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SECRETARIAT-GENERAL  
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**Subject: Comparative analysis of the Member States' and candidate countries' legislation concerning access to documents**

A wider access to documents is a consequence of the Community policy on transparency. A right of access to documents from the European Parliament, the Council and the Commission has become a general principle of Community law with its legal basis in Article 255 of the EC Treaty.

Legislation on access to documents or freedom of information is considerably more complex than may at first appear. Therefore, in preparing the draft legislation on access to documents, the Secretariat-General has studied carefully the legislation in the various Member States of the EU. In addition, a questionnaire on the actual application was sent out to the Member States and the replies have been taken into account in this paper.

This paper aims to summarise national legislation on access to documents and in particular to describe how areas such as the definition of what is a "document", the treatment of internal documents and documents produced by third parties are dealt with. It also explains the various "tests" used in connection with the provisions on exemptions. Twelve out of the fifteen EU Member States already have legislation on access to documents and in Luxembourg and Germany draft legislation is currently before Parliament. There is no general legislation concerning access to documents in Austria (at federal level), where access to documents is in principle granted only to participants in administrative procedures. However, in Germany, special provisions providing a general right to access to documents are included in the constitutions of some "*Länder*". The Austrian legislation obliges the public authorities to provide general information but does not include the right to inspection of records.

The first part of the paper concentrates on the term "document". How is a document defined and what form can it take? How is the administrative nature of documents determined and does the system also cover internal documents? What are the rules concerning documents produced by a third party i.e. other than a public authority itself? In the case of documents provided by third parties, does the author have to be consulted before the document is released?

The second part covers the limitations on the right of access to documents in each Member State. In particular it explains whether there are specific categories of documents which are excluded from the scope of the legislation, and describes the mechanisms governing the system of exemptions in each legislation.

Finally, the third part of the paper looks at the relationship between general legislation and special provisions on access to documents in a specific sector.

## **2. Documents**

### **2.1. The form in which information is held**

There seems to be no limitation on the type of support on which information may be held. In the *United Kingdom*, information can be recorded in any form. In *Sweden*, the definition of a document includes any written matter, picture, or record which can be read, listened to, or otherwise comprehended only by means of technical aids. In *Spain*, a document may take graphic, sound or visual form or it can have any other material support. In the *Netherlands*, a document can be a written document or other material containing data.

### **2.2. Documents “held by” a public authority**

In all the Member States which already have legislation on access to documents or are in the process of adopting it, the system covers both documents produced by and received by (or submitted to) a public authority. In other words, the access legislation covers both documents produced by a public authority itself and documents produced by third parties and held by the authority.

Both nationals and non-nationals have the same right of access to all public documents. The only exception relates to access to data classed as State or official secrets (Bulgaria). However, in Sweden nationals are afforded better protection of this right than non-nationals as this right is granted to them in their Constitution.

In *Sweden*, a document is “official”, and therefore covered by the access to documents system, if it is in the keeping of a public authority, and if it can be deemed (according to the law) to have been received, prepared, or drawn up by an authority. In *Finland*, an administrative document is a document held by a public authority. It can have been either drawn up by or submitted to an authority. In the *United Kingdom*, the Freedom of Information Act refers to “information held by the authority otherwise than on behalf of another person, or held by another person on behalf of the authority”. In *Ireland*, the Act offers access to any record held by (i.e. under the control of) a public body. In the *Netherlands*, *Belgium* and *France*, a document must be in the possession of (or deposited with) an administrative authority. In *Italy*, a document must be drawn up by the public administration, or serve for the purpose of administrative activities. In *Spain*, a document must be registered in the file, but there are no further specifications. In *Greece*, Act No 2690/1999 covers access both to documents produced by and to documents received by the public authorities. However, the law distinguishes explicitly between documents coming from inside the authority and those originating from outside the authority (administrative documents and private documents). Stricter conditions apply for access to private documents (existence of a particular legal interest).

### 2.3. The administrative character of documents

The right of access to documents is generally applicable insofar as the document requested falls within the scope of competence of the public authority. Most of the systems do not define this scope as such but rather focus on the public authorities covered by the legislation.

