This is the published version of a chapter published in *The Right of Access to Information and the Right to Privacy: A Democratic Balancing Act*.

Citation for the original published chapter:


Working paper

N.B. When citing this work, cite the original published chapter.

Permanent link to this version:
http://urn.kb.se/resolve?urn=urn:nbn:se:hj:diva-38227
On Democracy, the Right of Access to Information and the Right to Privacy

On December 13th 2016, an international and trans-disciplinary workshop took place at Södertörn University, Sweden. The topic around which the researchers had gathered was The Right of Access to Information and the Right to Privacy: A Democratic Balancing Act. The workshop was one of the many events which celebrated the 250th anniversary of the Swedish Freedom of the Press Act, the first legal instrument in the world laying down the right of access to official documents. An act, the first version of which was published in 1766, will of course have changed to form and content over the years, but original concepts are still possible to trace. Notably, the current right of access to official documents that all citizens benefit from today, is quite easily recognizable in the explanation from 1766 that various official documents must be “immediately […] issued to anyone who applies for them”.¹ This right of access has received much well-deserved international acclaim over the years, as it constitutes an important element of democratic systems. By way of example, the Council of Europe stated in its recommendation on access to government records from 1979 that democratic systems are able to “function adequately only if the people in general and their elected representatives are fully informed”, to which it added that “the freedom of information has operated successfully in Sweden for more than two centuries”.²

Freedom of information is not only important for democracy described from a deliberative and pluralistic point of view, but also for democracy in

² Council of Europe, Recommendation 854 (1979), Access by the public to government records and freedom of information, 1979, p. 1.
terms of the rule of law. The right of access to information certainly provides tools for rendering the public authorities accountable and promote compliance with the law of these actors.3

As the title of the workshop indicates, the right of access and its importance for democracy were discussed in conjunction with the right to privacy. Indeed, these two rights may conflict, not in the least when official documents disclosed by public authorities contain personal information. Additionally the fact that official documents containing personal data are often created – and disclosed – without the knowledge of the registered person also raises questions in terms of privacy rights.

Yet, as has been pointed out by scholars, not only the right of access, but also privacy is of great importance for democracy in the two senses of the terms.5 A starting point for the workshop was, therefore, the assumption that the right of access to information and the right to privacy are both necessary preconditions for a democratic society. Researchers from a broad range of fields were invited to discuss how these assumptions should be examined, and how the balance between the two interests should be assessed when conflicting with each other. The objective of the workshop was to broaden our understanding of various national and disciplinary approaches to the democratic balance between the right of access and the right to privacy.

Together, the articles in this volume convey important insights about the necessary and precarious balance between the right of access and the right to privacy. Below, some overarching tendencies and tentative concluding remarks are presented.

Several articles include a historical perspective of legal and technological developments. In some instances, an effect related to democracy taken from a deliberative point of view may be discerned. This is the case with the


article by Nicola Lucchi, Associate Professor in law, who discusses media freedom and media pluralism. Media freedom deals with editorial independence and access to information for journalists, areas which lately have come under pressure and thus touch upon the theme of right of access of the trans-disciplinary workshop. This could also be said to be the case with media pluralism, the possibility for individuals to satisfy their information needs. In this area, Lucchi identifies the challenges of concentration of power of certain Internet content aggregators and the development of “filter bubbles” that keep certain information outside of reach of the individual. Both in terms of media freedom and media pluralism we may therefore detect difficulties related to access to information, a development which in turn has a potentially negative impact on democracy.

Besides the topic of right of access to information, the privacy in relation to technological development is clearly pointed out in several articles. In two of the articles, we are furthermore reminded that privacy has been high on the agenda long before the digitalisation of our time. This is a theme brought forward by two archival science researchers, Samuel Edquist and Rikard Friberg von Sydow. Edquist studies the political and legal development concerning retention and destruction of social services files, which are documents containing very sensitive personal data on the persons in need of help. Although the current digitalisation certainly brings privacy matters to the foreground, Edquist emphasises how privacy has been a subject intensely discussed for decades. This theme is present also in the article by Rikard Friberg von Sydow on the development of data carriers for medical records during the last 150 years. Both authors contribute to the research on privacy through their historical analyses, showing that privacy matters have been the topic of much debate long before the current technical development.

