The Privacy of Public Officials in the Digital Age: A Democratic Issue

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The title of this paper may sound like an oxymoron. Yet, it may be considered as “incongruous, seemingly self-contradictory” to speak about the privacy of public officials. Indeed, may persons who held a public function deserve a right to privacy in their capacity of precisely public official? Is it not, on the contrary, a logical consequence of his/her public official status, which implies the carrying out and performing of public tasks and the exercising of public power, that they have to be transparent for the public in regard of these public tasks and may not be entitled a right of respect to one’s private life? Indeed, a certain transparency is required in order to control that those in charge of the concrete decisions affecting on a daily basis citizens’ rights, human rights and freedoms, do act in compliance with the law and are guided by the pursuit of the common good – also in regard to the use of public funds.

At the same time, there are to be limits to how far transparency of public officials can extend as well as there may be constraints concerning the way to make information about public officials transparent. Indeed, “inadequate” transparency, if we may call it that, may generate threats for public officials themselves and also, indirectly and simultaneously, for the democratic state.

The issue of balancing transparency and privacy is becoming more and more intricate and delicate along with the growing erasure of the frontier between private life on the one hand and professional and public life on the other hand; a phenomenon which may be largely explained by a combination of the technological development (including better performance of web searching tools) and the societal developments (expressed by a wide-reach-

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2 An oxymoron may namely be defined as “a figure of speech by which a location produces an incongruous, seemingly self-contradictory effect, as in “cruel kindness”. See https://www.dictionary.com/browse/oxymoron

3 See interesting reflections on the question whether civil servants deserve a right to privacy when it concerns information related to how they perform their public activities Bull, Thomas, ”Personlig integritet för det offentliga?” in: Vänbok till Claes Sandgren (2012), p. 105–118.
ing use of social media and what seems to be less concerns for personal secrecy). To the transparency/privacy balancing debate regarding public servants should also be added an ever-harsher social climate, which concretizes itself by growing occurrences of threats and violence against the “Democracy workers” that civil servants constitute.4

The perspective adopted in this paper is not a philosophical-sociological-political scientific one on the question of the pertinence or not of speaking in terms of a right of protection to privacy for the public official capacity. I would rather have a legal, ethical and pragmatic approach on the issue and point out the potential (damaging) consequences that disclosure of personal data permitting to identify a public official, may have and highlight the need therefore to have a transparency/privacy-aware approach.

Privacy is handled in this paper as a question of anonymity and more precisely a question of anonymity in documents uploaded on the Internet.

Indeed, the example I use for illustrating the issue at stake and for demonstrating the need for a broader reflection is the publication on the Internet of documents containing names of public servants. More specifically the example concerns decisions taken by the Swedish Parliamentary Ombudsman (JO) which contain the mention of civil servants’ names and are published in the online case law database of this authority.5

The point of departure of my interest for a reflection on the need to think in terms of public official’s privacy – or more precisely in terms of anonymity of the public officials on the Internet – was indeed the reading of decisions found in the online database of the Swedish Parliamentary Ombudsman.

Common elements of the selected decisions are (a) that an individual public official has been pointed out6 by the decision and criticized by the Ombudsman for having behaved in an unprofessional and inappropriate manner, (b) that the civil servant subject to the criticism has a position at a

4 See BRÅ report, p. 10.
5 Although this example may seem as typical Swedish because of the particular Swedish circumstances, I believe that the use of such an example may easily make understandable the issues and risks associated with public disclosure of information concerning public officials. It may also be that the selected examples are not even relevant anymore for the current Swedish context as it seems that the Parliamentary Ombudsman has changed his routine concerning its online database and does not anymore publish the names of the civil servants in the database. It should be an effect of the enter into force of the General Regulation of Data Protection which has eventually convinced the monitoring authority to have a privacy friendly approach.
6 The decision criticizes an individual public official and not the public administration or the department the civil servant belongs to.
quite low level in the administrative hierarchy, (c) that the decisions are published in the online case law database on the public website of the Ombudsman, (d) and finally that the name and surname of the criticized civil servant appear in the decision.

These selected documents illustrate in my view an inadequate transparency. Inadequate in the sense that the transparency the system provides may generate inappropriate and disproportionate infringements for the civil servant as a person, and may, in turn, adversely affect the democratic society. Inadequate also in the sense that the transparency such as encountered in the cases studied is unnecessary from the point of view of a democratic control as in the current cases it exist means – the sets of rules on the right of access to official documents – for having access to the names of the public officials if needed.

It is the conjunction of the publication on the Internet and the fact that the decision contains the name of the civil servants that constitutes the crucial problem. The privacy of the civil servants – and beyond the democratic character of the society – may be put in danger in two ways. (a) because if one wants to gather information about a person and this person’s name is to be found in a decision published in the online database, then this decision might appear in the search results performed by the search engine one made use of (b) but also – and it is the situation I aim to focus on – because the one who may want to gather information about the civil servant whose name is indicated in a specific decision very easily can map not only the professional profile of the civil servant but also his/her private life.

Because the decision reveals the civil servant’s identity, it becomes indeed easy with means of search engines – with Google at the forefront – to

7 With other words the publication on the Internet per se, if it occurs without the mention of names looses in general its dangerousness. Similarly, the mention of the names in a decision that is not posted on the Internet has much less propension to lead to the privacy and democracy infringements that are discussed in this paper.

8 This was an argument used by the Swedish Data Protection authority, the Datainspektion (DI) for criticizing the online publication (“When using search engines on the Internet” the DI says “there is also the risk that a search for a certain name, which is done for completely different reasons to find out if the person has been subjected to review by the Ombudsman, will also include the information that the person in question has been criticized by the Ombudsman”), DI’s decision (No.663-2010) of October 5, 2010, p. 6. See footnote 13 below.

This kind of privacy infringements have been tested by Tomas Bull who conclude that “general searches about a person’s name, place of residence or the like do not pose any significant risk of just spreading JO’s criticism of that person”. (my translation). See in Personlig integritet för det offentliga? See p. 115–116.

