GRAND CHAMBER

CASE OF GILLBERG v. SWEDEN

(Application no. 41723/06)

JUDGMENT

STRASBOURG

3 April 2012

This judgment is final but it may be subject to editorial revision.

In the case of Gillberg v. Sweden,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Françoise Tulkens,
Nina Vajić,
Dean Spielmann,
Corneliu Bîrsan,
Karel Jungwiert,
Elisabeth Steiner,
Elisabet Fura,
Egbert Myjer,
Danutė Jočienė,
Päivi Hirvelä,
Ledi Bianku,
Mihai Poalelungi,
Nebojša Vučinić,
Kristina Pardalos,
Paulo Pinto de Albuquerque, *judges,*
and Erik Fribergh, *Registrar*,

Having deliberated in private on 28 September 2011 and on 8 March 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 41723/06) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mr Christopher Gillberg ("the applicant"), on 10 October 2006.

2. The applicant was represented by Mr Bertil Bjernstam, a Bachelor of Laws from Gothenburg, and by Mr Clarence Crafoord and Ms Anna Rogalska Hedlund, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agents, Mr Anders Rönquist, Ms Charlotte Hellner and Ms Gunilla Isaksson, from the Ministry for Foreign Affairs.

3. The applicant complained in particular that in civil proceedings concerning access to public documents, and in subsequent criminal proceedings against him concerning misuse of office, his rights under Articles 8 and 10 of the Convention had been breached.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 November 2010 a Chamber composed of J. Casadevall, President, E. Fura, B. M. Zupančič, A. Gyulumyan, I. Ziemele, L. López

Guerra, A. Power, judges, and also of S. Quesada, Section Registrar, delivered its judgment. It unanimously declared the complaint under Articles 8 and 10 relating to the criminal proceedings against the applicant admissible and the remainder of the application inadmissible, and held, by five votes to two, that there had been no violation of Article 8 of the Convention and, unanimously, that there had been no violation of Article 10 of the Convention. The joint dissenting opinion of A. Gyulumyan and I. Ziemele was annexed to the judgment.

5. On 11 April 2011, following a request by the applicant received at the Court on 25 January 2011, the Panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 September 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr C. EHRENKRONA, *Counsel,*
Mr A. RÖNQUIST
Ms C. HELLNER,
Ms G. ISAKSSON,
Mr M. SÄFSTEN,
Ms A. STAWARZ, *Advisers;*

(b) *for the applicant*
Mr C. CRAFOORD,
Mr E. ERIKSSON,
Ms A. ROGALSKA HEDLUND, *Counsel,*
Mr B. BJERNSTAM,
Mr S. SCHEIMAN, *Advisers.*

The applicant was also present.

The Court heard addresses by Mr Crafoord, Mr Eriksson and Mr Ehrenkrona, as well as Ms Rogalska Hedlund's and Mr Ehrenkrona's answers to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1950 and lives in Gothenburg.

10. He is a professor, specialising in child and adolescent psychiatry, at the University of Gothenburg.

11. In the period between 1977 and 1992 a research project was carried out at the University of Gothenburg in the field of neuropsychiatry, focusing on cases of Attention-Deficit Hyperactivity Disorder (ADHD) or Deficits in Attention, Motor Control and Perception (DAMP) in children. The aim was to elucidate the significance thereof and associated problems from a long-term perspective. Parents to a group of one hundred and forty-one pre-school children volunteered to participate in the study, which was followed up every third year. Certain assurances were made to the children's parents and later to the young people themselves concerning confidentiality. The research file, called the Gothenburg study, was voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. It contained a very large amount of privacy-sensitive data about the children and their relatives. Several doctoral theses have been based on the Gothenburg study. The material was stored by the Department of Child and Adolescent Psychiatry, of which the applicant was director. The project was originally set up and started by other researchers but the applicant subsequently took over responsibility for completing the study.

12. The applicant alleged that the Ethics Committee of the University of Gothenburg had made it a precondition in their permits that sensitive information about the individuals participating in the study would be accessible only to the applicant and his staff and that he had therefore promised absolute confidentiality to the patients and their parents. That fact was disputed by the Government.

13. Two permits were issued by the Ethics Committee of the University of Gothenburg, on 9 March 1984 and 31 May 1988 respectively, consisting of one page each and indicating, among other things, the dates of application (respectively 26 January 1984 and 24 March 1988), the researchers involved in the project, the name of the project and the date of approval; they bore the signatures of the chairman and the secretary of the Ethics Committee. They contained no specific requirements and no reference to "secrecy" or "absolute secrecy".

14. In a letter of 17 February 1984 to the parents of the children participating in the study, the applicant stated, *inter alia*:

> "All data will be dealt with in confidentiality and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital, and its present results will, as was the case for the previous study three years ago, be followed up."

15. A later undated letter from the applicant to the participants in the study included the following wording:

"Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

A. Proceedings concerning access to the research material

16. In February 2002 a sociologist, K, requested access to the background material. She was a researcher at Lund University and maintained that it was of great importance to have access to the research material and that it could, without risk of damage, be released to her with conditions under Chapter 14, section 9, of the Secrecy Act (*Sekretesslagen*; SFS 1980:100). She had no interest in the personal data as such but only in the method used in the research and the evidence the researchers had for their conclusions. Her request was refused by the University of Gothenburg on 27 February 2002 because K had not shown any connection between the requested material and any research, and on the ground that the material contained data on individuals' health status which, if disclosed, might harm an individual or persons related to that individual. An appeal against the decision was lodged with the Administrative Court of Appeal (*Kammarrätten i Göteborg*), which referred the matter to the University of Gothenburg to examine whether the material could be released after removal of identifying information or with a condition restricting K's right to pass on or use the data. The University of Gothenburg again refused the request on 10 September 2002, on the ground that the data requested was subject to secrecy, that there was no possibility of releasing the material after removal of identifying information, nor was there sufficient evidence to conclude that the requested material could be released with conditions. K again appealed against the decision to the Administrative Court of Appeal.

17. In the meantime, in July 2002, a paediatrician, E, also requested access to the material. He submitted that he needed to keep up with current research, that he was interested in how the research in question had been carried out and in clarifying how the researchers had arrived at their results, and that it was important to the neuropsychiatric debate that the material should be exposed to independent critical examination. His request was refused by the University of Gothenburg on 30 August 2002, for the same reasons as its refusal to K, a decision against which E appealed to the Administrative Court of Appeal.

18. By two separate judgments of 6 February 2003, the Administrative Court of Appeal found that K and E had shown a legitimate interest in gaining access to the material in question and that they could be assumed to be well acquainted with the handling of confidential data. Therefore, access should be granted to K and E, but subject to conditions made by the University of Gothenburg in order to protect the interests of the individuals concerned in accordance with various named provisions of the Secrecy Act.

