out that the “widest possible access” instituted a fairly weak basis for the access to information, and there was an extensive list accompanying the Code of Conduct that listed areas where the Code was not applicable. The Code, then, fell short of its intended goal of being the basis for a principle of openness.

3.2 The EU post-1995

In 1997, two years after Sweden joined the EU, new legislation sprouted when the Amsterdam Treaty embedded the right of access to information in the old Treaty Establishing the European Economic Community (TEEC), also called the Treaty of Rome. The new Article in question stated:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents [...].

Naturally, this was subject to some exceptions, but for the first time, the European Union had, in primary law, a right to access Council, Commission and Parliament documents. The Amsterdam treaty also included an amendment in the Rules of Procedure, specifically alluding to the previously mentioned Article. This amendment states:

[…] the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision making process. In any event, when the Council acts in its...
legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.\textsuperscript{91}

By firmly establishing the right of access to documents from EU institutions, the Treaty of Amsterdam took steps towards a principle of openness in the EU.\textsuperscript{92} In the Treaty, the use of "right of access" rather than the term used in the Code, the "widest possible access", resulted in a reinforced and clarified right to share in documents.\textsuperscript{93} As a note, at this point in time, no public register of Union documents existed, resulting in difficulties in requesting access to these documents.\textsuperscript{94} In 2009, the Lisbon Treaty expanded the scope of the Article to include the right to share in documents from all EU institutions, with the exception of the ECJ, the European Central Bank, and the European Investment Bank.\textsuperscript{95}

### 3.3 Regulation No 1049/2001

During the Swedish chairmanship of the Council in 2001, a regulation concerning public access to the Commission, Council and Parliament documents was passed. Regulation No 1049/2001, "the regulation regarding public access to European Parliament, Council and Commission documents" contained the definition and specification requested in the Amsterdam Treaty, and the TEEC, and serves to accompany the primary law laid down in those treaties. The Regulation goes into detail on the public’s access to documents, and remains the single most important source on the subject in the EU.

The purpose of the Regulation is to define the principles, conditions and limits on grounds of public or private interest governing the right of access to the institution documents in such a way as to ensure the widest possible access to documents, to establish rules ensuring the easiest possible exercise of this right, and to promote good administrative practice on access to documents.\textsuperscript{96} While the term "widest possible access" made a return in the Regulation, this time it was accompanied by a fairly comprehensive specification of what it meant, and applied to. In many ways, the definition ended up being different from the term in the Code on Conduct, and more beneficial to public access to records as a whole. The right to "Good

\textsuperscript{91} Article 151(3), Amsterdam Treaty.
\textsuperscript{92} Österdahl 1999, p. 242.
\textsuperscript{93} Ibid., p. 241-242.
\textsuperscript{94} Ibid., p. 244.
\textsuperscript{95} Bohlin 2015, p. 290.
\textsuperscript{96} Article 1, Reg. No. 1049/2001.
administrative practice” refers to the right laid down in the Charter of Fundamental Rights.  

The right of access to "institution” documents means a right of access to European Parliament, Commission and Council documents. The Regulation also applies to all agencies established by the Parliament, Commission and Council. While the Lisbon Treaty amended the TEEC and Amsterdam Treaty Articles to expand the scope of the principle of openness laid down in the Treaties (and specified in the Regulation) to include all EU institutions except for the ECJ, the Investment Bank and the Central Bank, and not just the Parliament, Council and Commission, the Regulation has not yet been updated. Effectively, though, the current scope of the Regulation must be seen as including the institutions added in the Lisbon Treaty.

A statement in the Regulations preamble makes it clear that it is not the intent of the regulation to change national legislation concerning access to documents. However, in the same paragraph, the following is stated:

[…] it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

This could be interpreted as meaning that national legislation can’t be interpreted or applied in a manner that limits or goes beyond what is stated in the Regulation. In the case of Sweden, this could mean that more extensive national legislation would have to give way to the far less extensive legislation in the Regulation. For example, if Swedish law allows for access of many documents, but the corresponding rules in the Regulation limits access to one or two, they would have to apply the legislation in the Regulation when it comes to documents that originate from an EU institution, as not to intrude upon the principle of loyal cooperation.

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97 Article 41, Charter of Fundamental Rights.
98 Regulation preamble, (8).
100 Driessen 2012, p. 24.
101 Regulation preamble, (15).
102 See for example Klamert 2014, p. 131-134.
3.3.1 Beneficiaries, scope and definitions
The Regulation specifies who its beneficiaries are, and what its scope is. Any citizen of the EU, or any natural or legal person living in or having its registered office in a Member State is encompassed by the Regulation, and thus has a right of access to documents of the institutions. The institutions may, however, expand the scope of the Regulation to include persons who do not reside in a Member State, and thus grant access to documents to non-EU citizens if they should desire.

The Regulation applies to all documents held by an institution in all areas of activity of the EU. This includes all documents drawn up or received by an institution, provided the documents are in the institutions possession. A document in this context refers to any content concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility. The medium of the content does not matter; whether it be written on paper or stored in electronic form, or as a sound, visual or audiovisual recording, it is still to be considered a document for the purposes of the Regulation.

Ease-of-access is extremely important when it comes to public access to documents. How easy it is to access records can make a big difference when discussing if public access to documents accomplishes its purpose. How do you go about requesting official documents in the EU?