9 My approach is then different than Bull’s approach.
find a wealth of information related to the civil servant in his/her capacity of individual/citizen, such as their home address and pictures of the residence (thanks to Google Maps), their date of birth, picture of the individual him/herself and sometimes of his/her relatives and/or friends. Additionally, search engines may collect information of the brand of the car (as well as of the colour of the car!), hobbies, the name of the neighbour, the average salary in the neighbourhood and the voting patterns etc.

Moreover, the societal changes that express themselves through new ways of communicating (via social media such as Facebook, Blogs, Instagram, Twitter etc.) and the fact that always more information about individuals is available on the Internet, whether the persons concerned by the information want it or not, whether the persons concerned by the information know it or not, lead to an interlacing of the private and public/professional life and a blurring of the boundaries between the two spheres.

This is not contested, for getting back to the type of decision handled in this paper, that the personal information (i.e. the name) found in the Ombudsman’s decisions is linked to the individual in his capacity as civil servant. However, a large amount of information that search engines easily can gather, on the basis of the name of the civil servants contained in the decision, are of a purely private nature. In other words, the publication of the civil servant’s name in the case law database of the Ombudsman facilitates the mapping of the civil servant’s private life. Furthermore, the fact that on the Internet, the decisions will be available for an unlimited number of persons, even outside Sweden, and for an unlimited time, i.e. circumstances that Mayer-Schönberger calls for a spatial and temporal panopticon,10 adds to the vulnerability of the persons concerned.

I intend in this paper to address legal (1) and ethical (2) issues that the mention of the names of public servants in decisions published on the Internet crystallize.

The publication of the names of the civil servants in the online database: legal considerations

The publication of the civil servant’s names in the online database of the Ombudsman is to be legally considered as a question concerning the right

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to privacy and more specifically as a question regarding data protection. Such a publication consists of a processing of personal data as defined by the data protection legislation.\textsuperscript{11,12}

In fact, the issue of the publication of the civil servants’ names in the Ombudsman’s online case law database has been dealt with in depth by the Swedish Data Protection Authority, the Data Inspection Board (Datainspektion, DI) in its Decision \textit{Supervision according to the Personal Data Act (1998: 204) - The Ombudsman’s Publication of Personal Data in the online case law Database} (No.663-2010) of October 5, 2010,\textsuperscript{13} hereinafter called the “DI’s decision”. The decision originally concerned a complaint relating to the mention of a \textit{private individual’s name} – the plaintiff’s name – in a decision published in the online case law database of the Parliamentary Ombudsman,\textsuperscript{14} but the DI took the opportunity to enlarge the scope of the reasoning and to comment on the publication of \textit{public officials’ names} in the same database.\textsuperscript{15} In the decision it rendered, the DI stated that the publication of the plaintiff’s as well as of the civil servant’s personal data (i.e. the names) in the Ombudsman online database violated the Swedish data protection legislation in force at that time, the Personal Data Act (Personuppgiftslagen, PuL).

Although the specific legal argumentation of the DI is not entirely transposable into the new data protection framework, as the General Data

\begin{footnotes}
\item Indeed according to the GDPR processing of personal data is defined as “\textit{any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction}” (Article 4 (2)).
\item I will not go into the protection provided by article 8 of the European Convention of Human Rights and in the case-law of the European Court of Justice. However, it might be said that cases involving question of data protection issues are dealt by the Strasbourg Court in a procedure integrating data protection legislation. Indeed, the search of whether a “law” is provided for, according to Article 8.2, justifies the alleged privacy infringement consists of appreciating if data protection rules/principles are in place. See for example M.M v. the United Kingdom (n° 24029/07). Judgment 13.11.2012 (para 195) and L.H. v. Latvia (n° 52019/07), Judgment 29.4.2014.
\item Tillsyn enligt personuppgiftslagen (1998:204) – Justitieombudsmannens publicering av personuppgifter i praxisdatabas på Internet.
\item Several civil servants had lodged a complaint to the DI, see Sören Öman https://www.sorenoman.se/blendow/april2011.pdf
\end{footnotes}
Protection Regulation (GDPR)\textsuperscript{16} that has replaced the Data Protection Act differs from it in some aspects of relevance for the type of cases we analyse here, the legal reasoning the Datainspektion held 2010 is still of interest for understanding the privacy issues at stake.

I will therefore begin the legal analysis of the publication of the names of the civil servants in the Ombudsman’s online database by exposing the argumentation of the DI based on the former Swedish data protection legislation (1.1). I will then examine the question of the conformity of the online publication with the current applicable legislation, i.e. the GDPR (1.2).

The publication of the civil servants’ name in the Ombudsman’s online case law database and its conformity with the Personal Data Act

The Datainspektion carried out the examination of the Parliamentary ombudsman’s online publication in the light of the Swedish Personal Data Act (Personuppgiftslagen (1998:204), PuL), issued 29 April 1998 and based on the Data Protection Directive 95/46/EC.\textsuperscript{17}

Like the European legislation, the PuL contained a substantial set of rules that the data controller had to comply with, such as the rules which concern fundamental requirements for processing of personal data or the rules laying down requirements regarding the legitimation of the processing of personal data. However, the Swedish legislator wishing to lessen the compliance with the data protection legislation for “such everyday data processing of personal data that typically does not entail any greater risk of violation of the data subject’s privacy”\textsuperscript{18} wished to move away from this traditional regulatory model (hanteringsmodell\textsuperscript{19}) for these kinds of situations and introduced 2007 in a new provision (Section 5a) of the Personal Data Act a regime called abuse centered model. This new regime, which applied to processing

\textsuperscript{16} Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

\textsuperscript{17} Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

\textsuperscript{18} “[A] number of circumstances indicate that the data protection regulation should be lessened for such everyday data processing of personal data that typically does not entail any greater risk of violation of the data subject’s privacy”, Prop. 2005/06:173, p. 19.

in unstructured material\(^{20}\) consisted of exempting the data controller from most of the provisions of the Personal Data Act, as for instance the provisions on fundamental requirements for processing of personal data and on the conditions of legitimation of the processing\(^{21}\) as well as the provisions on sensitive data, on legal offences and on transfer to third countries. A data processing should not be performed however if it leads to an infringement of the data subject’s privacy.\(^{22}\)