Some *systems* refer to documents in general and then define the organisations that are considered to be public authorities and therefore subject to the access to documents legislation (*United Kingdom, Ireland, Finland*). In *Denmark*, while the Act is applicable to “all activities exercised by the public administration”, it also applies to some bodies vested with public authority. In *Portugal*, the Act applies to State bodies and autonomous regions exercising administrative functions as well as other associations and organs whose powers are recognised by the law (the Act does not apply to political documents). In *France*, the Act does not apply to documents of the parliamentary assembly, opinions of the Conseil d'Etat or other administrative courts or to documents of the Court of Auditors. In *Spain*, an exemption is used to exclude documents relating to the exercise of constitutional powers. In the *Netherlands*, apart from a definition of the administrative authority, an administrative matter is defined as “a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies”. Finally, the *Swedish* system refers to the official documents of public authorities, which also include the Riksdag (parliament) and local governments vested with powers of decision-making.

Different expressions are used in the legislation to describe a document, such as “administrative document” (*Finland, Belgium, France, Portugal, Italy, Luxembourg*), “document” (*Denmark, Netherlands, Spain, Ireland*), “official document” (*Sweden*), “documents”, with a further distinction between “administrative documents” and “private documents” (*Greece*), and “information” (*United Kingdom*).

### 2.4. Internal documents

Once the applicability of the legislation to administrative documents is established, differences may occur as to whether internal documents<sup>1</sup> (or which category of these documents) may be made available to public.

Two types of systems can be distinguished. The first category of systems excludes internal documents from the application of the legislation (*Switzerland*). Documents in the process of being drawn up which are not covered by access provisions are only made available to the public when they have been officially completed or when a final decision is taken (*Estonia, France, Iceland, Liechtenstein, Portugal, Slovenia, Sweden*), after a *predetermined* period of time (*Bulgaria, Finland, Hungary, Portugal*), when they have

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<sup>1</sup> Internal documents are administrative documents, drawn up for internal purposes, produced by a public authority and not intended for use outside the authority. Internal documents are also documents which are not yet finalised, e.g. preparatory acts.

been sent or shown to a person or organisation outside the public authority that has drawn up the document (*Denmark, Sweden*), when the information is not available through any other means (*Iceland*), or when the document in question has been archived (*Liechtenstein, Portugal*).

In *Finland*, the legislation does not apply to documents of a private nature or internal documents (internal notes, drafts of reports, documents for internal use, see section 3.2.3. below). However, internal documents such as documents relating to negotiations and communications between agents fall within the scope of application providing they contain information that is, according to the law, eligible to be kept in the archives. As in *Denmark, Luxembourg and Germany*, the authority's internal "case material" is taken out of the scope of application unless it is available in a final form. The same applies to other internal documents unless they contain information of factual importance (see section 3.2.2. below). In *Sweden*, internal documents<sup>2</sup> are not official (and therefore fall outside the scope of the legislation), unless they have been accepted for filing and registration (see section 3.2.11. below). In *Portugal*, the legislation is not applicable to political documents nor to personal documents of employees (see section 3.2.9. below). In *France*, the right of access is not applicable to documents which have not acquired their definitive form and documents that are preparatory to a decision in course of elaboration until the decision is being taken (see section 3.2.4. below). In *Hungary*, internal documents are only made available to the public 30 years after they are drawn up. However, the public authorities may permit access on request.

The second category of systems allows internal documents to remain within the scope of the legislation (*Norway*), but maintains the possibility of applying an exemption clause in order to reconcile this access with the need to protect the secrecy of deliberations during the internal preparation of a file. For example, it is possible to limit access when the document in question contains personal opinions (*Belgium, Bulgaria, Netherlands, Slovak Republic*), information on subjects or decisions that may change (*Iceland*), information that may compromise negotiations that are under way or pending (*Bulgaria, Ireland*), subjects that will be dealt with in a future publication (*United Kingdom*) or where there are general restrictions on document access laid down in law (for example in the interest of national defence or the conduct of public affairs – *Austria, Hungary, United Kingdom* – or the protection of personal data – *Austria*). In the *United Kingdom*, the Bill recognises an exemption called "formulation of government policy"<sup>3</sup> and another called "effective conduct of public affairs" and specifies the criteria that must be taken into account when applying this kind of exemption<sup>4</sup>. It also stipulates that a document in the process of being drawn up may nonetheless be made available to the public if a higher

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<sup>2</sup> Any memorandum or other note or record drawn up exclusively for the preparation or oral presentation of a case or matter not adding any factual information to the matter or preliminary outlines or drafts of decisions or official communications of a public authority which have been prepared within a public authority and which have not been circulated.