3.3.2 Requesting to share in official documents
Applications for access to a document should be made in any written form, including electronic form, in a sufficiently precise manner to enable the institution to identify the document. The applicant need not disclose why he or she is interested in obtaining the document. The application needs to be in Dutch, French, German, Italian, Danish, English, Finnish, Greek, Irish, Portuguese, Spanish or Swedish. Should an application be insufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example by providing information on the use of the public

103 Article 2(1), Regulation No 1049/2001.
104 Article 2(2), Ibid.
105 Article 2(3), Ibid.
106 Article 3(a), Ibid.
107 Article 6(1), Ibid.
registers of documents.\textsuperscript{108} There is also a restriction in the right to receive multiple documents, specifically:

\textit{In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.}\textsuperscript{109}

What a fair solution is in this context does not appear to be clear. The institutions shall also provide information and assistance to citizens on how and where applications for access to documents can be made, in a general sense.\textsuperscript{110} A received application for access to a document shall be handled promptly. First, an acknowledgement of receipt shall be sent to the applicant when his or her application arrives. Within 15 working days from registration of the application, the institution shall either grant and provide access to the document requested, or, in a written reply, state the reasons for the total or partial refusal, and inform the applicant of his or her right to make a confirmatory application.\textsuperscript{111} The right to make a confirmatory application states:

\textit{In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution’s reply, make a confirmatory application asking the institution to reconsider its position.}\textsuperscript{112}

In certain exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit of 15 working days may be extended by another 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.\textsuperscript{113} If the institution fails to reply within the prescribed time-limit, the applicant may make a confirmatory application.\textsuperscript{114} If a confirmatory application is totally or partially refused, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution, or making a complaint with the Ombudsman.\textsuperscript{115} If the institution does not reply to a confirmatory application within

\textsuperscript{108} Article 6(2), Regulation No 1049/2001.
\textsuperscript{109} Article 6(3), Ibid.
\textsuperscript{110} Article 6(4), Ibid.
\textsuperscript{111} Article 7(1), Ibid.
\textsuperscript{112} Article 7(2), Ibid.
\textsuperscript{113} Article 7(3), Ibid.
\textsuperscript{114} Article 7(4), Ibid.
\textsuperscript{115} Article 8(1), Ibid.
the allotted time limit, it should be considered as a negative reply, and entitle the applicant to pursue the remedies available to him or her.\textsuperscript{116}

Following an approved application, the applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according the applicant’s preference. The cost of producing and sending copies may be charged to the applicant. The charge should not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register is free of charge.\textsuperscript{117}

In the EU, as in Sweden, special rules apply to sensitive documents. Sensitive documents in accordance with the Regulation are any documents classified as confidential.\textsuperscript{118} Applications for sensitive documents shall be handled and processed only by those persons who have a right to acquaint themselves with those documents.\textsuperscript{119} Sensitive documents shall not be recorded in the register or released, unless the originator consents to this.\textsuperscript{120} The originator in this context is the entity from which the document originated; be it an institution or one of their agencies, from Member States, third countries or International Organisations.\textsuperscript{121}

3.3.3 Exceptions

As with any principle of openness, there are exceptions to the main rule. The exceptions\textsuperscript{122} specify that the institutions shall refuse access to a document where disclosure of said document would undermine the protection of the public interests:

- Public security,
- Defence and military matters,
- International relations,
- The financial, monetary or economic policy of the Community or a Member State.\textsuperscript{123}

\textsuperscript{116} Article 8(3), Regulation No 1049/2001.
\textsuperscript{117} Article 10(1), Ibid.
\textsuperscript{118} Article 9(1), Ibid.
\textsuperscript{119} Article 9(2), Ibid.
\textsuperscript{120} Article 9(3), Ibid.
\textsuperscript{121} Article 9(1), Ibid.
\textsuperscript{122} Found in Article 4, Ibid.
\textsuperscript{123} Article 4(1a), Ibid.
Privacy and the integrity of the individual is another grounds for refusal: especially in accordance with Community legislation regarding the protection of personal data. Apart from public interests and privacy, the institutions can refuse access to a document when sharing the document would undermine the protection of:

- Commercial interests of a natural or legal person, including intellectual property,
- Court proceedings and legal advice
- the purpose of inspections, investigations and audits

The above three reasons for refusal can be disregarded if there is an overriding public interest in disclosure. In addition, access to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution can be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is overriding public interest in disclosure. The same is true for access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution. All of the above exceptions only apply for the period of time during which protection is justified on the basis of the content of the document. The maximum amount of time an exception may apply is 30 years, unless the document relates to privacy or commercial interests, or if the document is considered to be sensitive, in which case the exceptions may continue to apply after the period of 30 years, if considered necessary.

Third party documents are subject to some exceptions; the institution shall consult the third party about disclosure of said documents, with a view to assess whether an exception is applicable. A third party in this context is any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies, as well as third countries.

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124 Article 4(1b), Regulation No 1049/2001, more on this later.
125 Article 4(2), Ibid.
126 Article 4(3), Ibid.
127 Article 4(7), Ibid.
128 Article 4(4), Ibid.
129 Article 3(b), Ibid.
In addition, a Member State may request that the institution should not disclose a document originating from that Member State. The ECJ has found, however, that this does not confer on a Member State a general and unconditional right of veto. Rather, it simply means that the Member State must be afforded the opportunity to show why documents originating from it are subject to the relevant exceptions. The point of this subparagraph, according to the ECJ, is to give Member States a chance to have a dialogue with EU institutions, in which the Member State has to provide reasons as to why a document should be encompassed by the exceptions in Article 4. It is then up to the relevant EU institution to record these reasons, so that an individual denied access to a document should be able to understand why it has been denied.