It is on this provision regulating data processing in unstructured material that the Parliamentary Ombudsman assessed the online publication on its website of decisions containing names. The Datainspektion was sceptical in regard to the application of the regime laid down in Section 5a for this kind of processing and stated that “it can be put into question if the legislator had intended that the abuse rule should apply to such a type of processing the Ombudsman performs when it makes its case law database accessible on the Internet”. The Data Protection authority added that it had “doubt as to the intention [of the legislator] was that the simplified regulation in 5a§ Data Protection Act should apply to public authorities when they make big database blocks (samlingar) of decisions containing individual’s personal data accessible on Internet”.\(^{23}\) Faced with the impossibility to refer to concrete statement in that direction in the preparatory works,\(^{24}\) and after having established that the processing had not had the characteristics of a processing in structured material,\(^{25}\) the Datainspektion made an appreciation of the lawfulness of the publishing on the basis of the provision the Ombudsman referred to.

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\(^{20}\) Which are “processing of personal data which is not included nor intended to be included in a collection of personal data which has been structured in order to facilitate the search or the compilation of personal data”.

\(^{21}\) For more details on the Personal Data Act and on Section 5a, Öman, Sören, Lindblom, Hans-Olof, Personuppgiftslagen: En kommentar, 2011, pp. 129–160.

\(^{22}\) Section 5a of the Personal Data Act from 1998 was labelled as followed: Undantag för behandling av personuppgifter i ostrukturerat material. Bestämmelserna i 9, 10, 13–19, 21–26, 28, 33, 34 och 42 §§ behöver inte tillämpas på behandling av personuppgifter som inte ingår i eller är avsedda att ingå i en samling av personuppgifter som har strukturerats för att påtagligt underlätta sökning efter eller sammanställning av personuppgifter. Sådan behandling som avses i första stycket får inte utföras, om den innebär en kränkning av den registrerades personliga integritet. Lag (2006:398).

\(^{23}\) This approach provides the name to the type of regime, the “abuse center model”.

\(^{24}\) DI’s decision, p. 3. See also the comment of Sören Öman who discusses the applicability of the abuse centered model in the case https://www.sorenoman.se/blendow/april2011.pdf

\(^{25}\) “This is not a collection in which the Ombudsman appears to have structured the information in a way that has significantly facilitated the search or compilation of personal data”, DI’s decision, p. 4.
This appreciation of the lawfulness of the processing in regard to PuL’s Section 5a - or, in other words, the appreciation on whether the processing led or led not to a privacy infringement, consisted in, the Datainspektion explained, of carrying out, in the individual case, a balancing between on one hand the data subject’s interest of a private protected sphere and on the other hand other opposite interests. The appreciation of the balance of interests should furthermore, the DI assessed, not only be done in taking into consideration the kind of personal data being processed, but should also take into account the context of the purpose in which the data appear and the data dissemination that “has occurred or is likely to occur and what the treatment can lead to.” The DI reminded additionally that PuL’s provisions relied on an EU Act (the Data Protection Directive), which meant that "The balance shall not be based on an interpretation that would be in breach of, inter alia, the fundamental rights protected by Community law, such as the right of every human being to the right of respect for his/her privacy in accordance with Article 8 of the Convention of the Council of Europe." As last element for appreciating if data processing leads to a privacy infringement or not, the Swedish Data Protection authority mentioned the application of the principle of proportionality, expressed by the Data Protection Directive and in Article 8 of the Council of Europe Convention and which may even been drawn from “the method the Swedish legislator refers to when it concerns the application of the abuse centered rule”.

In the current case, the purpose (interests) of the Ombudsman regarding the processing in form of the publication on the Internet was “primarily to award the public ‘insight’ in the Ombudsman’s activities” and “to disseminate knowledge on the legal assessments expressed in the decisions, with the intention to provide public authorities and public officials (befattningshavaren) guidance for acting properly”. This had to be weighed out, according to the DI, against the fact that when an official has been criticized by the Ombudsman this “may have significant consequences for him/her even beyond the

26 DI’s decision, p. 4.
27 DI’s own italics.
28 DI’s decision, p. 4. The DI recalled further, referring to the preparatory works, i.e. Prop. 2005/06: 173, p. 29, that there are the ones who are in charge of applying the law (the practitioners – rättstillämparna) whose task is to carry out the balance in the individual case.
29 DI’s decision, p. 4.
30 Id., p.5.
31 Id., p. 6.
service” (tjänsten). This should also be taken into consideration in the appreciation that the way of publishing made the publication “particularly sensitive”\(^{32}\) and that the purpose of the Internet publication could have been fulfilled even though the decisions did not contain the name of the civil servants. Moreover, argued the DI, if someone is interested in the name of the civil servants who is subject to the Ombudsman’s criticism it is usually enough to make a request directly to the Ombudsman for accessing the decision containing the name.\(^{33}\)

The Data Inspection Board concluded that the balance test spoke in favour of the protection of the civil servants’ privacy. It even assessed that the publication of the name of the Civil servants in the Ombudsman’s case law database was “normally not permitted under the abuse centered rule in the 5a§ Personal Data Act “but needed a “special support in the law”.\(^{34}\)

In clear, data processing as that carried out by the Ombudsman could potentially and in principle have been permitted according to the abuse centered rule of the Swedish Data Protection Act – but was not – the DI stated - due to the specific circumstances of the current processing.

The entering into force of the GDPR changed the playing field as the abuse centered regime disappeared from the data protection legal framework – and has even got the better of the Ombudsman reluctance to follow the conclusions of the DI concerning the publication of civil servants’ names.\(^{35}\)

\(^{32}\) The DI refers to the search functions on the database which offer the possibility to “produce comprehensive compilations of executives who have been criticized by JO”. See DI’s decision, p. 6.

"Publishing on the web also means”, the DI adds, “that the information becomes considerably more accessible, especially with the help of so-called search engines as well of various solutions for compiling and reusing materials available on the Internet.” See DI’s decision, p. 6.

\(^{33}\) Ibid.

\(^{34}\) “Särskilt författningstöd”, DI’s decision, p.7.