19. The University of Gothenburg's request to the Supreme Administrative Court (*Regeringsrätten)* for relief for substantive defects (*resning*) was refused on 4 April 2003.

20. In vain the applicant and some of the individuals participating in the study also applied to the Supreme Administrative Court for relief for substantive defects. Their requests were refused on 4 April, 16 May and 22 July 2003 respectively, because they were not considered to be party to the case (*bristande talerätt).*

21. In the meantime, on 7 April 2003 the University of Gothenburg decided that, "provided that the individuals concerned gave their consent", the documents would be released to K and E with conditions specified in detail in the decisions.

22. K and E appealed against certain of the conditions imposed by the University of Gothenburg. They also reported the University of Gothenburg's handling of the case to the Parliamentary Ombudsman, which in decisions of 10 and 11 June 2003 criticised the University of Gothenburg, notably regarding the delays in replying to the request for access.

23. In two separate judgments of 11 August 2003, the Administrative Court of Appeal lifted some of the conditions imposed by the university. It pointed out that in the judgments of 6 February 2003 K and E had already been given the right of access to the requested documents and that the only matter under examination was the conditions of access, which could only be imposed if they were designed to remove a given risk of damage, and that a condition should be framed to restrict the recipient's right of disposal over the data. Thereafter, six conditions were set regarding K's access, including that the data was only to be used within the Swedish Research Council funded research project called "The neurological paradigm: on the establishment of a new grand theory in Sweden" which K had specified before the Administrative Court of Appeal, that she was not allowed to remove copies from the premises where she was given access to the documents, and that transcripts of released documents containing data on psychological, medical or neurological examinations or treatment, or concerning the personal circumstances of individuals, and notes concerning such examinations, treatment or circumstances from a document released to her, would be destroyed when the above research project was completed and at the latest by 31 December 2004. Six similar conditions were also imposed on E, including that data in the released documents referring to psychological, medical, psychiatric or neurological examinations or treatment, and data in the released documents concerning the personal circumstances of an individual, was to be used for examination of how the researchers who participated in the research project in which the documents had been used had arrived at their results and conclusions, and so that E could generally maintain his competence as a paediatrician.

24. The University of Gothenburg did not have a right to appeal against the judgments and on 5 November 2003 the applicant's request to the Supreme

Administrative Court for relief for substantive defects was refused because he was not considered to be a party to the case.

25. In the meantime, in a letter of 14 August 2003 to the applicant, the Vice-Chancellor of the university stated that, by virtue of the judgments of the Administrative Court of Appeal, K and E were entitled to immediate access to the documents on the conditions specified. Furthermore, by decision of the university, K and E were to be given access to the documents on the university's premises on a named street and the documents therefore had to be moved there from the Department of Child and Adolescent Psychiatry without delay. The letter stated that the transportation of the documents was to begin on 19 August 2003 at 9 a.m. The applicant was requested to arrange for the documents to be available for collection at that time and, if necessary, to ensure that all the keys to the rooms where the material was kept were delivered to a person P.

26. The applicant replied in a letter of 18 August 2003 that he did not intend to hand over either the material or the keys to the filing cabinets to P. On the same day the Vice-Chancellor had a meeting with the applicant.

27. On instruction by the Vice-Chancellor, on 19 August 2003 P visited the Department of Child and Adolescent Psychiatry. He was met by controller L, who handed him a document showing that L had been instructed by the applicant not to release either the material in question or the keys to the filing cabinets.

28. By letter of 1 September 2003 the Vice-Chancellor of the University of Gothenburg informed K and E that since the applicant refused to transfer the material for the present he could not help them any further and that he was considering bringing the applicant before the Public Disciplinary Board (*Statens ansvarsnämnd*) on grounds of disobedience.

29. On 18 October 2003 the applicant had a meeting with the Vice-Chancellor of the University of Gothenburg about the case. Moreover, in autumn 2003 the applicant and various persons corresponded with the Vice-Chancellor, including a professor of jurisprudence and Assistant Director General of the Swedish Research Council who questioned the judgments of the Administrative Court of Appeal, which prompted the Vice-Chancellor to consider whether it would be possible to impose new conditions on K and E. The case was discussed within the University Board and subsequently, by decision of 27 January 2004, the University of Gothenburg decided to refuse to grant access to K because, in the light of a memorandum drawn up on 12 March 2003 by the Swedish Research Council, there was no connection between K's research and the research project that she had specified before the Administrative Court of Appeal. Likewise, in a decision of 2 February 2004 the university decided to impose a new condition on E before giving him access. It stated that it had reason to believe that E's activities and position did not justify giving him access to the material, even subject to restrictions. E thus had to demonstrate that his duties for the municipality included

reviewing or otherwise acquiring information about the basic material on which the research in question was based.

30. The decisions were annulled by the Administrative Court of Appeal by two separate judgments of 4 May 2004.

31. The applicant's request to the Administrative Supreme Court for relief for substantive defects was refused on 28 September 2004 and 1 July 2005, because he was not considered to be party to the case.

32. In the meantime, according to the applicant, the research material was destroyed during the weekend of 7 and 9 May 2004 by three of his colleagues.

B. Criminal proceedings against the applicant

33. On 18 January 2005 the Parliamentary Ombudsman decided to initiate criminal proceedings against the applicant and by a judgment of 27 June 2005 the District Court (*Göteborgs Tingsrätt*) convicted the applicant of misuse of office pursuant to Chapter 20, Article 1 of the Penal Code (*Brottsbalken)*. The applicant was given a suspended sentence and ordered to pay fifty day-fines of 750 Swedish kronor (SEK), amounting to a total of SEK 37,500, (approximately 4,000 Euros (EUR).

34. The Vice-Chancellor of the university was also convicted of misuse of office for having disregarded, through negligence, his obligations as Vice-Chancellor by failing to ensure that the documents were available for release as ordered in accordance with the judgments of the Administrative Court of Appeal. The Vice-Chancellor was sentenced to forty day-fines of SEK 800, amounting to a total of SEK 32,000 (approximately EUR 3,400).

35. The Parliamentary Ombudsman also decided to initiate criminal proceedings against the Chair of the Board of Gothenburg University, but the charges were later dismissed.

36. Finally, by a judgment issued on 17 March 2006, the three officials who had destroyed the research material were convicted of the offence of suppression of documents and given a suspended sentence and fined.