<sup>3</sup> Exempt information is information relating to the formulation or development of government policy, ministerial communications, and provision or request for provision of advice by any of the Law Offices.

<sup>4</sup> When applying the second exemption the authority has to take into account the following factors: the maintenance of collective responsibility, free and frank basis of discussions or advice, free and frank exchange of views for the purposes of deliberation.

public interest justifies its release. In *Ireland*, several types of exemption may be used, such as records relating to meetings of the government or the functions and negotiations of public bodies. Records relating to the deliberations of public bodies are also exempt if the granting of the request would be contrary to the public interest<sup>5</sup>. In the *Netherlands*, a certain category of documents drawn up for the purpose of internal consultation<sup>6</sup> may be disclosed only in the interest of effective, democratic administration, and in a form which cannot be traced back to any individual. In *Belgium* and *Greece*, the secrecy of the decision-making process of government is protected by exemption clauses.

## **2.5. Documents containing personal data**

As already pointed out, in most of the EU Member States the access to documents systems do not distinguish between documents coming from inside and outside the authority so that both types of documents are subject to the same general rules.

As regards personal data, most of the systems generally provide for non-disclosure of this kind of information unless consent is given by the person concerned, and stipulate respect for the private life of individuals named in documents or for any other protected interests. Some systems distinguish between nominative and non-nominative documents and take the documents of a nominative nature out of the scope of the general right of access (*Portugal*)<sup>7</sup>. In *Greece*, documents concerning the private and personal life of a third person are *a priori* excluded. In some systems the disclosure of personal information is governed by a special act on the protection of nominative data (e.g. the Data Protection Act 1988 in the *United Kingdom*, etc.). In *Sweden*, the Secrecy Act contains a number of provisions on secrecy specially designed to protect personal integrity (the degree of personal data which is protected varies according to the type of information).

## **2.6. Documents emanating from third parties**

In disclosing documents emanating from third parties, the question may arise of whether to consult the author or whether to respect the classification of document fixed by the third party. In the *United Kingdom*, the author's authorisation (or prior classification) is not required and it is up to the public authority to assess any possible harm that might be caused by releasing the information. Information is exempt on grounds of confidentiality only if the disclosure of information to the public would constitute an actionable breach of confidence protected by law. In *Ireland*, it is compulsory to consult the authors of documents containing confidential, commercially sensitive or personal information. In *Finland*, the author is consulted only in cases relating to the protection of privacy and other private interests, while it is for the authority to evaluate the need for confidentiality. This applies even in cases where the author has expressed his or her wish to have the

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<sup>5</sup> Documents can be withheld if release would be against the public interest on the ground that a requester would be aware of a significant decision that a public body had not yet taken.

<sup>6</sup> Documents containing personal opinions of a political nature. As already pointed out, in most of the EU Member States the access to documents systems do not distinguish between documents coming from inside and outside the authority so that both types of documents are subject to the same general rules

<sup>7</sup> Nominative documents contain information about a particular person, identified or identifiable, including judgements or evaluations or information regarding a person's private life.

document kept secret. In *Sweden*, a consultation of the author is only one of the factors in the assessment of potential harm. In *Portugal*, it is for the authority to assess the content of the document while the classification given by the author is taken into account. In the *Netherlands*, the possible refusal of the author will be balanced against the public interest in disclosing the information. However, if the document is explicitly classified prior authorisation will be always needed.

### **3. Applicability the system of exceptions**

#### **3.1. Definitions**

The scope of the legislation has been already partially analysed in section 2. This section compares the systems of exceptions applied in Member States' legislation.