\(^{35}\) Indeed, while the Ombudsman seemed to have accepted the arguments and conclusion of the DI concerning the names of the complaints as it has, after the decision of the Swedish Data Protection Board, only put the initials or neutral designations such as NN or AA or these individuals in the decisions published on its online database, the Ombudsman has continued until recently (Autumn 2019) to – although not systematically – publish the entire names of civil servants.
1.2. Publication of the name of the civil servants in the Ombudsman online case law Database and its conformity with the GDPR legislation

While the Swedish legislator was of the opinion that the Data Protection Directive from 1995 allowed for national rules such as the abuse centered rules it introduced 2007 in the Personal Data Act,\(^{36}\) the standpoint is different in regard to the GDPR which entered into force 25 May 2018. The latter European data protection instrument does not allow room for such arrangements, the Swedish legislator says.\(^{37}\)

In the absence of a centered abuse model the appreciation of the conformity or not of the online publication of decisions containing the names of public officials has to be assessed in regard to the set of protective rules laid down in the General Data Protection Regulation, rules that are directly applicable in the Swedish legal order.\(^{38}\)

The rules of relevance for appreciating the conformity of the online publication with the GDPR are especially the ones laying down the principles of the lawfulness of processing (Art. 6) and the ones on the principles relating to the processing of personal data (Art. 5).

Indeed, processing of personal data must comply with the conditions for the lawfulness of the processing provided by the GDPR. This means that each processing has to be founded on a ground provided for in Art. 6.1 of the Regulation. We will look closer at the grounds applicable to processing of personal data performed by a public entity,\(^{39}\) the category to which the online publication studied in this paper belongs to.

I. A first possible ground, as it relates to processing performed within the public sector is the one set out in Art. 6.1.e, second part of the sentence, according to which consisting the processing is lawful if it “is necessary for the performance of a task carried out […] in the exercise of official authority vested in the controller”. This ground

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\(^{36}\) Prop. 2005/06:173 Översyn av personuppgiftslagen, p.31.

\(^{37}\) See Prop. 2017/18:105, Ny dataskyddslag, p. 85 “Missbruksregeln i 5 a § PUL har dock ingen motsvarighet i dataskyddsforordningen”.

\(^{38}\) They had their counterpart in the Data Protection Directive – and consequently in the Swedish Data Protection Act – but were not applicable in cases where the abuse-centred regime applied.

\(^{39}\) Among the grounds some only apply to the public sector, others may apply both to the public sector and the private sector as for example the ground consisting of “compliance with a legal obligation to which the controller is subject”, see SOU 2017:39, p. 114.
may nevertheless directly be excluded from the ones applicable in
the case we study as the publication of personal data concerning
civil servants on the Internet as treated in this paper is undoubtedly
not done in the context of the exercise of official authority toward
citizens, which is, the Swedish legislator assesses, “characterized by
decisions or other unilateral measures which ultimately are an ex-
pression of the powers of society in relation to the citizens”.

II. Non-problematic is even to exclude the ground laid down by Art.
6.1. c) according to which the “processing is necessary for compli-
ance with a legal obligation to which the controller is subject”.
Indeed, to publish online personal data, as the Ombudsman did,
does not correspond to a legal obligation and certainly not to the
obligation to disclose information/documents that follow from the
principle of publicity regulated by the Freedom of the Press Act
(FPA). Indeed, the framework on the right of access to official
documents, constituted by the second Chapter of FPA, lays down
the obligation for public authorities to disclose documents upon
request (reactive disclosure) but not to disclose documents of its
own accord (proactive disclosure) as is the case when the Omb-
budsman publishes decisions on its website.

III. Would the online publication of the names of the civil servants be
able to be supported by Art. 6.1 e), first sentence, i.e. when “proces-
sing is necessary for the performance of a task carried out in the
public interest”?

Arguments might be found for defending the thesis that the processing,
consisting of publishing the names of the civil servants on the Ombuds-

40 “Myndighetsutövning mot enskilda karaktäriseras av beslut eller andra ensidiga åtgärder som ytterst är
uttryck för samhällets maktbefogenheter i förhållande till medborgarna”. See SOU 2017:39, p. 119. The
preparatory works accompanying the entry into force of the GDPR legislation (Prop. 2017/18:105, p. 62)
noticed, as the preparatory works dating from the time the Data Protection Directive had to be transposed
into Swedish law did, that the concept of exercise of official authority had a European common content but
that the point of departure in Swedish law would be so far to use the concept as understood in Sweden. See
41 It may be noted that Article 6.1 c 1 may apply to both the private and the public sector. “There is nothing
in Article 6 (1) (c) of the General Data Protection Regulation which limits the application to the private
42 See Jonason, P. (2018), The Swedish legal framework on the right of access to official documents. In:
Heidelberg: Springer, p. 239.
man’s website, may be seen as a processing related to the performance of a task carried out in the public interest. The definition of the term “task carried out in the public interest” is broad. According to the Data Protection committee it is “meant to refer to something that is of interest to or affects many people on a broader level, as opposed to special interest.” Additionally, according to the government “All tasks that the Riksdag or the government have given to state authorities to perform are [...] of public interest”. And as the Committee expresses it “The concept of task of public interest does not only encompass what is performed as a consequence of a public law and explicit obligation or task. To the contrary to what is applicable regarding art. 6.1 c) GDPR the data controller does not need to have an obligation to perform the task for the legal ground e) may be applicable”.

So, whether the task of public interest is interpreted in the current situation as the very task of the public authority – the monitoring of the application of the law within the public sector, which is regulated in the Ombudsman’s instructions – or as a more nebulous task of the public authority but still related to the primary task of the Ombudsman, one could say that the online publication of the names of the public servants is related to a “task carried out in the public interest”. One may consider indeed that the publication of names as the one performed by the Ombudsman enables the transparency of the activities of the Ombudsman and gives insight into the responsibility of individual civil servants.