37. On appeal, on 8 February 2006 the applicant's conviction and sentence were upheld by the Court of Appeal (*Hovrätten för Västra Sverige*) in the following terms:

> *General observations on the university's management of the case*
>
> "In its two initial judgments of 6 February 2003 the Administrative Court of Appeal held that K and E were entitled to have access to the documents requested. In its two subsequent judgments of 11 August 2003 the Administrative Court of Appeal decided on the conditions that would apply in connection with the release of the documents to them. The judgments of the Administrative Court of Appeal had therefore settled the question of whether the documents were to be released to K and E once and for all.
>
> At the hearing in the Administrative Court of Appeal, the university had the opportunity to present reasons why the documents requested should not be released to K and E. Once the judgments, against which no appeal could be made, had been issued in February 2003, whether or not the university considered that they were based on erroneous or insufficient grounds had no significance. After the February judgments the university was only required to formulate the conditions it considered necessary to avoid the risk of any individuals

sustaining harm through the release of the documents. Subsequently the university had the opportunity to present its arguments to the Administrative Court of Appeal for the formulation of the conditions it had chosen. After the Administrative Court of Appeal had determined which conditions could be accepted, the question of the terms on which [K and E] could be allowed access to the documents requested was also settled once and for all. There was then no scope for the university to undertake any new appraisal of K's and E's right of access to the documents.

Therefore, in the period referred to in the indictment [from 11 August 2003 until 7 May 2004] it was no longer the secrecy legislation that was to be interpreted but the judgments of the Administrative Court of Appeal. Their contents were clear. [The Vice-Chancellor's] letters of 14 August 2003 to [the applicant] and of 1 September 2003 to K and E show that the university administration had understood that it was incumbent on the university to release the documents without delay.

The promptness required by the Freedom of the Press Act in responding to a request for access to a public document should in itself have caused the university to avoid measures leading to further delay in releasing the documents. Despite this, in its interpretation of the conditions and in laying down additional conditions, the university made it more difficult for K and E to gain access to the documents."

The applicant's liability

"The prosecutor has maintained that after the judgments of the Administrative Court of Appeal of 11 August 2003 and until 7 May 2004, when the material is said to have been destroyed, [the applicant] in his capacity as head of the Department of Child and Adolescent Psychiatry, wilfully disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal and allow [E and K] access to the documents. According to the indictment, [the applicant] in so doing not only refused to hand over the documents in person but also refused to make them available to the university administration.

The research material was the property of the university and hence to be regarded as in the public domain. It was stored in the Department of Child and Adolescent Psychiatry, where [the applicant] was the head. [The Vice-Chancellor's] letter of 14 August 2003, to which copies of the judgments of the Administrative Court of Appeal relating to the conditions were attached, made it clear to [the applicant] that the material in question must be released. As head of the department, [the applicant] was responsible for making the material available to [K and E]. [The applicant's] awareness of his immediate responsibility is revealed not least by the instructions that he gave to [L] before the visit of [P] not to allow the university administration access to the material. It is also shown by [the applicant's] written reply on 18 August 2003 to [the Vice-Chancellor].

Through [the Vice-Chancellor] the university had instructed [the applicant] to release the material to the university, so that it could be moved to premises where K and E could examine it. In view of this, the Court of Appeal, like the District Court, does not consider that [the applicant] can be held culpable because he refused to hand over the documents in person. However, it was incumbent upon him to make the documents available for removal in accordance with the instructions he had received from the university.

[The applicant] has protested that he did not consider that there was any serious intent behind the instruction he received from the [Vice-Chancellor] on 14 August 2003. Here he has referred in particular to the meeting on 18 August 2003 and to the fact that P did not follow up his visit to the department and that he received no new directive to make the material available.

[The Vice-Chancellor], however, has stated that on no occasion did he withdraw the instructions issued on 14 August 2003, and that it must have been quite clear to [the applicant] that they continued to apply, even though they were not explicitly repeated. According to the Vice-Chancellor, nothing transpired at the meeting on 18 August 2003 that could have given [the applicant] the impression that these instructions no longer applied or that they were not intended seriously. [The Vice-Chancellor's] statement in this respect has been confirmed by the Director at the Vice-Chancellor's office, W. It is further borne out by the fact that after the meeting on 18 August 2003 W was given the task of drawing up a complaint to the Government Disciplinary Board for Higher Officials on the subject of [the applicant's] refusals and that the latter was aware that a complaint of this kind was being considered. In addition, it can be seen from a number of e-mails from [the applicant] to [the Vice-Chancellor] that during the entire autumn he considered that he was required to hand over the documents and that he maintained his original refusal to obey his instructions. It has also been shown that when the Board met on 17 December 2003, [the Vice-Chancellor] was still considering making a complaint to the Disciplinary

Board. Finally, [a witness, AW] has testified that at a meeting with [the applicant] shortly after the beginning of 2004, when asked whether he still persisted in his refusal, he confirmed that this was the case.

All things considered, the Court of Appeal finds that it has been shown that [the applicant] was aware that the instructions to make the material available to the administration applied during the entire period from when he learnt about the judgments of the Administrative Court of Appeal on 14 August 2003. It was incumbent on him to take the action required to comply with the judgments.

[The applicant] has stated that he was never prepared to participate in the release of the documents to K and E. His actions were, in other words, intentional and their result was that K and E were categorically denied a right that is guaranteed by the Constitution and that is also of fundamental importance in principle. All things considered, the Court of Appeal finds that [the applicant's] conduct means that he disregarded the obligation that applied to him as head of department in such a manner that the offence of misuse of office should be considered. [The applicant] has however also objected that his conduct should be regarded as excusable in view of the other considerations that he had to bear in mind.

He has thus claimed that in the situation that had arisen he was prevented by medical ethics and research ethics from disclosing information about the participants in the study and their relatives. He referred in particular to international declarations drawn up by the World Medical Association and to the Convention.

The nature of the international declarations agreed on by the World Medical Association is not such as to give them precedence over Swedish law. [The applicant's] objections on the basis of the contents of these declarations therefore lack significance in this case.

Article 8 of the Convention lays down that everyone has the right to respect for his or her private and family life, and that this right may not be interfered with by a public body except in certain specified cases. The provisions of the Secrecy Act are intended, in accordance with Article 8 of the Convention, to protect individuals from the disclosure to others of information about their personal circumstances in cases other than those that can be regarded as acceptable with regard to the right to insight into the workings of the public administration. These regulations must be considered to comply with the requirements of the Convention, and the judgments of the Administrative Court of Appeal lay down how they are to be interpreted in this particular case. [The applicant's] objection that his conduct was excusable in the light of the Convention cannot, therefore, be accepted.

[The applicant] has also asserted that he risked criminal prosecution for breach of professional secrecy if he released the documents to [K and E]. However, the judgments of the Administrative Court of Appeal determined once and for all that the secrecy Act permitted release of the documents. For this reason there was of course no possibility of prosecution for breach of professional secrecy, which, in the opinion of the Court of Appeal, [the applicant] must have realised.

