

When Rights Collide: GDPR and the Duty of Disclosure in Civil Proceedings

Commentary to the decision of the Swedish Supreme court, case Ö 1750-20

MOA HEDLUND

1. Introduction

Courts play a significant role in shaping the future of data protection across the EU and Swedish courts are not an exception. In case Ö 1750-20, the Swedish Supreme Court addressed the issue of disclosing a staff register containing personal data within civil litigation, focusing on the balance between evidentiary needs and the right to the protection of personal data under EU law.

This paper aims to discuss the case in relation to the General Data Protection Regulation (GDPR) and the obligation to produce documents¹ in judicial proceedings. The comments on the ruling will primarily focus on the assessment of balancing opposing interests within GDPR-related issues as well as the fact that the right to personal data tends to conflict with other fundamental rights.

2. Facts and background

The case arose from a dispute between Per Nycander AB (Nycanders) and Norra Stockholm Bygg AB (Fastec) regarding a construction project. Nycanders hired Fastec to conduct construction work.

¹ This can either be called “*duty of disclosure*” or “*obligation to produce a document*” see https://www.domstol.se/globalassets/filer/gemensamt-innehall/for-professionella-aktorer/svensk-engelsk_ordlista_2019.pdf, page 35.

The persons working on the building site concerned recorded their presence by means of an electronic staff register. This register contained personal data, including names and personal identification numbers of workers. After the project was completed, a financial dispute emerged. Nycanders alleged that Fastec had overbilled them for work that was either not performed or carried out to a lesser extent than invoiced. To support its claim, Nycanders sought access to the electronic staff register maintained by Entral AB (Entral), a third party responsible for recording worker attendance on-site.

Before the court, Nycander requested that Entral be ordered to provide Fastec's staff register for a specific period, preferably in its entirety or, alternatively, with the personal identity numbers redacted. Nycander argued that Entral possessed the staff register and that it could serve as crucial evidence in determining Fastec's claim, as the recorded data would help verify the hours worked by Fastec's employees. Fastec objected to the disclosure, arguing that it would violate the General Data Protection Regulation (GDPR), in particular art. 5(1)(b) and infringe on the workers' privacy rights.

The tingsrätt (District Court) ordered Entral to produce in an unredacted state Fastec's staff register for the staff concerned by the building site at issue in the main proceedings during the relevant period. The Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) upheld the decision of the District Court and dismissed Fastec's objection that the obligation to produce the document was in breach of GDPR. The decision was appealed to the Supreme Court in Sweden.

3. The Supreme Court's decision

First, the supreme court held that according to Swedish law, skatteförfarandelagen (2011:1244), there must be an electronic staff register in construction work containing necessary identification information for the employees. Furthermore, Chapter 38, Section 2, first

paragraph in rättegångsbalken (1942:740), states that anyone who possesses a written document that can be assumed to have significance as evidence is obliged to produce the document. The duty is based on the fact that in the administration of justice there is a fundamental requirement for the possibility of a complete investigation. Moreover, the court stated that when assessing whether a party should be required to produce a document, a balance must be struck between the relevance of the evidence and the opposing party's interest in not disclosing it. However, the interests of third parties in the document's content are generally not considered, except in cases covered by specific exceptions. If the requested document contains personal data, as in the disputed staff ledger, the issue of how Sweden's obligation to produce documents aligns with the EU General Data Protection Regulation arises, requiring an assessment of legal obligations versus data protection rights.

The court then referred to the following relevant provisions in GDPR. Under Article 6(1)(c) GDPR, processing personal data is lawful if necessary to fulfil a legal obligation. Article 6(3) requires that such obligations be based on EU or national law, serving a legitimate public interest in a proportionate manner. Article 6(4) states that if data is processed for a purpose other than originally collected and not based on consent or legal necessity under EU or national law, its compatibility must be assessed. Article 23(1) allows restrictions to protect judicial independence and legal proceedings. The Supreme Court in Sweden then decided to refer the following questions to the European Court of Justice (ECJ) for a preliminary ruling: **(i)** *“Does Article 6(3) and (4) of the GDPR also impose a requirement on national procedural legislation relating to the obligation to produce documents?”* **(ii)** *“If Question 1 is answered in the affirmative, does the GDPR mean that regard must also be had to the interests of the data subjects when a decision on [production] must be made which involves the processing of personal data? In such circumstances, does EU law establish*