Refusal to provide access to documents may be either for a practical administrative reason (the document cannot be identified because the request is imprecise, or because the request is frivolous or vexatious, etc.) or because disclosure of the information may prejudice either the public interest in general or a specific interest. The legislation then specifies the interests it wishes to protect. Exceptions may be either optional or mandatory. An optional exception (characterised by the formulation “may reject”) means that the authority has an option whether to apply it or not. It provides for greater latitude when balancing the interests or assessing harm than mandatory exceptions (characterised usually by the formulation “will or shall reject”), which should be applied in every case and which give the authority less discretion.

In the majority of countries, it is not generally necessary to indicate the reasons for requesting access to a public document, although there are some exceptions: access to archives (*Armenia, Croatia*); documents classified as “State secrets” (*Bulgaria*); written requests (*Liechtenstein*); documents relating to one individual (*Croatia*); documents that must undergo a “harm test” (*Finland*). In *Cyprus*, it is practice rather than the law which demands that reasons be given. In *Switzerland*, the legislation stipulates that requests do not have to be justified.

Where the legislation requires a public authority to assess the possible consequences of disclosure, it generally requires it to use one of two main types of “test” to determine whether disclosure of information would be prejudicial either to the public interest in general or to specific interests. A “balance of interests” test involves weighing up two opposite values (the interest in disclosing the information against the interest in non-disclosure). A harm test is applied when the authority focuses on the potential harm or prejudice which might be caused to a specific interest protected by the legislation. In some cases the potential harm caused to a particular interest must be balanced against an opposite interest, so these two tests may be combined as in the *Irish* system.

Access to a public document may be refused on the grounds that the request is “clearly unreasonable” in the following countries: *Austria* (when the information is available by other means), *Belgium* and *France* (when the request involves too many documents and

aims solely to harass the authorities), *Bulgaria* (when the same information has already been released to the interested party in the previous six months), *Croatia* (when a legal reason for accessing a document is required but is not provided), *Hungary*, *Ireland* (when a request is “frivolous or malicious”) *Sweden*, *Switzerland* and the *United Kingdom*. Other reasons for refusing access have been set out by *Iceland* (when the information requested is too vague), *Portugal* and *Austria* (“vexatious” intent). In *Estonia*, all justifications for requesting access to documents are laid down in law; as a result, a request for access may only be refused if the reason put forward is not set out in the legislation. In *Denmark*, however, requests do not need to be justified; consequently, there cannot be any “clearly unreasonable” requests.

When a request is rejected on the grounds that it is “clearly unreasonable”, the requester may contest the refusal by following the procedure laid down for refusals justified on any other grounds. This procedure varies from country to country. As a general rule, the matter is referred to an administrative tribunal, but it may also be referred to the body responsible for controlling access to documents (ombudsman, information commissioner, committee on access to documents). In the *United Kingdom*, before the matter is referred to the Information Commissioner, the requester must ask the competent authority to reconsider its decision.

### **3.2. National legislations**

#### **3.2.1. Belgium**

Belgian legislation provides for three kinds of exceptions. In the first group, the authority rejects a request for access if one of the protected interests prevails over the interest in disclosure (e.g. public safety, international relations, etc.). In the second group of exceptions, the authority rejects a request for access if disclosure might harm specific interests (private life, secrecy established by law and secrecy of government deliberations) and in the third case the authority may reject access if, for example, the request concerns incomplete documents or if the request itself is manifestly abusive.

#### **3.2.2. Denmark**

The right of access is not applicable to the authority’s internal “case material” (e.g. documents prepared for its own use, correspondence between units of the same authority, etc.) unless they are available in a finalised form (e.g. when they contain the authority’s final resolution on its decision or information under its duty to make a note, or when they contain general guidelines for consideration, etc.). The right of access also does not apply to other categories of documents (e.g. records of government meetings, inter-ministerial correspondence relating to the preparation of legislation, etc.). However, in both cases the authority may disclose the documents where factual information is of material importance.

Furthermore, the right of access shall not apply to information on the private circumstances of individuals or to information of a technical and business nature, which

is of material importance to the economic interests of an individual or an enterprise. Nor does it apply to matters relating to criminal justice.

The exemption clause is formulated as follows: “The right of access ... may be subject to limitation where protection is essential with regard to...”. When applying most of the exceptions (e.g. security of the State, public financial interests, etc.) the authority *may restrict* access to the extent necessary to avoid the risk of substantial harm to the protected interests. Therefore, a *harm test* is applied.