[The applicant] has also stated that he was bound by the assurances of confidentiality he had given to the participants in the study in accordance with the requirements established for the research project. The assurances were given in 1984, in the following terms: "All data will be dealt with in confidence and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital and its present results will, as was the case for the previous study three years ago, be followed up." A later assurance of confidentiality had the following wording: "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

The assurances of confidentiality given to the participants in the study go, at least in some respects, further than the Secrecy Acts permits. The Court of Appeal notes that there is no possibility in law to provide greater secrecy than follows from the Secrecy Act and that it is not possible to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited above did not take precedence over the law as it stands or a court's application of the statutes. [The applicant's] objections therefore have no relevance in assessing his criminal liability.

Finally, [the applicant] has claimed that his actions were justifiable in view of the discredit that Swedish research would incur and the decline in willingness to participate in medical research projects that would ensue if information submitted in confidence were then to be disclosed to private individuals. The Court of Appeal notes that there are other possibilities of safeguarding research interests, for example by removing details that enable identification from research material so that sensitive information cannot be divulged. What [the applicant] has adduced on this issue cannot exonerate him from liability.

[The applicant's] actions were therefore not excusable. On the contrary, for a considerable period he failed to comply with his obligations as a public official arising from the judgments of the Administrative Court of Appeal. His offence cannot be considered a minor one. [The applicant] shall therefore be found guilty of misuse of office for the period after 14 August 2003, when he was informed of the judgments of the Administrative Court of Appeal. The offence is a serious one as [the applicant] wilfully disregarded the constitutional right of access to public documents. On the question of the sentence, the Court of Appeal concurs with the judgment of the District Court.

38. Leave to appeal to the Supreme Court was refused on 25 April 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The right of public access to official documents

39. The principle of public access to official documents (*offenlighetsprincipen*) has a history of more than two hundred years in Sweden and is one of the cornerstones of Swedish democracy. One of its main characteristics is the constitutional right for everyone to study and be informed of the contents of official documents held by the public authorities. This principle allows the public and the media to exercise scrutiny of the State, the municipalities and other parts of the public sector which, in turn, contributes to the free exchange of opinions and ideas and to efficient and correct management of public affairs and, thereby, to maintaining the legitimacy of the democratic system (see Govt. Bill 1975/76:160 pp. 69 et seq.). The principle of public access to official documents is enshrined in Chapter 2, Sections 1 and 12, of the Freedom of the Press Act. Thus, every Swedish citizen is entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information (Chapter 2, Section 1; foreign nationals enjoy the same rights in this respect as Swedish citizens, Chapter 14, Section 5).

40. A document is official if it is held by and is regarded as having been received or "drawn up" by a public authority (Chapter 2, Sections 3 and 6-7, of the Freedom of the Press Act). A document is "drawn up" when it is dispatched by an authority. A document that is not dispatched is "drawn up" when the matter to which it relates is finally settled by the authority in question. If the document does not relate to any specific matter, it is "drawn up" when it has been finally checked or has otherwise received its final form. As research is considered to be an activity in its own right *(faktiskt handlande)* (see, for example, the Chancellor of Justice, 1986 p. 139), it cannot be said to relate to any specific matter. This means, in turn, that research material, as a rule, is "drawn up" and thereby official, as soon as it has been finally checked or otherwise received its final form. It could be added that preliminary

outlines, drafts, and similar documents enumerated in Chapter 2, Section 9, of the Freedom of the Press Act are not deemed to be official unless they introduce new factual information or have been accepted for filing. Finally, there is no general requirement that a document be filed in order to be considered official, and registration does not affect the issue of whether a document is official or not (cf. Chapter 15, Section 1, of the Secrecy Act).

41. An official document to which the public has access shall be made available on request forthwith, or as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such form that it can be read, listened to, or otherwise comprehended; a document may also be copied, reproduced or used for sound transmission (Chapter 2, Section 12). Such a decision should normally be rendered the same day or, if the public authority in question has to consider whether the requested document is official or whether the information is public, within a few days (see, for example, the Parliamentary Ombudsman's decision of 23 November 2007 in case no. 5628-2006). A certain delay may also be acceptable if the request concerns very extensive material. If a document cannot be made available without disclosure of such part of it as constitutes classified material, the rest of the document shall be made available to the person requesting access in the form of a transcript or copy (Section 12). A public authority is under no obligation to make a document available at the place where it is held if this presents serious difficulty.

B. Restrictions on the right of public access to official documents

42. An unlimited right of public access to official documents could, however, result in unacceptable harm to different public and private interests. It has therefore been considered necessary to provide exceptions. These exceptions are laid down in Chapter 2, Section 2 (first paragraph), of the Freedom of the Press Act, which reads as follows:

> The right of access to official documents may be restricted only if restriction is necessary having regard to
> 1. the security of the State or its relations with another State or an international organisation;
> 2. the central fiscal, monetary or currency policy of the State;
> 3. the inspection, control or other supervisory activities of a public authority;
> 4. the interest of preventing or prosecuting crime;
> 5. the economic interest of the public institutions;
> 6. the protection of the personal or economic circumstances of private subjects;
> 7. the preservation of animal or plant species.

43. According to paragraph 2 of the same provision, restrictions on the right of access to official documents shall be scrupulously specified in a provision of a special act of law or, if this is deemed more appropriate in a particular case, in another act of law to which the special act refers (see, for example, Govt. Bill 1975/76:160 pp. 72 et seq. and Govt. Bill 1979/80:2, Part A, pp. 48 et seq.). The special act of law referred to is the Secrecy Act. Pursuant to such a provision, the Government may issue more detailed provisions for its application in an ordinance (*förordning)*. Since the mandate to restrict the right of public access to official documents lies exclusively with the

Swedish Parliament (*Riksdag*), it is not possible for a public authority to enter into an agreement with a third party exempting certain official documents from the right of public access, or to make similar arrangements.

44. The Secrecy Act contains provisions regarding the duty to observe secrecy in the activities of the community and regarding prohibitions against making official documents available (Chapter 1, Section 1). The latter provisions limit the right of access to official documents provided for in the Freedom of the Press Act (*Tryckfrihetsförordningen*, SFS 1949:105). They relate to prohibitions on disclosing information, irrespective of the manner of disclosure. The question of whether secrecy should apply to information contained in an official document cannot be determined in advance, but must be examined each time a request for access to a document is made. Decisive for this issue is whether making a document available could imply a certain risk of harm. The risk of harm is defined in different ways in the Secrecy Act, having regard to the interests that the secrecy is intended to protect. Thus, the secrecy may be more or less strict depending on the interests involved. The secrecy legislation has been elaborated in this way in order to provide sufficient protection, for example, for the personal integrity of individuals, without the constitutional right of public access to official documents being circumscribed more than is considered necessary. In the present case, the Administrative Court of Appeal, in its judgments of 6 February 2003, found that secrecy applied to the research material under Chapter 7, Sections 1, 4, 9 and 13, of the Secrecy Act (Chapter 7 deals with secrecy with regard to the protection of the personal circumstances of individuals).