43 This Committee (Dataskyddsutredningen) was in charge of the preparation of the entry into force of the GDPR. It was composed of a special investigator and about 10 experts.
44 The notion of public interest, as stated in the regulation, should be considered, according to the Swedish Data Protection Committee, to have a broader meaning in the GDPR than it had in the Directive. SOU 2017:39, p.123. This is because, contrary to the Directive, the Regulation does not allow public authorities “when carrying out their duties, to process personal data on the legal basis which departs from a balance between the legitimate interests of the controller and the rights and interests of the data subject”. SOU 2017:39, p. 104. See also p. 123.
47 According to the Riksdag Act (Riksdagsordning (2014:801), Chapter 13, Section 2 “The Riksdag has, according to Chapter 13, Section 6 of the Instrument of Government, elect ombudsmen who are to supervise the application of laws and regulations in public activities”.
49 “As the Datainspektion interprets the assessment of the Ombudsman, the purpose of the Internet publication is primarily to give the public insight into the Ombudsmans’ activities. In addition, the purpose of the database should be to disseminate knowledge of the legal judgments expressed in the decisions, with the intention of giving the authorities and executives guidance on how to act correctly”. See DI’s decision, p. 6.
The task of public interest “shall” in the meanwhile – it is an additional requirement set in the GDPR “be laid down by Union Law or Member State law to which the controller is subject” (art. 6.3). Indeed, when using article 6.1 e as legal basis it is not possible to only refer to the general ground in the General regulation.\(^\text{50}\) According to the Swedish legislator, this does not mean nevertheless a requirement that the data processing itself has to be regulated. It means that the task itself has to have a basis in the legal order.\(^\text{51}\) Neither the Committee nor the government considered that there was a need to further regulate the public authorities’ mandatory tasks on a general level in order for authorities to take the necessary processing measures to fulfil their duties: “The actions taken by the authorities for the purpose of performing these tasks […] have thus themselves a legal basis that has been published through clear, precise and predictable rules”\(^\text{52}\).

Two solutions: the online publication is considered to be related to the performance of a task of public interest and then the requirement of the existence of a legal basis is fulfilled through the legality principle, or the online publication of names is not to be considered as related to the performance of a task of public interest and then the possibility to proceed that way is submitted to the introduction of such a task in the law (as the requirement to adopt specific legal instrument, declared by the Datainspektion 2010).

In any case, for being conform to (art. 6.1e) second part of the sentence, the purpose of the processing must moreover be necessary for the performance of the task of public interest. (art. 6.3).

\(^{50}\) Kommittédirektiv 2016:15. 5. See also in Prop. 2017/18:105, p. 49: “In the case of processing necessary to fulfil a legal obligation (Article 6 (1) (c)), as part of the exercise of authority or to carry out a task of general interest (Article 6 (1) (e)), there must also be other support in the legal order than the one provided in the Data Protection Regulation”.


\(^{52}\) SOU 2017:39, p. 129. Anyway, for art. 6 l.c and e, the Data Protection committee and the government proposed – and this solution has been adopted by the Parliament – that the Swedish Act with supplementing provisions to the EU Data Protection Regulation contains a reference to the necessity of having a legal basis for these processing. Indeed, Chapter 2, with the heading Legal basis, contains provisions related to the processing of personal data when there is a legal obligation, when a task is carried out in the public interest or when a task is carried out in the exercise of official authority. According to the preparatory works is this provision intended to provide guidance for the application of the law (in Sweden). Prop. 2017/18:105, p. 189. For more information on the Swedish Act see (Lag med kompletterande bestämmelser till EU:s dataskyddsförordningen (2018:218)). On this Act see Jonason, Patricia (2019), The Swedish measures accompanying the GDPR in National Adaptations of the GDPR, Collection Open Access Book, Blogdroiteuropeen, Luxembourg, Mc Cullagh K., Tambou O., Bourton S. (Eds.), pp. 42-51.
As commented by the government “the method the data controller chooses for performing his task has however – as all public administration – to be adequate in relation to its purposes, effective and proportional and may therefore not generate unnecessary infringement of individual privacy”. More clearly, it says that “the requirement that the purpose shall be necessary for performing the task of public interest means an obstacle against totally no indispensable processing of personal data or processing which constitute an disproportionate infringement of privacy that was not foreseeable”.

In other words, also if the online publishing of the names of the civil servants is to be considered to be authorized on the basis of art. 6 1.e first sentence because it can be said to fulfil the conditions of a processing for the performance of a public interest, the requirements concerning the purpose of the processing stated in the same provision may create an obstacle for the processing.

Moreover the existence of an adequate legal basis is “not a sufficient condition for a processing of personal data to be authorized”. Indeed, the processing has to comply with the other requirements laid down in the GDPR and not least with the “Principles relating to the Processing of Personal Data” stated in “Article 5 of the GDPR”. The general requirements enumerated in this provision are about lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality and apply to all personal data processing.

Among the above-mentioned principles, I would like to emphasize the existence of the principle of fairness. This principle, which means that the data must be processed in a “fair” manner in relation to the data subject and which application could impede the authorities to publish personal information on their websites despite the existence of a legally founded and

54 Ibid.
55 See SOU 2017:39, p. 129.
56 Id., p. 106.
57 The Swedish term contained in the GDPR is the term “correct” (korrekthet). The Data Protection committee which questions the choice of the Swedish term and whether it corresponds to the intention of the provision (SOU 2017:39, p. 106) prefers to use the word fairly (skälig or rimlig in Swedish). SOU 2017:39, p. 129.
necessary processing in accordance with Article 6.1.e, – is indeed not far from the ethical principles\(^58\) that I will analyse in the next section.

Indeed, to publish on the Internet personal data related to civil servants may engender – as will be demonstrated in the following – serious negative consequences for the civil servants themselves as for the Rule of Law. So, whatever the law allows, an ethical approach is required in this field.