If only parts of the requested document are covered by any of the exceptions above, the remaining parts of the document shall be released.

3.3.4 Summary

In summary, the Regulation applies to any citizen of the EU, natural or legal, as well as any natural or legal person who lives or has its registered office in a Member State. The Regulation applies to all documents held by an institution, and all documents drawn up or received by an institution. In this context, a document is synonymous with any content, regardless of form, that concerns a matter relating to activities within the institutions’ sphere of responsibility.

When applying to access documents, any written form will do. As in Sweden, you do not need to give a reason as to why you’re interested in the document in question. If your request relates to a large number of documents, or one very long document, the institution might contact you, with a view to finding a fair solution. When you apply for a document, your request shall be handled promptly, and a receipt will be sent to you. The institution then has 15 days to respond, either granting you access, or denying your application. This may in some cases be extended by another 15 days. Should your request be denied, you have a right to make a confirmatory application; essentially, you re-apply for the same document, asking the institution to reconsider its position. If your confirmatory application is refused, you will be

131 Sweden v Commission, Case C-64/05 P.
132 Craig & De Búrca 2011, p. 572.
133 Article 4(6), Regulation No 1049/2001.
informed of the remedies open to you. These include court proceedings, or making a complaint with the Ombudsman. If your request is approved, you shall have access to documents either by accessing them on the spot, at the EU institution, or by receiving a copy. The cost of a copy may be charged to you.

Applications for documents that are sensitive (classified) shall be handled only by those who have a right to share in the classified documents. Sensitive documents will only be released with the originator’s consent.

The exceptions to the principle specify that where disclosure of a document would undermine the protection of the interests of the public, which entails public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State), or the interests of privacy, the institution can refuse to share the documents with an applicant. Other grounds for refusal include commercial interests of a natural or legal person, court proceedings and legal advice, and where disclosure would undermine the purpose of inspections, investigations and audits. Documents that are intended for internal use only are also encompassed by the exceptions. These last four grounds for refusal are only legitimate if there is no overriding public interest in disclosure. Exceptions only apply to documents for a maximum of 30 years, unless in the cases where the document is related to privacy, commercial interests, or the document is sensitive.

If a document originates from a Member State, that Member State can request that the EU institutions do not disclose the document. If a document originates from a third party, the institution needs to contact the third party before sharing any documents, and with them assess if any exception is applicable. If parts of a document are covered by an exception, but the remaining part of a document is not, the remaining part of the document is not encompassed by the exception, and shall be released.

Regulation No 1049/2001 does not specify to what extent privacy and integrity can influence the assessment of whether or not access to a document should be restricted. Rather, the Regulation simply mentions privacy and integrity as a grounds for restriction of access, in particular in accordance with Community legislation regarding the protection of personal data. The relevant community legislation can be found in Regulation No 45/2001.
3.4 **Regulation No 45/2001**

Regulation No 45/2001, "The Regulation 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” specifies the object on which it applies by stating:

*In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities [...] shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national law of the Member States implementing Directive 95/46/EC.*

The Regulation defines processing of personal data as any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as: collecting, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction. In accordance with the Regulation, personal data may be processed if the processing is necessary for compliance with a legal obligation to which the controller is subject, or if the data subject has unambiguously given his or her consent. In addition, without prejudice to the previously stated rules, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority. If the recipient establishes that the necessity of having the data transferred, the data shall be transferred if there is no reason to assume that the data subject’s legitimate interests might be prejudiced. The data subject also has a right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her. The exceptions to this is in cases where the processing of personal data is necessary for compliance with legal obligations, and if the data subject has unambiguously given his or her consent. The data subject also has a right to be informed before personal data are disclosed.

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134 Article 1, Regulation No 45/2001.
135 Article 2(b), Ibid.
136 Article 5 (b, e), Ibid.
137 Article 8 (a, b), Ibid.
138 Article 18 (a), Ibid.
for the first time to third parties or before they are used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such a disclosure or use.\textsuperscript{139}

4 The Bavarian Lager Co v Commission

4.1 Background

In 1993, the Bavarian Lager Co., based in the North of England, lodged a complaint against United Kingdom legislation, that they considered to be in violation of the TEEC treaty with the Commission.\textsuperscript{140} Following an investigation in ’95, the Commission decided to institute proceedings against the UK. In ’96, the Commission decided to send a reasoned opinion to the UK. In August of ’96, Bavarian Lager was informed of the fact that a meeting would take place between the Directorate-General for the Internal Market and Financial Services, officials of the UK, the Department of Trade and Industry, as well as representatives of the Confederation des Brasseurs du Marche Commun (CBMC). The meeting took place on October 11, 1996. Bavarian Lager had requested to attend the meeting in question, but were refused permission by the Commission. At this point, the Commission had suspended its decision to issue a reasoned opinion to the UK twice. In early ’97, the UK announced a proposal to amend the legislation Bavarian Lager had lodged the complaint against. Later in the same year, Bavarian Lager was informed that as a result of the proposed amendment, the procedure had been completely suspended, and the reason opinion had not been served on the UK government. In fact, the procedure would be discontinued entirely as soon as the amended legislation came into force. The new legislation entered into force in August of ’97, and the Commission decided to take no further action in the infringement procedure.