45. If a public authority deems that such a risk of loss, harm, or other inconvenience which, pursuant to a provision on secrecy, constitutes an obstacle to information being communicated to a private subject, can be removed by imposing a restriction limiting the private subject's right to re-communicate or use the information, the authority shall impose such a restriction when the information is communicated (Chapter 14, Section 9, of the Secrecy Act). As an example of such a restriction, the preparatory notes mention prohibiting the dissemination of the content of a document or the publication of secret information contained in a document (see Govt. Bill 1979/80:2, Part A, p. 349). An individual who has been granted access to a document subject to a restriction limiting the right to use the information may be held criminally liable if he or she does not respect that restriction (see Chapter 20, Section 3, of the Penal Code).

C. Procedure concerning requests for public access to official documents

46. A request to examine an official document must be made to the public authority which holds the document (Chapter 2, Section 14, of the Freedom of the Press Act and Chapter 15, Section 6, of the Secrecy Act). As mentioned above, there are specific requirements of promptness regarding the handling of such requests. A

decision by an authority other than the Swedish Parliament or the Government to refuse access to a document is subject to appeal to the courts – as a general rule, an administrative court of appeal – and, further, to the Supreme Administrative Court (Chapter 2, Section 15, of the Freedom of the Press Act; Chapter 15, Section 7, of the Secrecy Act and Sections 33 and 35 of the 1971 Administrative Court Procedure Act (*Förvaltningsprocesslagen*; SFS 1971:291)). Leave to appeal is required in the last-mentioned court. Only the person seeking access has a right of appeal. Thus, if the Administrative Court of Appeal – contrary to the public authority holding the document in question – decides that a document must be made available, its judgment is not open to appeal by the public authority in question, or by private subjects who consider that harm would be inflicted on them as a consequence of access to the document being granted (see RÅ 2005 note 1 and RÅ 2005 ref. 88). The reason why the right of appeal has been narrowly limited is that once the competing interests have been considered by a court the legislator has given priority to the principle of public access to official documents over other private and public interests (see, for example, Govt. Bill 1975/76:160 p. 203 and RÅ 2003 ref. 18, which concerned an institution's request for relief for substantive defects).

D. Responsibility of public officials and criminal provisions

47. The principle of public access to official documents is applicable to all activities within the public sector and every public official is obliged to be acquainted with the laws and regulations in this area. This is in particular the case where a certain official – following a special decision or otherwise – has the duty to examine requests for access to official documents (Chapter 15, Section 6, second paragraph of the Secrecy Act). Formally, the head of the public authority has the primary responsibility to ensure that such requests are duly examined. However, the task may be delegated to other office holders within the authority and this is what is usually done in practice for the purposes of the authority's daily activities. Such delegation has to be in accordance with the regulations of the authority (Section 21 of the former Government Agencies and Institutes Ordinance, *Verksförordningen* SFS 1995:1322, applicable at the relevant time). Irrespective of a public official's particular competence or power under the regulations of the authority in question, he or she has a general duty to perform the tasks that are part of his or her official duties. As previously mentioned, this duty involves the obligation to assist in making official documents available forthwith, or as soon as possible, to persons who are considered to have the right of access to them under the legislation described above.

48. By virtue of Chapter 20, Article 1, of the Penal Code a person who, in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, will be sentenced for misuse of office (*tjänstefel)*. The provision reads as follows:

Chapter 20, Article 1:

"A person who, in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, shall be sentenced for misuse of office to a fine or a maximum term of imprisonment of two years. If, having regard to the perpetrator's official powers or the nature of his office considered in relation to his exercise of public power in other respects or having regard to other circumstances, the act may be regarded as petty, punishment shall not be imposed. If an offence mentioned in the first paragraph has been committed intentionally and is regarded as serious, the perpetrator shall be sentenced for gross misuse of office to a term of imprisonment of at least six months and at most six years. In assessing whether the crime is serious, special attention shall be given to whether the offender seriously abused his position or whether the crime occasioned serious harm to an individual or the public sector or gave rise to a substantial improper benefit. A member of a national or municipal decision-making assembly shall not be held responsible under the provisions of the first or second paragraphs of this Article for any action taken in that capacity. Nor shall the provisions of the first and second paragraphs of this Article apply if the crime is punishable under this or some other Law."

49. A suspended sentence may be imposed by the courts for an offence for which a fine is considered an inadequate penalty, and such a sentence is, as a general rule, combined with day-fines. A maximum total of 200 day-fines may be imposed. When determining the amount, account is taken of the economic circumstances of the accused, but a day-fine may not exceed 1,000 Swedish kronor (SEK) (Chapter 25, Section 2, Chapter 27, Sections 1 and 2, and Chapter 30, Section 8 of the Penal Code).

50. In Sweden a suspended sentence does not refer to any specific number of days of imprisonment. Under Chapter 27 of the Penal Code a suspended sentence is always subject to a probationary period of two years. A suspended sentence may be linked to specific conditions. If the person convicted commits a new crime during the probationary period the courts may, having due regard to the nature of the new crime, revoke the suspended sentence and impose a joint sanction for the crimes (Chapter 34 of the Penal Code).

E. The Parliamentary Ombudsmen

51. The functions and powers of the four Parliamentary Ombudsmen are laid down in particular in Chapter 12, Section 6 of the Instrument of Government (*Regeringsformen*) and in the Act with Instructions for the Parliamentary Ombudsmen (*Lagen med instruktion för Riksdagens ombudsmän;* SF5 1986:765). Their main task is to supervise the application of laws and other regulations in the public administration. It is their particular duty to ensure that public authorities and their staff comply with the laws and other statutes governing their actions. An Ombudsman exercises supervision, either on complaint from individuals or of his or her own motion, by carrying out inspections and other investigations which he or she deems necessary. The examination of a matter is concluded by a decision in which the Ombudsman states his or her opinion whether the measure taken by the authority contravenes the law or is otherwise wrongful or inappropriate. The Ombudsmen may also make pronouncements aimed at promoting uniform and proper application of the law. An Ombudsman's decisions are considered to be expressions of his or her personal

opinion. They are not legally binding upon the authorities. However, they do have persuasive force, command respect and are usually followed in practice. An Ombudsman may, among many other things, institute criminal proceedings against an official who has committed an offence by departing from the obligations incumbent on him or her in his or her official duties (for example, as in the present case, misuse of office). The Ombudsman may also report an official to the competent authority for disciplinary measures. The Ombudsman may attend deliberations of the courts and the administrative authorities and is entitled to have access to their minutes and other documents.