2. Publication of the civil servants’ names in the online case law database of the Ombudsman: ethical considerations

The publication of the names of the civil servants in the Ombudsman’s online case law database engenders, as the Swedish Data Protection Authority assessed in its decision of 2010, “significant consequences for the executives (befattningshavaren) even outside the service”.\(^59\) The risks for such consequences increase due to the possibility of using search engines and, on the basis of the name found in the Ombudsman’s decision, to easily and quickly collect a wealth of information related to the named civil servants’ and his/her relatives’ private life. The privacy infringement that the names’ publication triggers constitutes both a threat and an unfair punishment for the civil servants concerned. The publication of the names thus raises a number of ethical issues in relation to the individual civil servant criticized in the decisions. Furthermore, the blurring of the civil servants’ names as well as information related to the civil servants’ private sphere, which publication on the Internet enables, increase the vulnerability of the public employees and impact the exercising of their freedoms, which, in the long run, constitutes a threat to the democracy and the Rule of Law. The unfair punishing effect of the publication may also have a deterrent impact on the body of civil servants (tjänstemannakåren) which also impact the Rule of Law.

The publication of the names of the civil servants in the case law database thus raises ethical questions\(^60\) in relation to the individual civil servants

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\(^{58}\) See a definition of fairness found on the Internet https://josephsononbusinessethics.com/2010/12/ fairness/ Fairness is concerned with actions, processes, and consequences, that are morally right honorable, and equitable. In essence, the virtue of fairness establishes moral standards for decisions that affect others. Fair decisions are made in an appropriate manner based on appropriate criteria.

\(^{59}\) DI’s decision, p. 6.

\(^{60}\) I will not go in depth into the concept of ethics. I take the term ethics and ethical behavior as a way to act that is right and that will not negatively influence others or what constitute humanity. https://www. oxfordscholarship.com/view/10.1093/0199285721.001.0001/acprof-9780199285723
themselves (2.1), and even in relation to the democratic state and the Rule of Law (2.2).

2.1 Ethical issues with regard to the individual civil servants

In order to give a more concrete understanding of the situation the affected civil servants may experience, I begin with a description of two illustrative cases I have found in the online case law database of the Ombudsman.

A first case concerns a public official working at a “medical” unit who, after having from the same person, nights and days, received a huge number of phone calls, one day answered in an inappropriate and impolite manner to her interlocutor. The interlocutor in question has then lodged a complaint to the Ombudsman and sent him, as a proof for what had happened, the sound recording of the conversation with the public official she had an altercation with. The decision of the Ombudsman (hereinafter referred to as the medical unit decision) reproduces in written the recorded phone conversation and identified the civil servant with her name and surname.

Another decision concerns an inspector who, in two emails sent to an individual who had contacted him/her in a matter concerning a project, had answered in an impolite manner. Here also the conversation – in the form of an email correspondence, is reproduced in the decision (hereinafter referred to as the inspector decision).

The decisions have several similarities. In both cases the Parliamentary Ombudsman criticized the civil servants’ behavior as infringing the requirement of objectivity laid down in Chapter 1, Section 9 of the Instrument of Government. The principle of objectivity includes indeed the obligation for the employees by the public authorities to treat the individuals contacting

61 The vagueness concerning the task of the civil servant is on purpose. The same applies for the other decision presented below.
62 We found even several decisions concerning police officers criticized for expressing themselves on social media belonging to the police administration in a way that has been considered as not acceptable. The interest in these decisions lies not least in the fact that they disclosed the name of police servants, civil servants who occupy a special and vulnerable position. According to 2015:12 Hot och Våld – Om utsatthet i yrkesgrupper som är viktiga i det demokratiska samhället. (see footnote 78). p.107, the police, in common with the customs officials, coastguard officials are apparently the most vulnerable groups in the legal field.
them in a correct manner. Both civil servants were “severely criticized” by the Ombudsman.

Common for the decisions was even the raw reproduction of the paroles of the civil servants, said or written, always indelicate – and in one case furthermore in an incorrect Swedish language, which leads to the fact that the publication of the conversation combined with the name of the public servant – a non-Swedish name may generate an even stronger stigmatization.

As the names of the criticized civil servants were indicated in the decisions (and were not common Swedish names) it has been possible, using search engines, to easily and rapidly collect a large amount of information concerning the private life of the civil servants and their relatives. I made that experience. It took me about 3 to 4 minutes in these above-mentioned cases to find out where the civil servants lived and to get a picture of the place of their residence, to get a (private) picture of the civil servant themself and sometimes of his/her relatives, to collect information about their civil status and on their hobbies...I stopped my Google search there but I guess there would have been much more information to access.

The cases described put to the fore a number of (varying) ethical issues related to the situation of the individual civil servants.

They concern the question of who bears the burden for shortcomings occurring in the administration, the question of stating examples, the stigmatization and inequality due to the names of the civil servants, the question of the assessment to indicate, or not, the name of the civil servant in the decision, the question of the selection of the decisions to be made subject to an online publication.

I. A first ethical issue concerns the question of the burden bearer for the shortcomings taking place within the administration. Indeed, one may question if it is ethical to point out by name a person as responsible for the occurred problem when, in fact, the errors made by the civil servants when they carry out their duties often could be said at least

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64 Inspector decision, p. 3 and Medical Unit decision, p. 2. The Ombudsman refers to the preparatory works 2007/08:KU6 pp.14 “Kravet på saklighet innebär bl.a. att anställda vid myndigheter har en skyldighet att bemöta dem som vänder sig till myndigheten på ett korrekt sätt”.

65 “Förtjänar allvarlig kritik”, Medical unit decision p.4 and Inspector decision, p. 4.

66 I present here some issues without pretending to be exhaustive.
partially to be linked to defects that can be attributed to the public authority itself.67

It is clear that the impolite way of behaving by the medical unit’s employee as well as by the inspector are wrong and shall be sanctioned by criticisms pronounced by the Ombudsman (which is what the Ombudsman did). However, it is not unlikely that such acts of maladministration by civil servants could have been avoided if the public authority had taken adequate measures. It could have been, for example, measures to protect civil servants from harassment, a situation that seems to have occurred in the case of the public official working at the medical unit and to some extent in the inspector case. The extract from the phone conversation between the public official criticized by the Ombudsman and the plaintiff indicates namely in the case concerning the medical unit the use of a harassing if not threatening tone from the plaintiff towards the civil servant.68 Such a poisonous situation that not only seems have its origin in the civil servant’s behavior may also be read between the lines in the inspector case. The lack of routines and other measures in order to avoid or at least manage situations such as those encountered may undoubtedly affect the work environment of the civil servants, inside the organization as well as outwardly, and therefore how the public officials perform their work in relation to the citizens.