Back in March of ’97, Bavarian Lager had requested of the Director-General of Internal Market and Financial Services a copy of the reasoned opinion, in accordance with the Code of Conduct concerning public access to Council and Commission documents in effect at the time. The request, despite being repeated, was refused. The Secretary-General of the Commission confirmed the refusal of the application a couple of months later. Following this confirmed refusal, Bavarian Lager brought an action before the General Court against the decision. In the judgement of 14 October 1999, the Court dismissed the action, stating that the preservation of the aim of allowing a Member State to comply voluntarily with the

\textsuperscript{139} Article 18 (b), Regulation No 45/2001.
\textsuperscript{140} Case C-28/08.
requirements of the Treaty justified, for the protection of public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure.

Pending the above Court case, in ‘98 Bavarian Lager addressed a request to the Commission, again under the Code of Conduct, for access to all of the submissions made under file reference P/93/4490/UK by 11 named companies and organisations, and by three defined categories of person or company. The Commission denied both the application and the confirmatory application on the grounds that the Code of Conduct only applied to documents of which the Commission was the author. Following this denial, Bavarian Lager complained to the European Ombudsman, stating that it wished to obtain the names of the delegates of the CBMC and the names of the companies and any persons who fell into one of the 14 categories identified in the original request for access to documents containing the communications to the Commission and who had attended the meeting on 11 October 1996. The Ombudsman conferred with the Commission, and as a result the Commission indicated to the Ombudsman in November of 1999 that, of 45 letters it had written to the persons concerned requesting approval to disclose their identities to Bavarian Lager, 20 replies had been received, 14 replying in the positive, and 6 in the negative. The Commission supplied the names and addresses of those that had responded positively. Bavarian Lager complained to the Ombudsman that the information provided by the Commission was still incomplete, but nothing came of it.

In December of 2003, Bavarian Lager again sent a request to the Commission regarding access to the documents referred to above. This time, however, the request was based on Regulation No 1049/2001. The Commission replied that certain documents relating to the meeting could be disclosed, but drawing Bavarian Lager’s attention to the fact that five names had been blanked out from the minutes of the meeting, following two express refusals by persons to consent to the disclosure of their identity and the Commission’s failure to contact the remaining three attendees. In 2004, Bavarian Lager made a confirmatory application, requesting the full minutes of the meeting, including all of the names. The Commission rejected the confirmatory application as well, referring to Regulation No 45/2001 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. As Bavarian Lager had not established an express and legitimate purpose or need for such a disclosure, the conditions set out by Regulation No 45/2001 had not been met, and the exception in Article 4(b) of
Regulation No 1049/2001 applied, argued the Commission. It also concluded that even if the rules on the protection of personal data did not apply, it would have had to refuse the access to the other names anyway, so as not to compromise its ability to conduct inquiries.

Bavarian Lager again brought action before the Court, and appeared before the General Court in November of 2007.141

4.2 Procedure before the General Court
The Court quickly concluded that Bavarian Lager’s request was based on Regulation No 1049/2001, and that establishing an express and legitimate purpose or need for a disclosure was not necessary, in accordance with Article 6(1), Regulation No 1049/2001.

The Court investigated the interaction between the two Regulations mentioned by the parties; 1049/2001 on public access to documents, and 45/2001 on the protection of personal data. Regulation No 45/2001 indicates that access to documents, including the conditions for access to documents containing personal data is governed by the rules adopted on the basis of Article 255 TEEC. Therefore, access to documents containing personal data falls under Regulation No 1049/2001, the Court argued. Thus, Regulation No 1049/2001 is the applicable legislation. The exception relevant to this case can be found in Article 4(b) of that Regulation. The Article specifically states that the exception is applicable in particular in accordance with Community legislation regarding the protection of personal data. Therefore, Regulation No 45/2001 is applicable legislation as well.

According to Article 2(b) of Regulation No 45/2001, communication of data by transmission, dissemination or otherwise making data available falls within the definition of ”processing”. Thus, Regulation No 45/2001 itself provides for the possibility of making certain personal data public, independently of Regulation No 1049/2001, the Court concluded. In order to make that personal data available, the processing of personal data must be lawful under either Article 5(a) or 5(b) of Regulation No 45/2001, according to which the processing must be necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject. The Court concluded that the right of access to documents of the institutions for any natural or legal person residing or having its

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registered office in a Member State constitutes just such a legal obligation as mentioned in Article 5(b) of Regulation No 45/2001. Following this reasoning, the Court comes to the conclusion that if Regulation No 1049/2001 requires the communication of data, which constitutes “processing” within the meaning of Article 2(b) of Regulation No 45/2001, Article 5(b) of the same Regulation makes a communication of data lawful.

In regards to the obligation to prove the need to transfer in accordance with Article 8(b) of Regulation No 45/2001, the Court pointed out the fact that access to documents containing personal data falls within the application of Regulation No 1049/2001. According to Article 6(1) of that Regulation, a person requesting access is not required to justify his request and therefore does not have to demonstrate any interest in having access to the requested documents. Where personal data is transferred in order to fulfill the right of access to documents for all citizens of the EU in accordance with Article 2 of Regulation No 1049/2001, the situation falls within the application of that same Regulation and, therefore, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001. If a requirement to demonstrate the necessity of having data transferred existed according to Regulation No 45/2001, that requirement would be contrary to the objective of Regulation No 1049/2001, namely the “widest possible access” to documents held by the institutions. Besides, access to documents can be refused under Article 4(1)(b) of Regulation No 1049/2001 where disclosure would undermine the protection of the privacy and integrity of the individual. A transfer that does not fall under that exception cannot prejudice the legitimate interests of the person mentioned within the meaning of Article 8(b) of Regulation No 45/2001.