III. THE HELSINKI DECLARATION

52. The Helsinki Declaration, adopted by the 18th World Medical Association's General Assembly in Finland in June 1964, with later amendments, states, *inter alia*:

> INTRODUCTION
>
> 1. The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, including research on identifiable human material and data. The Declaration is intended to be read as a whole and each of its constituent paragraphs should not be applied without consideration of all other relevant paragraphs.
>
> 2. Although the Declaration is addressed primarily to physicians, the WMA encourages other participants in medical research involving human subjects to adopt these principles.
>
> 3. It is the duty of the physician to promote and safeguard the health of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty.
>
> 4. The Declaration of Geneva of the WMA binds the physician with the words, "The health of my patient will be my first consideration," and the International Code of Medical Ethics declares that, "A physician shall act in the patient's best interest when providing medical care."
>
> 5. Medical progress is based on research that ultimately must include studies involving human subjects. Populations that are underrepresented in medical research should be provided appropriate access to participation in research.
>
> 6. In medical research involving human subjects, the well-being of the individual research subject must take precedence over all other interests.
>
> ...
>
> 10. Physicians should consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards. No national or international ethical, legal or regulatory requirement should reduce or eliminate any of the protections for research subjects set forth in this Declaration.
>
> BASIC PRINCIPLES FOR ALL MEDICAL RESEARCH
>
> 11. It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects.
>
> ...
>
> 14. The design and performance of each research study involving human subjects must be clearly described in a research protocol. The protocol should contain a statement of the ethical considerations involved and should indicate how the principles in this Declaration have been addressed. The protocol should include

information regarding funding, sponsors, institutional affiliations, other potential conflicts of interest, incentives for subjects and provisions for treating and/or compensating subjects who are harmed as a consequence of participation in the research study. The protocol should describe arrangements for post-study access by study subjects to interventions identified as beneficial in the study or access to other appropriate care or benefits.

15. The research protocol must be submitted for consideration, comment, guidance and approval to a research ethics committee before the study begins. This committee must be independent of the researcher, the sponsor and any other undue influence. It must take into consideration the laws and regulations of the country or countries in which the research is to be performed as well as applicable international norms and standards but these must not be allowed to reduce or eliminate any of the protections for research subjects set forth in this Declaration. The committee must have the right to monitor ongoing studies. The researcher must provide monitoring information to the committee, especially information about any serious adverse events. No change to the protocol may be made without consideration and approval by the committee.

...

23. Every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information and to minimize the impact of the study on their physical, mental and social integrity.

24. In medical research involving competent human subjects, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information. After ensuring that the potential subject has understood the information, the physician or another appropriately qualified individual must then seek the potential subject's freely-given informed consent, preferably in writing. If the consent cannot be expressed in writing, the non-written consent must be formally documented and witnessed. ...

THE LAW

I. THE SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

53. From the outset, the Grand Chamber reiterates that the content and scope of the "case" referred to it are delimited by the Chamber's decision on admissibility (see, *inter alia*, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII; *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V; *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR-2007-IV). Thus the Grand Chamber may only examine the case in so far as it has been declared admissible; it cannot examine those parts of the application which have been declared inadmissible. Therefore, if an applicant before the Grand Chamber raises a complaint which has been declared inadmissible by the Chamber, this complaint will be declared outside the scope of the case before the Grand Chamber (see, *inter alia*, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, §§ 61-62, ECHR 2007-I).

54. Furthermore, under Article 35 § 4 of the Convention the Grand Chamber may dismiss applications it considers inadmissible "at any stage of the proceedings".

Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *inter alia*, *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III).

55. In these circumstances the Grand Chamber has jurisdiction to examine only the merits of the case as declared admissible by the Chamber in its judgment of 2 November 2010. This means, in particular, that the applicant's complaints concerning the outcome of the civil proceedings before the administrative courts cannot be examined as they were declared inadmissible as being lodged out of time.

56. In conclusion, the Grand Chamber has jurisdiction to examine only whether the criminal conviction of the applicant for misuse of office infringed his rights under Articles 8 and 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

The Government's preliminary objection

1. The Government's submissions

57. By way of a preliminary objection, the Government contended that the applicant's complaint fell outside the scope of Article 8 of the Convention and should therefore be declared incompatible with the Convention*ratione materiae*.

58. More specifically, they contested that a criminal conviction could constitute an interference with the right to respect for private life under Article 8, unless there were special circumstances in a particular case calling for a different conclusion (see, for example, *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, *Reports of Judgments and Decisions* 1997-I).

59. Furthermore, recalling that the applicant was convicted of a crime related to his professional duties as a public official, the Government contended that the applicant had failed to show how such a conviction had affected his "private life" or any other aspects of Article 8, in order for his complaint to fall within the ambit of the said Article.

2. The applicant's submissions

60. The applicant first claimed that he had a right under Article 8 of the Convention not to impart confidential information and that this right had been breached by his criminal conviction.

61. He also contended that his moral integrity, his reputation and his honour had been affected by the conviction to a degree falling within the scope of Article 8, and that he had suffered personally, socially, psychologically and economically. On this last point, he had lost income because he had been dismissed by the Norwegian

Institute of Public Health and because he could have written at least five books during the time that had been taken up by the case.

62. The applicant submitted that the national authorities had put him in the impossible dilemma of having either to breach his promise of secrecy to the participants in the study by complying with the Administrative Court of Appeal's judgments, which in his opinion was wrong, or to refuse to comply with the said judgments and run the risk of being convicted for misuse of office. He chose to keep his promise of secrecy and received massive support for that decision from numerous renowned and highly respected scientists.

3. The Chamber's decision

63. In its judgment of 2 November 2010 the Chamber left open whether the applicant's complaint fell within the scope of Article 8 and whether there had been an interference with his right to respect for his "private life", because even assuming that there had been an interference, it found that there had been no violation of the provision concerned.

4. The Grand Chamber's assessment

64. The Court recalls that the applicant was a public official researcher exercising public authority at a public institution, namely the University of Gothenburg. He was not the children's doctor or psychiatrist and he did not represent the children or the parents. In their judgment convicting the applicant, the criminal courts found him guilty of misuse of office from 14 August 2003 to 7 May 2004 because he had refused to make the research material belonging to the University of Gothenburg available in compliance with the final judgments of the Administrative Court of Appeal. The criminal courts did not, however, decide on whether K and E should have had access to the research material before it was destroyed in May 2004, because that question had already been determined by the Administrative Court of Appeal in its judgments of 6 February and 11 August 2003. Whether or not the latter judgments breached a right under Article 8 of the Convention not to impart confidential information, as the applicant claims, falls outside the scope of the Grand Chamber's jurisdiction (see paragraphs 53-56 above).