### **3.2.3. Finland**

Firstly, the right of access is applicable only to administrative documents (certain types of internal documents fall outside this category and are therefore excluded, see below). Secondly, an administrative document must acquire a public character. The moment when it acquires this character is specified by the law. In general, a document enters the public domain when the examination of the matter has been completed or the decision has been taken. However, the public authority also has the discretion to decide whether to make public documents which have not yet reached the public domain.

The legislation does not cover documents of a private nature or internal documents<sup>8</sup>. On the other hand, internal documents such as documents relating to negotiations, communications between agents or all other internal memos are considered to be administrative documents providing they contain information that is, according to the law, eligible to be kept in the archives.

The exemption clause is formulated as follows: “Are considered confidential documents:...”. Documents are classified confidential according to their content (e.g. those relating to external relations, infringement proceedings and criminal investigations, national security, and financial stability). Most of the secrecy clauses are not absolute and the authority has to apply either negative or positive harm tests.

### **3.2.4. France**

The right of access is not applicable to documents that have not yet been finalised. Nor does it apply to documents that are preparatory to a decision until the final decision is taken.

The law provides for two groups of exceptions. The first group contains mandatory exceptions to protect the public interest, and prohibits the communication of documents whose disclosure might be prejudicial to specific public interests (e.g. the secrecy of the government’s deliberations, secrecy of national defence and external policy, State security and public security, public credit, preliminary investigation proceedings, and secrets protected by law). The second group deals with access to nominative documents

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<sup>8</sup> Notes drawn up by the agent or representative of the authority, or drafts which have not yet been presented as a report or submitted to the overall examination of the matter, or documents which have been obtained or drawn up for the purpose of the internal use of the authority.

and documents whose disclosure could be prejudicial to the right to privacy in private life, medical secrets, and commercial and industrial secrets. The law provides that only the persons concerned have a right of access to this category of documents.

### 3.2.5. Greece

The new Code on Administrative Procedures provides for two groups of exceptions, obligatory and optional. The obligatory exemption clause is formulated as follows: “The right of access to documents does not exist when the document concerns the private or personal life of a third person or when secrecy which is specifically provided for by the current legislation is prejudiced”. Therefore, documents which concern the private or personal life of a third person are absolutely and *a priori* excluded from the right of access (without any harm test having to be applied). As regards access to documents relating to an area where secrecy is specifically provided for by the current legislation (e.g. secrecy relating to national defence, external relations, public order and public security, taxation matters, bank secrecy, monetary secrecy), a simple harm test has to be applied and access must be denied if the disclosure could prejudice the protected secret.

Under the optional exemption clause the public authority can deny access a) if the document refers to the discussions of the Council of Ministers or b) if disclosure could essentially harm judicial, police, military or administrative investigations into criminal or administrative offences. In that case, when exercising its discretionary power, the administrative authority has to balance the interest in disclosing the information against the interest of non-disclosure (balance of interests test). In the second case (case b) the potential essential harm caused to the protected interest must be balanced against the disclosure interest, so that a substantial harm test and a balance of interest test are combined.

The right of access has to be exercised without prejudice to existing intellectual or industrial property rights.

Article 16§ 4 of Law 1599/1986 provided that by a joint decision of the Prime Minister and the minister responsible, other exceptions could be defined. After the entry into force of the new legislation, the above-mentioned provision must be considered to have been abolished.

### 3.2.6. Ireland

Most exceptions apply a combined harm test (the disclosure would affect adversely, disturb or prejudice a particular interest) and a balance of interests test (“the disclosure would be contrary to the public interest”). No specific public interest criteria are set out except in the case of the deliberation of public bodies<sup>9</sup> and personal information<sup>10</sup>. The

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<sup>9</sup> Documents can be withheld if release would be against the public interest on the ground that a requester would thereby be aware of a significant decision that a public body proposes to make.

<sup>10</sup> Documents can be released if the public interest in release outweighs the right to privacy of the person concerned.

public interest criterion is not mentioned in relation to such exceptions as parliamentary documents (that are characterised by the type of document) or court documents (which must contain contempt of court).