Regarding the data subject’s right to object, Article 18 of Regulation No 45/2001 provides that the person has a right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in cases covered by Article 5(b) of the same regulation. As the Court already concluded, the processing of data in accordance with Regulation No 1049/2001 constitutes just such a legal obligation as the one mentioned in Article 5(b). Therefore, the data subject does not have a right to object. However, the Court argued, as there is an exception to that legal obligation in Article 4(1)(b) of Regulation No 1049/2001, that specifically deals with the privacy and integrity of the individual, it is necessary to take into account the impact of the disclosure of data concerning the data subject.
Finally, the General Court concluded that the exception under Article 4(1)(b) of Regulation No 1049/2001 had to be interpreted restrictively and concerned only personal data that was capable of actually and specifically undermining the protection of privacy and the integrity of the individual. The Court concluded that the Commission had been wrong to hold that Bavarian Lager had not established either an express and legitimate purpose or any need to obtain the name of the five persons who participated in the meeting of 11 October 1996, and who after the meeting objected to communication of their identity to Bavarian Lager. Regarding the exception concerning protection of the purpose of inspections in Article 4(2) of Regulation No 1049/2001 brought up by the Commission, the Court saw no reason as to why that provision could be applied to the present case, and, in particular, it held that confidential treatment could not be granted to persons other than the complainant and that the protection was justified only if the procedure in question was still in progress.

The Commission filed an appeal, clamining that the General Court misinterpreted and misapplied Article 4(1)(b) of Regulation No 1049/2001, that the General Court erred in law by excluding from the scope of Article 4(1)(b) the Community legislation on protection of personal data contained in a document, and that in regards to Article 4(2), the General Court wrongly limited the protection of confidentiality of investigations to complainants only, and, for that confidentiality to be maintained, required that the investigation still be current. The ECJ decided to examine the case, but to hold no oral procedure.

4.3 The Appeal

In their appeal, the Commission argued that the General Court made errors of law in its findings concerning the application of the exemption in Article 4(1)(b), and thereby rendered certain provisions of Regulation No 45/2001 ineffective. The Commission also considered that the General Court ruled without reference to the second part of the sentence in Article 4(1)(b) of Regulation No 1049/2001, which provides that institutions are to refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, ”in particular in accordance with Community legislation regarding the protection of personal data”.

The General Court renders ineffective the requirement of a recipient of a transfer of personal data to demonstrate the need for their disclosure in accordance with Article 8(b) of Regulation
No 45/2001 by giving predence to Article 6(1) of Regulation No 1049/2001, which provies that the applicant is not obliged to state reasons for the application, argues the Commission. The obligation on a recipient of personal data to demonstrate that a legitimate purpose is being pursued, provided by Article 8(b) of Regulation No 45/2001, is one of the key provisions of the whole EU legislation concerning data protection. Thus, communication of personal data appearing in a document held by an institution constitutes not only public access to a document under Regulation No 1049/2001, but also a processing of personal data under Regulation No 45/2001, which the General Court did not take into account.

The Commissions adds that the General Court, in holding that any request for personal data must comply with the legal obligation arising from the right of public access, within the meaning of Article 5(b) of Regulation No 45/2001, renders devoid of purpose Article 18(a) of that regulation, which confers on the data subject the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her.

4.4 Findings of the Court of Justice

The ECJ, too, starts by looking at the relationship between Regulation Nos 1049/2001 and 45/2001. For the purpose of applying the exception under Article 4(1)(b) of Regulation No 1049/2001 to the case in point, it must be borne in mind that those regulations have different objectives. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices. The second is designed to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data.

The intent of Regulation No 45/2001 is to establish a "fully-fledged system” of protection of personal data and considered it necessary to ensure throughout the Community "consistent and homogeneous application of the rules for the protection of individuals’ fundamental rights and freedoms with regard to the processing of personal data.” In the mind of EU legislation, then, the legislation on the processing of personal data serves to protect fundamental rights and freedoms. According to recitals of Regulation No 45/2001, the measures in question are
"binding measures" which apply to "all processing of personal data by all Community institutions and bodies" and "in any context whatsoever".

As indicated in the recital of Regulation No 1049/2001, the Regulation forms part of the intention to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Regulation No 1049/2001 lays down as a general rule that the public may have access to the documents of the institutions, but provides for exceptions by reason of certain public and private interests. The recital of the Regulation mentions this specifically, stating "in assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities."

The two Regulations were adopted on dates very close to one another, and do not contain any provisions granting one regulation primacy over the other. In principle, their full application should be ensured. There is, however, an express link between the two regulations established in Article 4(1)(b) of Regulation No 1049/2001, which is an indivisible provision and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001. The previously mentioned article establishes a specific and reinforced system of protection of a person whose personal data could be communicated to the public. It follows that, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety, including Article 8 and 18, argues the Court.

By not taking into account the reference in Article 4(1)(b) of Regulation No 1049/2001 to the legislation of the Union concerning the protection of personal data, and thus to Regulation No 45/2001 itself, the General Court dismissed the application of Article 8(b) and Article 18 of Regulation No 45/2001. These articles constitute essential provisions of the system of protection established by Regulation No 45/2001. Consequently, the restrictive interpretation which the General Court gave to Article 4(1)(b) of Regulation No 1049/2001 does not
respond to the balance which the Union legislature intended to established between the two regulations.