65. It therefore remains to be examined whether the applicant's criminal conviction for misuse of office, on account of having disregarded his duties as a public official, amounted to an interference with his "private life" within the meaning of Article 8 of the Convention.

66. The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for

example, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008).

67. The applicant maintained that the criminal conviction in itself affected the enjoyment of his "private life" by prejudicing his honour and reputation. The Court reiterates in this regard that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see, *inter alia*, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII, and *Mikolajová v. Slovakia*, no. 4479/03, § 57, 18 January 2011).

68. The applicant also contended that the criminal conviction had adversely affected his moral and psychological integrity and that he had suffered personally, socially, psychologically and economically. The Court observes that the protection of an individual's moral and psychological integrity is an important aspect of Article 8 of the Convention. It notes, however, that there is no Convention case-law in which the Court has accepted that a criminal conviction in itself constitutes an interference with the convict's right to respect for private life. The Court does not ignore that such a criminal conviction may entail personal, social, psychological and economic suffering for the convicted person. In the Court's view, though, such repercussions may be foreseeable consequences of the commission of a criminal offence and can therefore not be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for "private life" within the meaning of Article 8 of the Convention.

69. The Court is aware that Article 8 of the Convention was found applicable to convictions in *Laskey, Jaggard and Brown* (cited above). Nevertheless, in that case the applicants complained that their convictions were the result of an unforeseeable application of a provision of the criminal law to their consensual sado-masochistic activities between adults. The Court expressed doubt as to whether those activities fell entirely within the notion of "private life" in the particular circumstances of that case, but saw no reason to examine the issue of its own motion since that point was not disputed by the parties (*Laskey, Jaggard and Brown,* § 36).

70. In the present case, the applicant was convicted of misuse of office in his capacity as a public official, pursuant to Chapter 20, Article 1 of the Penal Code (*Brottsbalken).* His conviction was not the result of an unforeseeable application of that provision and the offence in question has no obvious bearing on the right to respect for "private life". On the contrary, it concerns professional acts and omissions by public officials in the exercise of their duties. Nor has the applicant pointed to any concrete repercussions on his private life which were directly and causally linked to his conviction for that specific offence.

71. Moreover, the applicant has not further defined or elaborated on the nature and extent of his suffering connected to the criminal conviction. He did point out, though, that he had found himself in a dilemma and that he had chosen to refuse to comply

with the judgments of the Administrative Court of Appeal, with the risk that he would be convicted of misuse of office. This confirms, in the Court's opinion, that the applicant's conviction and the suffering it may have entailed were foreseeable consequences of his having committed the criminal offence.

72. The applicant also contended that he had lost income because he was dismissed by the Norwegian Institute of Public Health and could have written at least five books during the time taken up by the case. To the extent that this is to be understood as a claim that the applicant's conviction affected the enjoyment of his "private life" because of its bearing on his professional activities (see, among other authorities, *Turán v. Hungary*, no. 33068/05, 6 July 2010; *Sidabras and Džiautas* (cited above); *Halford v. the United Kingdom*, 25 June 1997, *Reports* 1997-III; and *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B), the Court considers this form of economic suffering to be a foreseeable consequence of the commission of a criminal offence by the applicant in respect of which Article 8 cannot be relied on (see paragraph 68 above).

73. At any rate, the Court observes that the criminal conviction of the applicant had no negative bearing on his maintaining his position as professor and head of the Department of Child and Adolescent Psychiatry at the University of Gothenburg. Furthermore, even if the applicant's allegation that he was dismissed by the Norwegian Institute of Public Health is an established fact, the Court notes that the applicant failed to show that there was any causal link between the conviction and the dismissal. Moreover, the applicant's claim that he had lost income from at least five books which he had planned to write, but had been unable to because his time was taken up by the case, remains wholly unsubstantiated. Finally, according to the applicant, he had support from numerous renowned and highly respected scientists who agreed with the conduct for which he was convicted. There is therefore no indication that the impugned conviction had any repercussions on the applicant's professional activities which went beyond the foreseeable consequences of the criminal offence for which he was convicted.

74. In conclusion, the Court finds, in light of the facts of the present case, that the applicant's rights under Article 8 of the Convention have not been affected. Accordingly, this provision does not apply in the instant case and the Government's preliminary objection must be upheld.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

The Government's preliminary objection

1. The Government's submissions

75. By way of a preliminary objection, the Government contended that the applicant's complaint fell outside the scope of Article 10 and therefore should be declared incompatible with the Convention *ratione materiae*.

76. They disputed that a right to negative freedom of expression could apply in the context of a criminal conviction of a public official for failure as an employee to assist in disclosing official documents as ordered by a court of law.

77. The Government noted in this regard that there was no case-law supporting the view that the right to receive information set out in Article 10 should be interpreted as including a general right of access to case files and other documents held by public authorities, especially if these were not of a general character. Thus, it was difficult to conclude that its negative counterpart, namely the right to refuse access to official documents, could be considered to enjoy the protection of Article 10.

78. Nor did the Government find that the applicant's situation could be compared to that of journalists protecting their sources or that of lawyers protecting the interest of their clients (see, for example, *Goodwin v. the United Kingdom,* 27 March 1996, *Reports* 1996-II, and *Niemietz*, cited above).

2. The applicant's submissions

79. In the applicant's view, he had a negative right within the meaning of Article 10 of the Convention not to impart the disputed research material.

80. He pointed out that he had given a promise of confidentiality to the participants in the research and had attempted to protect their integrity, in spite of being ordered by a court to reveal the confidential data. For that he had been convicted and punished, a situation very similar to that in the *Goodwin* case (cited above). He also found that his situation could be compared to the duty of confidentiality by which lawyers were bound.

3. The Chamber's decision

81. In its judgment of 2 November 2010 the Chamber left open whether the applicant's complaint fell within the scope of Article 10 and whether there had been an interference with his right to freedom of expression, because even assuming that there had been an interference, it found that there had been no violation of the invoked provision.

4. The Grand Chamber's assessment

82. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without

which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see among other authorities, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 53, 12 September 2011).

83. The right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116, and *Gaskin v. the United Kingdom*, 7 July 1989, § 52, Series A no. 160).

84. In the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his “positive” right to freedom of expression. He argued that he had a “negative” right within the meaning of Article 10 to refuse to make the disputed research material available, and that consequently his conviction was in violation of Article 10 of the Convention.