In the case of the two exemptions relating to law enforcement and public safety, security, defence and international relations the provisions seem to contain a combined optional and mandatory element. The request may be refused if access could be reasonably expected to cause prejudice but if the authority “is satisfied that” prejudice would indeed be caused, the request shall be refused. This element is also found in the provisions relating to the exemption governing meetings of the government. In a further group of exemptions, the option of refusal does not apply if the public interest would be better served by disclosing the information (e.g. financial and economic interests, research and natural resources). There are three purely mandatory exemptions: these apply to parliamentary and court documents, information obtained in confidence and commercially sensitive information.

Access can also be refused on administrative grounds (e.g. lack of precision, the fee has not been paid, planned publication, etc.), or the moment of the disclosure can be deferred (e.g. if the report is of an interest to the public generally, or if it would be contrary to the public interest, etc.).

### **3.2.7. Italy**

The right of access is afforded to everyone who has a legitimate interest in obtaining access to administrative documents. Reasons have to be given for each request (in order to enable the administration to verify the existence of the legal interest).

There is no distinction between official/non-official, finished/non-finished documents. The right of access is not applicable in respect of the documents containing State secrets as provided for by the law, or in all other cases of secrecy required by law (e.g. military secrecy, industrial and business secrets).

Documents may not be exempted when it would be sufficient to defer access. The authority may defer access to documents as long as the disclosure would adversely influence the workings of the administration. In principle, access is not afforded to a certain category of documents such as preparatory documents of a legislative nature or documents concerning planning and programming.

The exceptions are provided for in a Regulation adopted by the government. Documents may only be exempted from access when disclosure would cause actual prejudice to the protected interests. All exemptions are facultative and a harm test is applied.

### **3.2.8. The Netherlands**

The exemption clause is formulated as follows: “Information shall not be disclosed if ...”. In most of the cases documents are disclosed only if their importance does not

outweigh the protected interests. In three cases the balance test does not apply, one of which is characterised by the type of information<sup>11</sup>, and the second two, by the harm to a particular interest<sup>12</sup>. The category of documents drawn up for the purpose of internal consultation<sup>13</sup> may be disclosed only in the interest of effective, democratic administration, and in a form which cannot be traced back to any individual.

Except in the cases of particular necessity, documents over 30 years old are generally accessible.

### **3.2.9. Portugal**

The Act distinguishes between nominative and non-nominative documents, administrative and political documents (political acts of the government).

The right of access is not applicable to political documents, i.e. documents relating to the meetings of the Council of Ministers and State Secretaries as well as preparatory documents for these meetings.

It also does not apply to personal documents of employees such as documents containing personal memos, notes, drafts and other documents of this nature.

In the system of exceptions, access to documents of a non-personal (non-nominative) nature may be deferred in time. Access to documents related to an investigation is deferred until after the potential disciplinary proceedings. Access to preparatory documents or to documents related to pending cases is deferred until after the decision is made. Access to documents containing information where disclosure may prejudice national security and integrity is refused until they are declassified. The administration can also refuse access to documents containing information which could compromise business or industrial secrets or involve the internal matters of companies.

A special regime relates to the documents of a personal (nominative) nature<sup>14</sup>. These are disclosed only to a person having a written authorisation from the person involved, or a person who is directly concerned or other persons who show a direct and personal interest<sup>15</sup>.

### **3.2.10. Spain**

Citizens have a right of access to the registers and the documents that form part of a file and are held in the administrative archives. The files must correspond to matters which have been finalised at the time of the introduction of the request.

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<sup>11</sup> Data on companies or manufacturing processes submitted in confidence by natural or legal persons.

<sup>12</sup> Endangering the unity of the Crown, damaging security of the State.

<sup>13</sup> Documents containing personal opinions on policy.

<sup>14</sup> Information about particular person, identified or identifiable, that includes judgements or evaluations or that is covered by the reservation regarding intimate private life.

<sup>15</sup> The automatic processing of personal data is further specified in a special act.

The right of access is not applicable in specific cases (e.g. non-administrative matters, national defence and State security, business and industrial secrets, etc.).

There is special protection for documents relating to the private life of individuals and certain documents relating to legal proceedings that can be invoked under the exercise of civil rights.

