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Openness and Secrecy

Media Law, KTH

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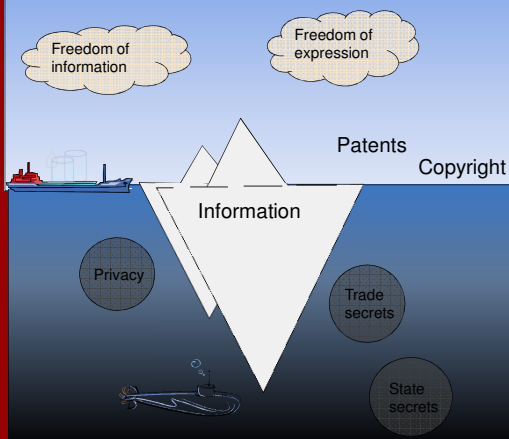
Structure

- Freedom of expression
- Freedom of information
- Trade secrets

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The diagram shows an iceberg floating in water. Above the waterline (visible information) are two clouds labeled 'Freedom of information' and 'Freedom of expression'. On the water surface are 'Patents' and 'Copyright'. Below the waterline (invisible information) are three circles labeled 'Privacy', 'Trade secrets', and 'State secrets'. The word 'Information' is written inside the submerged part of the iceberg.



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Freedom of expression



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Sources of law

- International / EU
 - UDHR
 - ICCPR
 - ECHR (also part of EU law!)
 - EU Charter of Fundamental Rights
- National
 - Entrenched law (e.g. constitutions)
 - Lex specialis (e.g. press, TV and media laws)

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ECHR – art. 10

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...*
2. ...

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Sweden

- Fundamental Law on Freedom of Expression
 - Yttrandefrihetsgrundlag (1991:1469)

Ch.1 Art.1(3) :

The purpose of freedom of expression (...) is to secure the free exchange of opinion, free and comprehensive information, and freedom of artistic creation

- Freedom of the Press Act
 - Tryckfrihetsförordning (1949:105)
- Fundamental Rights and Freedoms
 - Kungörelse (1974:152) om beslutad ny regeringsform



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United Kingdom

- Human Rights Act 1998
- No entrenchment
- Negative right
 - *Everything is permitted except for what is expressly forbidden*



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Freedom of expression

- Purpose:
 - *Freedom to hold opinions*
 - *Freedom to seek, receive, and share information and ideas without interference by public authority*
- Human right
 - *Any person should be able to receive and share information*
- Technology neutral
 - *offline*
 - *online*
 - *TV*
 - *radio*
 - *newspapers*
 - *blogs etc.*



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Freedom of expression

- Limitations only possible if necessary to serve a legitimate interest
- Special rules for TV, radio, newspapers

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Limitations – ECHR art.10

1. ...
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, **may** be subject to such **formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.***

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Limitations - examples

- Offences against a person or group
 - Threats
 - Hate speech
- Defamation
 - *Libel (writing)*
 - *Slander (oral)*
- Child porn
- Inciting imminent lawless action
- Certain other actions conflicting with other human rights
- State secrets
 - *Treason*

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Freedom of expression - conflict

Attorney General v The Observer Ltd and others
[1988] 3 All ER 545
(Spycatcher case)

- Peter Wright
- Spycatcher
- Breach of Official Secrets Act 1911
- Breach of confidence
 - *Sunday Times* – defence of prior publication (they had published before it was published in the US)
- Application for injunctions
- Published in the US

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Non-compliance/breach

- National rules
 - *Jurisdictional matters*
 - e.g. *Edward Snowden*
- Tort law
 - *Injunctions*
 - *Damages*
- Criminal law
 - *Fines*
 - *Imprisonment*

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Liability - examples

- Author
- Editor
- Content provider
- Host, search engine etc.
- Linker

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Balancing rights, *lex specialis*

- Marketing – Freedom of Expression
 - *Promoting a product vs expressing an opinion*
 - *Comparative advertising*
 - *Unfair marketing practices*
- Privacy – Freedom of Expression
 - *human right vs human right*
 - *Data protection*
 - *Defamation*
 - *General public interest*
 - *Context!*

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Privacy v Freedom of expression

von Hannover v Germany (No. 2) [2012] ECHR 228

1. Whether the information contributes to a debate of general interest
2. How well known the person concerned is and the subject matter of the report
3. The prior conduct of the individual concerned
4. Consent, form, and consequences of the publication.
5. The circumstances in which the photos were taken.