Practically applying this information to this case, it is apparent that the Commission sent Bavarian Lager a document containing the minutes of the meeting of 11 October 1996, with five names removed. Of those five names, three persons could not be contacted by the Commission in order to give their consent, and two others expressly objected to the disclosure of their identity. In refusing access to that document, the Commission based its reasoning on Article 4(1)(b) of Regulation No 1049/2001 and Article 8 of Regulation No 45/2001. The General Court has correctly deduced that surnames and forenames may be regarded as personal data, and that communication of such data falls within the definition of "processing" for the purposes of Regulation No 45/2001. Thus, the list of participants in the meeting of 11 October 1996 contains personal data for the purposes of Article 2(a) of Regulation No 45/2001, since the persons who participated in that meeting can be identified. Therefore, the decisive question is whether the Commission could grant access to the document including the five names of the participants in the meeting of 11 October 1996, in compliance with Article 4(1)(b) of Regulation No 1049/2001 and Regulation No 45/2001.

The ECJ points out that Bavarian Lager was able to have access to all the information concerning the meeting of 11 October 1996, including the opinions which those contributing expressed in their professional capacity. The Commission, upon receiving the request from Bavarian Lager sought the agreement of the participants at the meeting of 11 October 1996 to the disclosure of their names. The Commission was right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them, the ECJ found. The Court found that, by releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe upon the provisions of Regulation No 1049/2001, and sufficiently complied with its duty for openness. By requiring that Bavarian Lager establish the necessity for the five names to be transferred, the Commission complied with the provisions of Article 8(b) of Regulation No 45/2001. 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. Not was it able to verify whether there was any reason to assume that the data subject’s legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No
45/2001. It follows that the Commission was right to reject the application for the access to the full minutes of the meeting of 11 October 1996.

5 Analysis

5.1 What records/documents are available to the public in Sweden, as well as the EU?

In Sweden, official records are available to the public. An official record is any production in writing or imagery, or any recording that can be perceived provided that it is stored at an authority and has either been received by or produced at an authority. What an authority constitutes in Swedish legislation is complicated, but includes all public governmental organs, as well as any entity that acts under colour of authority or has been assigned tasks generally considered an authorities’ responsibility. There are, however, a couple of exceptions to this. Unarchived memorandums, records stored at authorities only for the purposes of technological processing or storage, letters, telegrams, messages and records that have been received by an authority for the purposes of publication in periodicals are not to be considered produced or received by an authority, and are thus exempt from the principle of public access to official records, and are not available to the public.

In the EU, all documents held by an institution in all areas of activity of the EU are subject to the relevant Regulation, and are thus available to the public unless an exception applies. The medium of the content is irrelevant; whether it be written on paper or stored in electronic form, or as a sound, visual or audiovisual recording. This includes all documents drawn up or received by an institution, provided the documents are in the institutions possession. A document refers to any content concerning a matter relating to policies, activities and decisions falling within the institutions’ sphere of responsibility. Before 2009, the definition of an “institution” in this context only provided for the access of Parliament, Commission, Council and their agencies’ documents. However, the Lisbon Treaty expanded the scope of the Regulation to include all EU institutions except for the ECJ, the European Central Bank and the European Investment Bank.

All things considered, the two systems are surprisingly similar. The medium of the content is as far as I can tell almost identical, including written and electronic forms, as well as all manner of recordings that can be perceived. In the context of Sweden, the document in
question being produced or received by an institution is a prerequisite for obtaining access to it. In the EU, the document being drawn up or received by an institution is included in the definition, but does not appear to be a prerequisite for access. In the EU, the definition of the term document is limited to any content relating to policies, activities and decisions falling within the institutions’ sphere of responsibility. A corresponding limitation does not exist in Swedish legislation. This condition in the EU legislation includes all of the specifically mentioned exceptions in Swedish legislation, but also goes above and beyond the exceptions in Swedish legislation, and can exempt from access a wide array of documents that would be available for access in Sweden. In addition, whereas in Sweden the definition of authorities encompasses all courts, and all other governmental agencies, the EU legislation specifies that the ECJ and the European Banks are exempt from all conditions in the Regulation, and records originating from these institutions are thus unavailable to the public.

5.2 What is required of an individual before he or she can share in official records/documents, and what is the general procedure for handling these requests in Sweden and the EU respectively?

In Sweden, you request to share in an official record at the authority that stores or possesses the record. The authority then processes and examines your request. A request shall be processed in all due haste. If the record can be shared with the public, it shall be immediately or as soon as it is possible be made available to the person requesting access. The record shall be made available on location, in a way that it can be perceived, without cost to the person requesting to share in the record. At cost price, a person who wishes to share in an official record has the right to get a copy of the record in question, if said copy can be produced by printing, and isn’t deemed difficult to print. All authorities are expressly forbidden from asking you who you are or what you intend to do with the record. Anyone can request access to official documents in Sweden, as a foreigner is equated with a citizen for all purposes relating to the principle of public access to official records. Requests for records that are of paramount importance to national security shall be sent to and processed by a specific authority.