any requirements concerning how, in detail, that decision should be made?”²

In the judgment of the ECJ on 2 March 2023 in the case *Norra Stockholm Bygg AB*, C-268/21, the court clarified that art. 6(3) and 4 in the GDPR must be interpreted as meaning that the provision applies, in the context of court proceedings, to the production as evidence of a staff register containing personal data. Art. 5 and 6 must be interpreted as meaning that, when assessing whether the production of a document containing personal data must be ordered, the national court is required to have regard to the interests of the data subjects concerned and to balance them according to the circumstances of each individual case and taking into account the requirements of the principle of proportionality and the requirements arising from the principle of data minimisation.

With support from this, the Supreme Court issued a decision as follows: the right to effective judicial protection and a fair trial requires that the parties have access to the documents necessary to prove their case. The client is deemed to have a legitimate interest in obtaining the contractor’s personnel ledger through disclosure. This interest should carry significant weight in the assessment. In accordance with the preliminary ruling, consideration must be given to the interests of the registered personnel. The Supreme Court then states that the personal data in the personnel ledger mainly consists of identity information in the form of names and personal identification numbers. Furthermore, these details were provided to also be accessible to the client during the execution of the contract (even though the specific contract had been completed several years earlier).

The dispute concerns whether the contractor is entitled to certain compensation, and the registered individuals themselves are not otherwise significantly affected. Therefore, the court stated that the interest of the registered individuals in having their personal data protected from

² See Judgment of the European Court of Justice (ECJ) on 2 March 2023, C-268/21, paragraph 24.

disclosure is considered to carry less weight. However, special consideration must be given specifically to personal data in the form of personal identification numbers or similar. Since the client has not provided a detailed explanation of why these details are necessary, the disclosure order should, in accordance with the principle of data minimization, be limited so that the contractor must provide the personnel ledger with the registered individuals' personal identification numbers, coordination numbers, or similar numbers redacted.

Thus, The Supreme Court ruled that Entral must provide the staff register but with person identifiable information redacted.

4. Comments and analysis

It is interesting to discuss whether the access to evidence in a civil judicial process should triumph the right to the protection of personal data, which was the case in Ö 1750-20.³ To begin with, the purpose of data protection legislation is to provide fundamental safeguards for individuals' personal data. This is reflected in a set of requirements aimed at increasing awareness of data processing and protecting individual privacy. Those handling personal data must carefully consider how it is collected, transferred, and used. Individuals should have clarity on what data is processed and for what purpose. Lawful processing must therefore be meaningful, accurate, secure, and limited in scope. The lawfulness of processing data is laid down in art. 6 GDPR. Any processing of personal data, including such that are carried out by courts, must meet the criteria of lawfulness set by this provision.⁴

In case Ö 1750-20, the personal data would be processed for another purpose other than that for which those data have been collected for. As the ECJ stated in their ruling, this is not allowed as a starting

³ However, one must consider that the personal information actually was redacted.

⁴ Judgment of the European Court of Justice on 2 March 2023, C-268/21, paragraph 29.

point. However, in order for the further processing that takes place on the basis of the obligation to produce documents to be lawful, it requires that it is a necessary and proportionate measure in a democratic society and protect one of the objectives set out in art. 23 (1) GDPR. Such an objective is, for example, the protection of the independence of the judiciary and legal action. It was the consideration above in relation to the duty of disclosure that the Supreme Court had to deal with in its assessment of the clients request for access to the personal register. In the light of ECJ's response, the Supreme Court also had to balance the client's interest in obtaining the register file, and the individual's interest in the protection of their personal data. The Supreme Court initially stated that the ability to obtain the staff register from the contractor through disclosure constitutes a legitimate interest, and that this interest should carry significant weight in the assessment. This legitimate interest was then weighed against the privacy interests of the personnel whose data was subject to the disclosure request. The Supreme Court did not consider the requested information to be particularly sensitive in terms of personal integrity. The proportionality assessment was made and led to the conclusion that "the registered individuals' interest in having their personal data protected from disclosure is considered to carry less weight."