The authority may refuse access in three cases: public interest, the special interest of a third party and when provided for by law.

### 3.2.11. Sweden

The right of access applies only to official documents, in other words documents which are in the keeping of a public authority, and if they are regarded (according to the law) as having been received, prepared or drawn up by the authority<sup>16</sup>. In general a document is official if it reaches a certain degree of finalisation or if it has been distributed outside the public authority.

As for internal documents, any memorandum or other note or record drawn up exclusively for the preparation or oral presentation of a case or matter (except those which add factual information to the matter concerned), or preliminary outlines or drafts of decisions or official communications of a public authority, which have been prepared within a public authority and which have not been distributed, are not official unless they have been accepted for filing and registration.

The main exemption clause is formulated as follows: “The right of access ... may be restricted only if restriction is necessary having regard to...”. Therefore, the authority *may restrict* access to official documents only if it is necessary with regard to the protection of particular interests (e.g. State security, international relations, personal integrity, etc.). Official documents may not be kept secret in respect of other than those particular interests.

Which documents are secret is stated in a special law<sup>17</sup>. In most of the cases there is no automatic refusal when the information belongs to the category of secret information. A harm test (either a straight (positive) harm test or a reverse (negative) harm test) is also applied. Absolute secrecy applies in very rare cases (particularly in matters relating to taxation).

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<sup>16</sup> A document has been “received” when it has arrived at the authority or is in the hands of a competent official, and has been “drawn up” when it has been dispatched outside the public authority or has otherwise obtained a final form or the matter has been finally settled.

<sup>17</sup> The Secrecy Act indicates all the instances when official documents are secret.

### 3.2.12. United Kingdom

Part II of the Freedom of Information Act sets out the circumstances in which the rules on access to information described in Part I do not apply. Some exceptions are class-based: i.e. if the information is of the type described, an exception can be claimed. Other exceptions rely on the application of a harm test referring to the harmful consequences of disclosure.

A harm test is applicable in cases where disclosure may cause harm to a particular interest (e.g. in case of health and safety matters, the information is exempt if its disclosure is likely to endanger the physical or mental health of an individual). The Act does not specify whether the authority should exercise a substantial or a simple harm test<sup>18</sup>. Exemptions determined by the type of document and its content apply in the case of information relating to national security or to bodies dealing with security matters, information held by the authority for the purpose of proceedings and investigations, court records, formulation of government policy, information provided in confidence, legal professional privilege, and communications with Her Majesty.

However, even if the authority is exempt from the duty to communicate the information requested to the applicant under certain provisions in Part II, the Bill requires the application of a public interest test and the disclosure of information where taking into account the circumstances of the case, it is in the public interest to do so. In that case the authority has to apply a two-stage process: in a first stage it has to consider whether or not the information belongs to the category of exempt information (and if so to apply a harm test) and secondly it must consider the public interest in disclosure.

The information is also considered exempt if it is already accessible or if it is intended for future publication.

The exemptions expire after a specific period of 30, 75 and 100 years.

### 3.3. Other legal acts that may affect the general rules on access to documents

In certain systems the provisions governing rules on access to documents are more complex and unified than in other systems. In *Denmark*, access can be limited by the special provisions on the duty of secrecy laid down by statute in specific areas such as the financial sector. In *Ireland*, access shall be refused if the disclosure is prohibited by any other enactment (or if the non-disclosure is authorised by any such enactment). In *Finland*, any possible secrecy clauses in other acts must be in conformity with the ones in the main Act (the Finnish Act was drawn up with the intention to unify the different rules on confidentiality). In the case of *the Netherlands*, apart from the general legislation there are special provisions which prevail in the specific area they govern. In *Sweden*, any further restriction on the right of access must be specified in the Special Act or in another

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<sup>18</sup> The White Paper proposed the application of a substantial harm test in most areas. However, in the case of “the integrity of the decision-making and policy advice processes in Government”, it suggested a simple harm test.

Act to which the Special Act makes reference. In the *United Kingdom*, the Bill exempts all documents whose disclosure is prohibited by any other enactment. Nevertheless, it is only in the case of true necessity when a separate system applies. Therefore, some cases do not require application of the *lex specialis* insofar as they are covered by the exceptions in the general legislation.

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