In the EU, applications for access to a document should be made to an institution in any written form, including electronic form, in a sufficiently precise manner to enable the institution to identify the document. If the application is insufficiently precise, the institution has an obligation to ask the applicant to clarify the application and shall assist the applicant in
doing so. The applicant does not need to disclose why he or she is interested in obtaining the
document. If an application relates to a very long document, or to a very large number of
documents, the institution may confer with the applicant with a view to finding a fair solution.
Within 15 working days from registration of the application, the institution shall either grant
and provide access to the document requested, or in a written reply state the reasons for total
or partial refusal. Following an approved application, the applicant shall have access to
documents either on the spot or by receiving a copy. The cost of producing and sending
copies may be charged to the applicant, but should not exceed the real costs of producing the
materials. Only citizens of the EU, or any natural or legal person living in or having its
registered office in a Member State has a right to access official documents of the EU
institutions. Applications for sensitive documents shall be handled and processed only by
those persons who have a right to acquaint themselves with these documents, and can only be
released if the originator of the document consents to a release.

The requirements on individuals are similar between the two systems, with one major
exception: if an individual wants to request documents in the EU, citizenship, residence or
having a registered office in a Member State is a requirement for obtaining access. In neither
system does the applicant need to motivate why he or she is interested in the document in
question, although in Sweden, an authority even asking about it is expressly forbidden. In the
event of a long document, or a very large number of documents, the EU institutions may
confer with the applicant, with an aim to find a fair solution. What this entails is unclear, and
a corresponding possibility does not exist in Swedish law. The biggest difference between the
legal systems on this subject is how they handle sensitive documents. In the EU, sensitive
documents can only be released if the originator of the document consents to releasing them.
In Sweden, requests for records that are of paramount importance to national security shall be
handled by a specific authority. However, the authority or the originator can not refuse to
release the record, even if it is sensitive, unless any of the specific exceptions apply to the
document.

5.3 On what grounds can access to records/documents be restricted in
Sweden and the EU?

In Sweden, public access to records can be restricted in reference to national security, the
records relation to another state or international organization, the nations central fiscal or
monetary policy, an authorities official business of inspection, control or other supervision, in
the interest of prosecuting crime, in the public's economic interest, in the protection of an individual's personal or economic circumstances, or in the interest of preserving animal or plant species. The exceptions are elaborated upon and specified in great detail in Swedish legislation.

In the EU, institutions shall refuse access to a document where disclosure of said document would undermine the protection of public security, defence and military matters, international relations, the fiscal, monetary or economic policy of the Community or a Member State and the privacy and integrity of the individual (especially in accordance with Community legislation regarding the protection of personal data). In addition, provided there is no overriding public interest in disclosure, access to documents can be restricted when sharing the document would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, and the purpose of inspections, investigations and audits. Access to a document drawn up for internal use which relates to a matter where the decision has not been taken by the institution, and access to a document containing opinions for internal use as part of deliberations and preliminary consultation with the institutions can also be restricted, provided there is no overriding public interest in disclosure.

In the exceptions, a couple of differences are evident. Access to documents can be refused in reference to defence and military matters in the EU. In Sweden, the same possibility exists to a lesser extent in reference to national security. Concerning economic interests, Sweden restricts access in reference to the public’s economic interest, and in the protection of an individual’s economic circumstances. The EU goes further than that, and can refuse access in reference to the commercial interests of an individual, or even a corporation, including intellectual property. The restriction in access to institution documents that are drawn up for internal use present in EU legislation also exists in Sweden, albeit in a different spirit. In Sweden, a record is not considered produced by an authority (and thus can’t be shared with the public) unless it has been dispatched, which happens when the matter to which it relates is finalized, or when the record is archived. The possibility in the EU to disregard an exception if there is an overriding public interest in disclosure does not exist in Sweden; however, in Sweden, the exceptions only apply if it is deemed "warranted" in reference to an interest expressed in the exceptions. Swedish legislation is also a lot more extensive than corresponding EU legislation; the exceptions have been specified in great detail in Swedish
law, and there is thus a higher degree of legal certainty in Sweden than in corresponding EU legislation.

5.4 Would the outcome of the Bavarian Lager case have been different if Swedish legislation had been used in place of EU legislation?

Well, let’s find out by examining the case under Swedish legislation. As established by the principle of public access to official records, every Swedish citizen should have the right to share in official records. The logical first step, then, is to assess whether or not the full minutes of the meeting constitutes an official record in accordance with Swedish legislation. As we have established, a record is any production in writing or imagery, as well as any recording that can be read, listened to or by other means perceived with technical aids. As it can be read, the full minutes of the meeting constitutes a record under Swedish law. A record is to be considered ”official” if it is stored at an authority, and if it has been received by or produced at an authority. The recording is considered stored at an authority if it can be accessed by the authority in a form it in which it can be read, listened to or by other means perceived. A record is considered produced by an authority if it has been dispatched to anyone outside of the particular authority. In addition, a record has been received by an authority when it has arrived at the authority, or it has reached a competent official. As none of the specific exceptions in 9-11§ FPA apply to this particular record, and the record is certainly stored and received, the full minutes of the meeting should be considered an official record according to Swedish law, provided that the Commission is to be considered an authority.