- ECtHR: no breach of art. 8 ECHR (right to privacy)

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Legal challenges

- Blogs and social media
 - *Liability for comments on blogs and statements on social media (status updates etc)*
- Filtering online-content by governments

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Legal challenges

- Benefits and risks (legal, business, society, technology) of limiting freedom of expression for:
 - *Host-service provider*
 - *Google*
 - *Facebook*

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Freedom of information



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Legal sources

- International
 - *ECHR*
- EU
 - *TFEU*
 - *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Public Access Regulation)*
 - *Directive 2003/98/EC on the re-use of public sector information (PSI Directive)*
- National
 - *Laws on access to information*
 - *PSI laws*

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Freedom of information

- Extension of Freedom of Expression
- Human right
- Rationale

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Principles

- **The public** has access to public information
 - Access to documents/information
 - Limitations in cases of national security, privacy, health, etc. **and when information is not considered public information**
 - Who is **the public**?
- Re-use of public data
- National laws specify when & how information can be obtained
- Administrative law completes with requirements
 - e.g. if application needs to be made, response required within 14 or 30 days, requests for information need to be handled immediately, etc.

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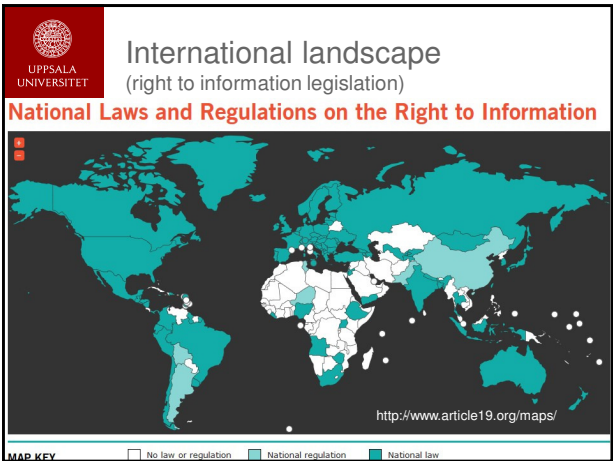
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Starting point?

Everything is secret except for what is expressly public information, or everything is public information except for what is expressly a secret?

- What should the law be?

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TFEU

- Art.15 TFEU
 1. In order to promote **good governance** and ensure the participation of **civil society**, the Union's institutions, bodies, offices and agencies shall conduct their work **as openly as possible**.
 - 2 ...
 3. 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 documents** of the Union's institutions, bodies, offices and agencies, **whatever their medium**, subject to the principles and the conditions to be defined in accordance with this paragraph.

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Sweden

- Fundamental Law on Freedom of Expression
 - Yttrandefrihetsgrundlag (1991:1469)
- Freedom of the press Act
 - Tryckfrihetsförordning (1949:105)
 - The right to receive public information (offentlighetsprincipen)

Ch.2 Art.1:
For the purpose of freedom of expression and comprehensive information (...) [anyone] shall have the right to receive public information/documents

- Fundamental Rights and Freedoms
 - Kungörelse (1974:152) om beslutad ny regeringsform



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United Kingdom

- Human Rights Act 1998
 - Limited usefulness => see the wording of **s.1(2)** (does not actually say: "you have a right of..")
- Freedom of Information Act 2000

s.1 General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him

...



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Access to what?

- Information?
- Documents?
 - What is a document?