85. The Court observes that case-law on the “negative” right protected under Article 10 is scarce. Referring to *K. v. Austria* (16002/90, Commission Report of 13 October 1992, § 45), the former Commission stated in *Strohal v. Austria* (no. 20871/92, Commission decision of 7 April 1994) that “the right to freedom of expression by implication also guarantees a “negative right” not to be compelled to express oneself, that is, to remain silent”. Article 10 was also invoked in *Ezelin v. France* (judgment of 26 April 1991, Series A no. 202, § 33) where the Court stated that a refusal to give evidence was an issue “which in itself does not come within the ambit of Articles 10 and 11 ...”.

86. The Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case.

87. It notes that in the present case it was the Department of Child and Adolescent Psychiatry of the University of Gothenburg which carried out the research from 1977 to 1992. The project was originally set up and started by other researchers, but the applicant subsequently took over responsibility for completing the study. The material belonged to the University and was stored at the Department of Child and Adolescent Psychiatry of which the applicant was head. Accordingly, the material consisted of public documents subject to the principle of public access under the Freedom of the Press Act and the Secrecy Act. That entailed, among other things, that secrecy could not be determined until a request for access was submitted, and it was impossible in advance for a public authority to enter into an agreement with a third party exempting certain official documents from the right to public access (see paragraphs 43 and 44).

Nevertheless, in his letter of 17 February 1984 to the parents of the children participating in the research project, the applicant stated, *inter alia:* "All data will be dealt with in confidentiality and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital, and its present results will, as was the case for the previous study three years ago, be followed up." In a later, undated, letter to the participants, the applicant submitted: "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

88. In its judgment of 8 February 2006 convicting the applicant, the Court of Appeal held that "[these] assurances of confidentiality given to the participants in the study go further, at least in some respects, than the Secrecy Act permits" and that "there is no possibility in law to provide greater secrecy than follows from the Secrecy Act or to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited above did not take precedence over the law as it stood or a court's application of the statutes". Equally important, in the period referred to in the indictment, namely from 11 August 2003 to 7 May 2004, it was no longer the secrecy legislation that was to be interpreted by the criminal courts but rather the judgments of the Administrative Court of Appeal, which had settled once and for all the question of whether and on what conditions the documents were to be released to K and E.

89. The Court of Appeal also found that the nature of the international declarations agreed on by the World Medical Association was not such that they took precedence over Swedish law. In this regard it is noteworthy that the applicant in the present case was not mandated by the participants in the research and that, as a consequence, he was not bound by professional secrecy as if he were their doctor or psychiatrist, or by virtue of the Helsinki Declaration adopted by the World Medical Association's General Assembly.

90. Moreover, the national courts dismissed the applicant's allegation that his assurances of confidentiality to the participants had been a requirement of the Ethics Committee of the University of Gothenburg for approving the research project. Nor has the applicant submitted any convincing evidence to that effect before this Court.

91. Accordingly, the applicant was not prevented from complying with the judgments of the Administrative Court of Appeal by any statutory duty of secrecy or any order from his public employer. Rather, his refusal to make the research material available was motivated by his personal belief that for various reasons the outcome of the judgments of the Administrative Court of Appeal was wrong.

92. Taking these circumstances into account, the Court considers that the crucial question can be narrowed down to whether the applicant, as a public employee, had an independent negative right within the meaning of Article 10 of the Convention not to make the research material available, although the material did not belong to him but to his public employer, the University of Gothenburg, and despite the fact that his public employer – the university – actually intended to comply with the final judgments of the Administrative Court of Appeal granting K and E access to its research material on various conditions, but was prevented from so doing because the applicant refused to make it available.

93. In the Court's view, finding that the applicant had such a right under Article 10 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned, and on their rights under Article 6 to have the final judgments of the Administrative Court of Appeal implemented (see, *mutatis mutandis*, *Loiseau v. France* (dec.) no. 46809/99, ECHR 2003-XII, extracts; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III; and *Hornsby v. Greece*, judgment of 19 March 1997, § 40, Reports 1997-II).

94. Accordingly, the Court cannot endorse the applicant's view that he had a "negative" right within the meaning of Article 10 to refuse to make the research material belonging to his public employer available, thereby denying K and E their right to access to it as determined by the Administrative Court of Appeal.

95. It appears that the applicant also maintained that his complaint fell within the ambit of Article 10 of the Convention because his situation was similar to that of journalists protecting their sources. The Court notes, however, that the pertinent case-law on this subject concerns journalists' positive right to freedom of expression (see, *inter alia*, *Goodwin* (cited above); *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; and *Roemen and Schmit v. Luxembourg*, application no. 51772/99, ECHR 2003-IV). Moreover, the information diffused by a journalist based on his or her source generally belongs to the journalist or the media, whereas in the present case the research material was considered to belong to the University of Gothenburg, and thus to be in the public domain. The disputed research material was therefore subject to the principle of public access to official documents under the Freedom of the Press Act and the Secrecy Act, which specifically allowed for the public, and the media, to exercise control over the State, the municipalities and other parts of the public sector, and which in turn contributed to the free exchange of opinions and ideas and to the efficient and correct administration of public affairs. By contrast, the applicant's refusal in the present case to comply with the judgments of the Administrative Court of Appeal, by denying K and E access to the research material, hindered the free exchange of opinions and ideas on the research in question, notably on the evidence and methods used by the researchers in reaching their conclusions, which constituted

the main subject of K's and E's interest. In these circumstances the Court finds that the applicant's situation cannot be compared to that of journalists protecting their sources.

96. Finally, in so far as the applicant contended that his complaint fell within the scope of Article 10 of the Convention because his situation was comparable to that of lawyers protecting information obtained in confidence from their clients, the Court reiterates that the relevant case-law thereon, including access to correspondence with legal advisers, concerns Article 8 of the Convention (see, for example, *Niemietz*, cited above,and *Foxley v. The United Kingdom*, no. 33274/96, 20 June 2000). In any event, referring to its finding above (paragraph 89), the Court notes that since the applicant had not been mandated by the research participants as their doctor, he had no duty of professional secrecy towards them. Moreover, the applicant was never asked to give evidence and there are no elements indicating that, had he complied with the Administrative Court of Appeal's judgments, there would have been repercussions on other proceedings as may be the case when a lawyer's professional secrecy has been disregarded (see *Niemietz,* § 37 and *Foxley,* § 50, both cited above). In these circumstances the Court finds that the applicant's situation cannot be compared to that of a lawyer bound by a duty of professional secrecy vis-à-vis his clients.

97. In conclusion, the Court finds, in light of the facts of the present case, that the applicant's rights under Article 10 of the Convention have not been affected. Accordingly, this provision does not apply in the instant case and the Government's preliminary objection must be upheld.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 8 of the Convention does not apply in the instant case;

2. *Holds* that Article 10 of the Convention does not apply in the instant case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 April 2012.

Erik Fribergh Nicolas Bratza
Registrar President

GILLBERG v. SWEDEN JUDGMENT