With the point of departure that the public authorities themselves have acted wrongly – because of their passivity, lack of satisfying routines etc. – it sounds unreasonable and unethical to publish the public official’s name on the Internet, which consequently concentrates all responsibility on the individual public official while the public authorities themselves implicitly get out of responsibility. In these cases, the sanctioned civil servants were moreover at a low level in the hierarchy of the administration and had probably little capacity to influence the circumstances/routines of the public authorities.

67 One may notice that according to Section 8 of the Act with Instructions for the Parliamentary Ombudsmen (1986:765) “The Ombudsman should not intervene against lower-ranking executives without independent powers, unless there are special reasons for an intervention”.

68 The plaintiff wanted to get answer to the question why she was not allowed to visit a certain patient. According to the Health and medical board in charge of the service, the plaintiff “has on several occasions, several hours in a row, day and night for several weeks continuously called the patients’ phone as well as the expedition’s phone. This has meant limited opportunities to call for other patients”, Medical unit decision, p. 2.
II. – a means to state cautionary examples for other public officials and discourage and prevent them from behaving wrongly. However, such an “exploitation” of an individual public official to “educate” other public officials may be considered to be contrary to the Kantian maxim according to which human beings should be treated as an end and not as a means. The fact that public officials are being criticized – even if they are anonymous in the online published decision – should suffice to have this deterrent effect.

III. The same ethical element of Kant’s moral philosophy could be used to counter the argument that the Ombudsman used towards the Swedish Data Protection Authority in order to defend the publication of the names of civil servant in his online case law database, namely as mentioned earlier, the argument according to which “Transparency [in the form of publication] is an essential element in exercising official authority that constitutes the core of the mandates of the Ombudsman”.69 In the meantime, to “sacrifice” in this way an individual’s privacy (may he/she be a public official) to achieve openness is not defendable, especially since the transparency of the Ombudsman’s activities can also be met, as the Datainspektion also pointed out, while the names of the criticized officials are not included in the decision. In addition, those who wish to further investigate the cases handled by the Ombudsman has the possibility, by exercising his/her right to request access to public documents, to gain insight into the entire decision, including the civil servants’ names.

IV. A further ethical issue is related to the Ombudsman lack of consideration for the “hanged” public official’s own circumstances – more precisely the names they bear – and the higher risk of stigmatization and inequality these circumstances generate when the names are published online.

Clearly, if the public official has an unusual name, the publication may cause him/her a greater risk of privacy infringement than if he/she carries a more common name. The accuracy and thus the possibility to chart a person’s privacy is higher or even dramatically higher if the name – (our modest survey confirmed) and especially the first name /surname combination - is unusual. In fact, it is much easier to map the private life of a civil

69 DI’s decision, p. 6.
servant called Patricio Jonasonoskiou than the private life of a civil servant named Anders Johansson. Having a (for Sweden) unusual name, which many of the citizens “with other ethnical background than Swedish” have, is in this context a stigmatization factor,\(^\text{70}\) even related to the question of citizen’s equality.

The manner the Ombudsman (more especially the Bureau of the Ombudsman) did assess, for each decision taken, whether the name, the initials, or neutral letters (as AA or NN for example) should be used in the decision for identifying the civil servants also triggers ethical questions related to equality and justice. A review I made of a certain number of decisions could not show any clear and coherent policy on that point: neither the gravity of the faults, the Ombudsman who the decision came from, the sector concerned nor the common or uncommon character of the name of the civil servant could be found to be explaining factors for the decision of the bureau of the Ombudsman to indicate or not the name of the criticized civil servant in the decision.

In the same “lottery” vein, why should the “sanction” pronounced by the Ombudsman be more noticeable (in fact a double sanction – the criticisms itself and the disclosure on Internet of the name) for those civil servants who happen to be involved in a matter that the Ombudsman considers to be “of particular interest”\(^\text{71}\) than for the lucky ones whose case has been judged less interesting and consequently not worth being included in the online case law database? Here again, the argument of equality and justice may be of importance.

In summary, there are several aspects that indicate that, from an ethical point of view and with regard to the civil servants considered individually, it constitutes an inappropriate routine to include the names of the public officials in decisions published on the authority’s website.

\(^\text{70}\) The stigmatization of public officials with foreign names may affect the concerned civil servants even more if the decision contains a raw transcription of a text written by the criticized civil servant and containing several linguistic errors. The stigmatization may even affect the “community” of civil servants of foreign origin. In a general manner I have no criticism to raise against the transcription of the sayings of the civil servants (email and phone conversation \textit{inter alia}) in the decisions published online. From a pedagogical point of view, the method may help to concretely understand the types of behavior the Ombudsman judges to be inappropriate. The ethical problem with such a transcription stems from the easy-to-read link between the conversation published in the decision and a named civil servant.

\(^\text{71}\) They therefore ended up among the decisions the Ombudsman chose to publish on its website.
2.2. Publication of Official’s Name in JO’s Web Based Practice Database and its compatibility with the requirements of the democratic Rule of Law

The publication of the names of the public servants does not only lead to negative consequences for the individual civil servants themselves (in terms of, *inter alia*, privacy infringement, stigmatization and “double punishment”) but also to problematic consequences for the democracy and the Rule of Law. Thus, the Internet publication of decision containing the name of civil servants also raises ethical questions in relation to the Rule of Law. In the following I will focus on two prerequisites for a well-functioning democracy which may be challenged when the civil servants’ names are published on the Internet.

The first is the need for civil servants to be protected against harassment, extortion and other inconveniences. The second is the need for the public officials to enjoy their full human rights. These two aspects are interrelated in such way that the first mentioned prerequisite is *a sine qua non* condition for the second prerequisite.