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Document

- Regulation 1049/2001 – art.3

*(a) "document" shall mean **any content whatever its medium***
(written on paper or stored in electronic form or as a sound, visual
*or audiovisual recording) **concerning** a matter relating to the*
policies, activities and decisions falling within the institution's
sphere of responsibility;

- **CONTENT NOT FORM**

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Access to public information

- Physically at a specific location?
- Read information online?
- Duty to publish information by authorities?
- Right to receive a copy for free or for a fixed fee?
- Right to remain anonymous?

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Re-use of public data

- Public sector information (PSI) – data held by public authorities
- PSI can be used by businesses to create products or services – forecasts, geo-data (e.g. GPS, maps etc.), insurance (e.g. statistics)
- Also for use that can be in the "grey area" freedom of information-right to privacy – databases with info on where someone is living, contact details, paid tax etc.

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Balancing rights

- Same problems as with expression of thought etc.
 - *Human right vs human right*
 - *Data protection, integrity vs re-using public data etc.*
- What is more important? Right to public insight into government actions or right to privacy?
 - *What's the harm?*

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Challenges

- A lot of public data contains personal data
- Criminal records being used in job interviews
- Whistleblowing

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Secrecy - Sweden

- Freedom of the Press Act
 - *Tryckfrihetsförordning*

Lists the interests that may be protected by keeping official documents secret:

- 1. national security or Sweden's relations with a foreign state or an international organisation;*
- 2. the central financial policy, the monetary policy, or the national foreign exchange policy;*
- 3. the inspection, control or other supervisory activities of a public authority;*
- 4. the interest of preventing or prosecuting crime*
- 5. Public economic interests*
- 6. The protection of personal or economic circumstances of private subjects.*
- 7. Preservation of animal or plant species*

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Secrecy – Sweden

- Public Access to Information and Secrecy Act
 - *Offentlighets- och sekretesslag (2009:400)*
- How authorities should handle official documents – register incoming documents and what should subsequently be done (secrecy marking), when to disclose etc.
- Secrecy provisions to protect public interest
- Secrecy provisions concerning protection of individuals

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United Kingdom

- Freedom of Information Act 2000
 - Part II Exempt Information (ss.21-44)
- Official Secrets Act 1911
- Official Secrets Act 1920
- Official Secrets Act 1939
- Official Secrets Act 1989

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Trade secrets



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Legal framework

- **TRIPS** – data protection in art.39 TRIPS
 - *Not to be confused with data protection legislation concerning processing of personal data.*
- Also indirectly: Paris Convention for the Protection of Industrial Property – art. 10bis (unfair competition)
- National legislation
- Internal (company) policies
- Confidence clauses in agreements
- NDAs (non-disclosure agreements)

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Legal framework

- Sweden
 - Act on the Protection of Trade Secrets
 - Lag (1990:409) om skydd för företagshemligheter
- United Kingdom
 - Equitable right
 - Breach of confidence

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Trade secrets

any confidential business information which provides an enterprise a competitive edge may be considered a trade secret.

right to prevent information from being disclosed to or used by others without one's consent

e.g. industrial or commercial espionage

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Trade secrets

- right applies to information that
 - is secret* (= not generally known among or readily accessible to people outside company)
 - has commercial value because it is secret*; and
 - has been subject to reasonable steps by the rightful holder of the information to keep it secret* (through confidentiality agreements? What about access control? Where should the line be drawn?)
- Duration: potentially unlimited
- Consequences after breach?
 - Injunctions? Damages?
 - Disclosed information will not be a secret anymore

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Examples

- Compilations of data
- Algorithms and processes that are implemented in computer programs
- Manufacturing or repair processes,
- Techniques and know-how;
- Business strategies, business plans, methods of doing business, marketing plans
- Trade secrets encapsulate more than copyright or patents as there are no strict standards for the quality of data (such as originality or novelty)

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Thank you!

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