In my opinion, the Supreme Court's assessment is very brief regarding the balancing of the opposing interests involved. The Supreme Court established that GDPR did not prevent the disclosure of the staff register in this specific case, as the requested personal data was not of such a nature that it would, in itself, constitute a significant intrusion into the employees' privacy. This assessment was based on the fact that the personal data, such as names and personal identification numbers, were intended to be used in this context and that access to this information was of essential importance to the legal process in the dispute. However, there is room for criticism. Such an interpretation poses a risk of undermining data protection when another legal function, such as a dispute, is deemed to outweigh individual privacy. The question that

arises is whether there is truly a proportional balance between these legal interests. Are all pieces of evidence truly of such a nature that they necessitate the disclosure of detailed personal data in order to ensure justice, or is there room to consider alternative approaches that better protect personal privacy?

Criticism can therefore be directed at the court for not fully weighing the potential risk that the disclosure of personal data, even in a legal context, could have grave consequences for individual privacy. It is possible that some employees did not intend for their personal data to be used in this manner, making it particularly problematic that such information is released without sufficient safeguards. One could argue that data protection should be more restrictive when it comes to the disclosure of personal data in all types of legal proceedings, even if this might lead to certain complications in the legal process. However, in case Ö 1750-20, as the disclosure request did not clarify why access to personal data in the form of personal identification numbers, coordination numbers, or foreign equivalents was necessary for evidentiary purposes, the Supreme Court found reason to limit the obligation to produce the document by redacting such data. In other words, considerations were made in accordance with the principle of data minimisation stated in art. 5 GDPR.

Furthermore, the right to protection of personal data is stipulated in art. 8 of the Charter of Fundamental Right of the European Union. Also, even if it is not explicitly protected in art. 8 of the European Convention on Human rights, it falls within its scope. The fact that personal data within the EU is protected as a fundamental right result in conflicts between this right and other opposition fundamental rights and freedoms. Case law from ECJ shows examples where the right to personal data has had to be balanced against other rights.⁵ Case Ö 1750-20 is also a perfect example of when the right to protection of personal data

⁵ See for example ECJ cases: C-131/12 (Google Spain), C-101/01 (Lindqvist) and C-461/10 (Bonnier Audio).

interferes with other fundamental rights. In particular, when the right to personal data conflicts with the right to a fair trial and right to effective remedies as the court also noted. Since all of these rights can be restricted, their has to be a balance between them.⁶ This is what the Supreme Court of Sweden is trying to do in case Ö 1750-20. The court ruled that the right to a fair trail was more important in this case. The fact that they decided that the personal data should be redacted makes the judgment reasonable in my opinion. However, if the court would have concluded that the personal data would continue to be public, I would have strongly questioned the Supreme Courts decision.

Historically, Swedish courts have only considered the opposing interests of the applicant and the respondent when assessing a disclosure request, without considering the privacy interests of third parties.⁷ An example of this is another case from the Supreme Court of Sweden, NJA 1982 s. 650, where the court did not comment at all on the fact that the application of obligation to produce document concerned a large number of personal data. However, Ö 1750-20, can be considered a step in the right direction. When the court chose to request a preliminary ruling to the ECJ, it indicated that the legal situation was unclear and that more detailed guidance was needed to determine whether the GDPR should take precedence over the need for evidence in civil litigation. The more apparent conclusion is that an assessment of a request for disclosure involves a balancing of the duty to disclose and the individual's privacy interest when the subject of disclosure includes personal data. Through the Supreme Court's decision, it has been clarified that the right to obtain documents through disclosure constitutes a legitimate interest that carries significant weight in the balance against the individual's interest in protecting their personal data.

⁶ See ECJ case C-268/21, paragraph 46.

⁷ Delphi, "edition av handlingar som innehåller person personuppgifter", <https://www.delphi.se/sv/publikationer/dataskydd-integritet/edition-av-handlingar-som-innehaller-personuppgifter/> (17 January 2024).

5. Summary and final reflections

In summary, case Ö 1750-20 highlights a fundamental and challenging issue for the modern legal system: how to balance the protection of personal data with the legal need to provide evidence and ensure a fair trial. While the court prioritized the relevance of the personal data to the legal proceedings and deemed its disclosure permissible, the case raises important questions about the long-term impact of granting excessive weight to legal interests without fully safeguarding the right to protection of personal data. Finally, the principles established by the ECJ in case C-268/21 are not limited to the Swedish disclosure procedure but will have significant implications for the procedural rules on evidence collection in all EU member states.