A well-functioning democracy requires the individuals composing the civil service to be protected against harassment and other threats. Indeed, threats and harassment affect the public official’s performance of tasks. That is one of the conclusions the Swedish Crime Prevention Council (BRÅ) comes to in a report submitted on *Threats and violence – On vulnerability corruption for professional groups of particular importance to democratic society*. The report establishes that some of the civil servants who have been victims of harassment or other inconveniences say that they since then are not comfortable making certain decisions and are “*passive in various situations*”. It happens for example that civil servants give over the cases they handle to colleagues in order not to have to deal with a case which with they have had trouble. Some of them even question the correctness of their own professional practice.

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72 Hot och Våld – Om utsatthet i yrkesgrupper som är viktiga i det demokratiska samhället. The report summarizes and analyses the different studies that have been conducted on this issue.
73 “[…]one can hesitate more before taking decisions”, BRÅ report, p. 101.
74 “behaves passively in different situations”, BRÅ report, p. 13.
75 Ibid.
76 BRÅ report, p. 102 “Almost one of ten who is threatened states that they themselves are affected in such a way that their authority can be called into question”.
In addition to the fact that the vulnerability of public employees affects the quality of day-to-day performance of activities (including public authority), this exposure to harassment and other inconveniences has implications for the administration’s ability to retain officials and perhaps in the long run to recruit people. And indeed, the number of civil servants who have suffered inconvenience indicates that they would like to change jobs. As BRÅ’s report states, this vulnerability can “reduce the attractiveness of different professions”.\(^77\) “It’s negative for democracy if people do not want to work in important professions because they feel uncomfortable about threats and violence”.\(^78\) At the same time the report shows civil servants are subject to these types of inconvenience in a greater extent than ordinary workers and that the civil servants working with tasks related to exercising of power (myndighetsutövning) are “particularly vulnerable”.\(^79\)

Among the “relatively common forms of harassment” (except for unpleasant phone calls and unpleasant letters /e-mails) mentioned in the report is also noted one’s mapping of the employee or doing “malicious reports”,\(^80\) whatever that means.

It could not be excluded, in my view, that the publication on the Internet of the names of public officials may contribute to a greater concern about the threats and other inconveniences the civil servants are affected by\(^81\) and in parallel to a greater discomfort for the civil servants.

A well-functioning democracy should furthermore presuppose that citizens, including those working in the public sector, can enjoy human rights and freedoms.

As this paper has shown, the fulfilment of this condition can be questioned regarding the right to privacy/data protection\(^82\) when public officials’ names are published on the Internet. The online publication enables, as we

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\(^77\) BRÅ report, p. 7.
\(^78\) Id., p. 16.
\(^79\) Id., p. 10.
\(^80\) “Okynnesanmälningar”, BRÅ report, p. 96.
\(^81\) Actually, there are already examples on the Internet of “harassment campaign” against civil servants who have been criticized by the Ombudsman not least via websites such as Flash back.
\(^82\) Beyond data protection the right to privacy is, as known, guaranteed not least by Article 8 of the European Convention on Human Rights, which enjoys a legal status in Sweden through the Act (1994: 1219), See also the Swedish Instrument of Government, Chapter 2, Section 6, which guarantees some aspects of privacy. This provision protects inter alia individuals against “significant infringements [made by the State] on the individual’s privacy if they occur without consent and consist in surveillance or the mapping of the personal circumstances of the individual.
have seen above, an intrusion into the private sphere of the civil servant, an intrusion due especially to the technical and societal development and the erasure that followed, of the border between the public/professional sphere and the private sphere.

In the meantime, it is not only the individual aspect of the right to privacy, i.e. the possibility of self-realization of the individuals that is of concern when the civil servants’ right to privacy is under threat. Even the “collective” side of their right to privacy, may be infringed. By “collective” side of the right to privacy is intended the conditions that allow the individuals to contribute to a pluralistic society in which people enrich society with the choices they make and their exercising of freedom of expression and other rights. On the contrary, a person who fears that his/her privacy may be under threat, for instance because his/her position as a public official can be linked to the individual and the citizen he/she is, could tend to restrict his/her freedom of expression on social media for example. Such fears to be tracked may impact on the civil servant’s participation in social life in general as almost all kinds of participation in social and political life leave tracks on Internet: participation in sport events, membership in an association, etc. Here again, the publication on the Internet of the names of the public servants may be deterrent for democracy if the civil servants’ human rights and freedoms are limited by self-censorship in this way.

Concluding remarks

Having regard to the interests at stake, i.e. interests that go beyond the very interests of the civil servants to have their privacy protected and includes interests for the democracy and the Rule of Law, legislation, while necessary is insufficient. An ethical approach is in addition required.

In other words, before publishing personal information related to civil servants, beside the necessary analysis of the legal conditions set out for the publication, an ethical reflection should take place. The questions to be posed are not least what kind of consequences the online publication of the names of the civil servants could have in the short term and in the long term for the civil servants themselves and for democracy and the Rule of law. Another given question to pose – both ethical and legal – is if the infringement of privacy and the risks in terms of a diminishing of the Rule of Law

83 If not as a civil servant at least as an individual.
Law be overweighed by the benefits such a publication is expected to generate and if there are less damageable way to attain the goals. The ethical reflection must be performed by the individual actors who, in the particular case, take the decision to publish the names of the civil servants online. This in turn requires that an ethical reflection takes place within the publishing authority itself. Ideally, such a reflection is also brought to a higher level and given a concretization in general guidelines.

The case of the online publication of personal data performed by the Swedish Parliamentary Ombudsman is, as mentioned in the beginning of this paper, only to be taken as an illustration of the legal and ethical problems which may occur when personal data concerning civil servants are subject to a publication on the Internet. In other words, the paper aims to arouse a reflection of principal nature. Some of the considerations analyzed in the paper – if not all – may be applicable to situations of various kinds which entail the publication of the names of the civil servants on the Internet.84 When it concerns the institution of the Ombudsman, it seems to have changed its policy. Where the Datainspektion failed, the GDPR did. I warmly welcome the changes made by the Ombudsman, which as a leading authority in the legal and institutional Swedish landscape has a great responsibility to show the way for other public authorities!

84 The reasoning may also be applicable mutatis mutandis concerning the publication of the names and other personal data regarding politicians, a professional group of particular importance to democratic society and also particularly subject to threats and violence.