In Swedish legislation, the term ”authority” is used to describe all organs of government and the municipalities, except for Parliament and municipal assemblies. For the purposes of the principle of public access to official records, however, Parliament and municipal assemblies are included in the definition of authorities. While the Commission does not exist in Sweden, the intent of the Swedish legislator is clear; all organs of government, including Parliament, are considered authorities for the purposes of the principle. Thus, if the Commission existed in Sweden, it would certainly be considered an authority in regards to the principle, and thus fall under its scope. It seems clear that the full minutes of the meeting is to be considered an official record if Swedish law is applied. This requires the authority to share the document with the applicant, provided that none of the exceptions to the principle are applicable in this particular case.
If an exception applies, the public’s access to official records can be restricted. By taking a look at the exhaustive list in the 2nd § of the 2nd Chapter FPA, we can deduce that if an exception were to apply to the full minutes of the meeting, it would certainly be number six, in the protection of an individuals’ personal or economic circumstances. This exception is elaborated upon, and the criterion for when it applies can be found in the fifth section of the Public Access to Information and Secrecy Act. As none of the specific conditions for secrecy elaborated upon in Chapters 22-40 can reasonably apply to the full minutes of the meeting, the only option available to us is to look for a general condition for secrecy in Chapter 21 of the Public Access to Information and Secrecy Act. In the 7th § of said Chapter, we find the only condition that may apply. Said condition specifies that secrecy applies to personal data, if it can be assumed that the disclosure of said data would result in the data being treated in contravention of the Personal Data Act. However, the Personal Data Act has a special relationship with the principle of public access to official records. Namely, the conditions in the Personal Data Act can not be used to restrict an authorities’ obligation to grant access to personal data in accordance with the 2nd Chapter of the FPA.

As the 2nd Chapter of the FPA contains both the principle of public access to official records, and the legal framework specifying when it applies, a refusal to grant access to an official record can not be based on the conditions of the Personal Data Act. Thus, the 7th § of Chapter 21 of the Public Access to Information and Secrecy Act can not be used to restrict access to the full minutes of the meeting. As far as I can tell, no other conditions that might restrict access to the full minutes of the meeting exists. Therefore, in my legal opinion, if the Bavarian Lager case had been subject to Swedish legislation, there would have been no legal grounds to deny access to the full minutes of the meeting that the Bavarian Lager Co. requested access to.

5.5 How does Sweden and the EU respectively deal with instances where public access to documents and privacy overlap, and have to be considered opposing interests? Do they lean one way or another, or consider both equally important?

In Sweden, nineteen separate chapters of the Public Access to Information and Secrecy Act deal with this issue specifically. Regardless of context, however, it can be said that secrecy applies to any data that corresponds to an individuals health or sex life, including data about diseases, addiction, sexual orientation, sex change, sexual crimes or other similar data, if it
has to be presumed that the individual or someone intimate with the individual would be caused harm as a result of the data being disclosed. Secrecy also applies to data that can be used to come into contact with an individual, if there is particular reason to assume that the individual or someone related or intimate with him or her could have subjected to threats or violence or suffer other harm as a result of the data being disclosed. Secrecy also applies to data that corresponds to a foreign national if it can be assumed that the disclosure of the data would result in an increased risk of someone being subjected to abuse or suffering other significant harm. Secrecy also applies to personal data in a general sense if it can be presumed that the disclosure of the data would result in the data being treated in contravention of the Personal Data Act. This last exception, however, can not be used to infringe upon the principle of public access to official records and accompanying rules. Almost all of the specific Swedish legislation is constructed in the same way as the above paragraphs; access can be restricted in reference to the private and economic circumstances of an individual if disclosure of a record would risk causing the individual harm or suffering, in one way or another.

In the EU, access to documents can be refused in reference to the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. Personal data may, in this context, only be disclosed if it is necessary for compliance with a legal obligation to which the controller of the personal data is subject, or if the data subject has unambiguously given his or her consent. In addition, personal data shall only be transferred to a recipient if he or she establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or if the recipient establishes that the necessity of having the data transferred and if there is no reason to assume that the data subject’s legitimate interests might be prejudiced. The data subject also has a right to object at any time to the disclosure of data relating to him or her, except in cases where the processing of personal data is necessary for compliance with legal obligations, or if the data subject has given his or her consent. The data subject also has a right to be informed before personal data are disclosed for the first time to third parties or before they are used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such a disclosure or use. See the section on the Bavarian Lager judgement about how these specific conditions interact with the conditions laid out in Regulation No 1049/2001.
This is where the big differences in the two legal systems becomes evident. Sweden is very restrictive when it comes to applying exceptions to the principle of public access to official records, only restricting access to records when disclosure of said records could lead to actual damage, harm or suffering for the individual. In the EU, however, personal data may only be disclosed if it is necessary in compliance of a legal obligation (and even then they are offered the right to object free of charge to such a disclosure or use) or if the data subject has given his or her consent. What conclusions about the legal systems can we draw? Swedish legislation on the subject of public access to documents is a lot more extensive than the corresponding EU legislation, for one. It also seems evident that Swedish legislation prioritizes public access to records higher than the privacy and integrity of the individual, unless there is a real and concrete risk of harm. EU legislation, on the other hand, requires that the applicant establishes the necessity for the personal data to be transferred in a given situation. This motivation needs to provide express and legitimate justifications and convincing arguments that demonstrates the necessity for the personal data to be transferred, in accordance with the ECJs ruling in *Bavarian Lager*. It seems evident that Swedish and EU legislation lean in different directions when it comes to the equilibrium between public access to documents and privacy, with Sweden valuing public access to documents higher, and the EU prioritizing the privacy and integrity of the individual. As I have highlighted in my reimagining of the *Bavarian Lager* case under Swedish legislation, this legislative difference leads to wildly different outcomes when applied to given situations.
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