Another theme deals with the current applicable legislation for protecting privacy. In her article on proactive disclosure, i.e. online publishing by public authorities without the previous request for the release of information, public law expert Patricia Jonason shows that there is some opacity about the legal framework to be applied. Samuel Edquist touches upon a similar topic as he describes the political debate during the last decades regarding retention or destruction of social services files, and shows that the development has been all but straightforward.

The situations described by Jonason and Edquist is a theme similar to the one brought up by historian and archival law expert Anna Rosengren. The object of analysis in the article by Rosengren is the Swedish principle of
public access to official documents ("offentlighetsprincipen" in Swedish). From a literature study, she had identified several factors having an influence on the creation and release of official documents. The high number of factors makes the workings of the principle of public access to official documents a very complex one, to the extent that it becomes largely impossible for individuals to know how personal data about her might be collected, and subsequently released from official documents and further used. Rosengren therefore combined the identified factors with concepts from systems theory regarding the black box, used for systems that cannot be directly observed. The resulting Swedish Black Box model was used to shed light over the Swedish principle of public access to official documents, and showed that factors related to technology and routines, not to legislation, could affect the creation and release of official documents.

The analysis of the technological development of medical records by Friberg von Sydow furthermore shows us that privacy has become more difficult to protect in certain ways. The author points out that protecting data from persons not allowed to access it has become more difficult, just as it has become more difficult to hinder and monitor changes of data as compared to earlier versions of data carriers for medical records. On the other hand, Friberg von Sydow shows that it has become increasingly easy for the different types of medical staff as well as for the patient herself to reach the current medical records, in comparison to e.g. the handwritten notes of the physician of previous times. The medical records being easily reachable could be interpreted as a step towards democratisation, rendering the power relationship between the physician and the patient a more even one. The issue of medical records is also the focus of public law expert William Gilles. In his paper, a presentation and analysis of the latest development of the French legislation in the medical field is provided. Gilles, who presents and compares the previous health database system with the new one, underlines the advancements made to improve the benefits of the system for administrative, research and other public purposes while protecting and also reinforcing privacy.

Privacy is furthermore dealt with at an institutional level in the article by social scientist Ekaterina Tarasova. In this article, an in-depth analysis of research on Data Protection Authorities (DPA’s) is carried out. Tarasova points out the need for a distinction between formal and informal independence of the DPA’s in different countries. As one of the main contributions of the paper, she makes the point that research on DPA’s in Central and Eastern Europe in societies with a lower level of trust would be bene-
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ficial, as new insights could emerge shedding new light also on the DPA’s of western countries. Patricia Jonason also addresses the institutional aspect of privacy protection. In her article on online disclosure of public information she gives much space to the manner in which the Swedish Data Protection Authority, Datainspektionen, carries out the balancing between the interest of transparency and the interest of protecting privacy.

Summing up the results from the various articles, our tentative concluding remarks are the following: Firstly, we may conclude that the right of access and the right to privacy and the balancing of the two is a multifaceted and topical theme over time. Articles sometimes show positive development of some of these areas. This was the case with Rikard Friberg von Sydow who described that reaching medical records have become easier with technological advancement, a development which may be interpreted as a step towards democratisation as patients get easier access to their own data. The paper of William Gilles also shows a positive development in the field, as the description of detailed rules for the access to data in health databases indicates that public policies benefit from these rules at the same time as they improve the protection for privacy. In other instances, recent developments seem to indicate lack of predictability regarding what kind of information might be provided individuals about how her personal data is handled. This, in turn, may have a negative impact on democracy. The article by Patricia Jonason, for instance, indicates difficulties to overview the legislation for proactive disclosure. Yet the General Regulation on Data Protection that will be in force from May 2018, is likely to provide an opportunity for the Swedish legislator to rethink the issue of online proactive disclosure by public authorities. The article by Samuel Edquist on the political debate leading up to the current situation of retention of few, and destruction of most, social services acts, also recalls the fact that knowing about how public authorities handle personal data might be difficult. To what extent may we assume that individuals are aware of how their personal data is going to be handled? According to the article by Anna Rosengren on the Swedish Black Box, predicting the handling of one’s personal data in accordance with the Swedish principle of public access seems an overwhelming task, if not impossible. This lack of predictability might have implications for the rule of law.

Among the conclusions we may draw from the workshop, and the articles emanating from it, is the confirmation of the need to strike the balance between the right of access and the right to privacy. This is certainly difficult, but since the two interests are both of such importance for demo-
cracy, we constantly need to make the effort. The articles in this volume contain information on some of the areas that need our further attention.

Patricia Jonason & Anna Rosengren