

Redogörelse  
2006/07:JO1

## Justitieombudsmännens ämbetsberättelse

---

Omslag Eva Lena Johansson  
Översättning till engelska av Summary in English: David Jones  
ISSN 0282-0560  
Elanders Gotab, Stockholm 2006

BILAGA 10

## The Swedish Parliamentary Ombudsmen

### Report for the period 1 July 2005 to 30 June 2006

#### 1 General information and statistics

During the period covered by the report, the following have held office as Parliamentary Ombudsmen: Mr. Mats Melin (Chief Parliamentary Ombudsman), Ms. Kerstin André, Mr. Nils-Olof Berggren and Ms. Cecilia Nordenfelt. The Deputy Ombudsmen Mr. Leif Ekberg (July 1–November 26, 2005), Mr. Jan Pennlöv and Mr. Hans Ragnemalm (November 16, 2005–June 30, 2006) have handled and decided cases of supervision during a number of shorter periods.

Mr. Melin has supervised the courts of law, the public prosecution service and the police, while Ms. Nordenfelt have dealt with matters concerning the prisons, the armed forces, taxation, customs, execution of judgments, social insurance and chief guardians. Mrs. André has supervised the fields of social welfare, public health and medical care and education. Mr. Berggren, finally, has been responsible for the supervision of the administrative courts, building and construction, immigration, administration of foreign affairs, environmental protection, farming and protection of animals, labour market, and all additional aspects of civil administration, not supervised by any other Parliamentary Ombudsman.

During the year, 6 008 new cases were registered with the Ombudsmen; 5 804 of them were complaint cases (an increase by 371 compared to the number during the previous year) and 89 were cases initiated by the Ombudsmen themselves on the basis of observations made during inspections, of newspaper reports or on other grounds. 115 cases concerned new legislation, where the Parliamentary ombudsmen were given opportunity to express their opinion on i.a. bills.

6 051 cases were concluded during the period, an increase by 296; out of them 5 865 were complaint cases, whereas 75 were cases initiated by the Ombudsmen themselves and 111 were cases concerning new legislation. It should be noted that the schedules overleaf show cases concluded during the period, not all cases lodged.

This summary also comprises the full reports of two of the cases dealt with by the Ombudsmen during the period.

*Schedule of cases initiated by the Ombudsmen and concluded during the period 1 July 2005–30 June 2006*

<b>Activity concerned</b>	<b>Closed without final criticism</b>	<b>Admonitions or other criticism</b>	<b>Referred to other agencies or state organs</b>	<b>Total</b>
Courts	2	5	–	7
Public prosecutors	–	4	–	4
Police authorities	1	6	1	8
Armed forces	–	1	–	1
Prison administration	2	7	–	9
Social welfare	3	4	–	7
Medical care	–	1	–	1
Social insurance	1	4	–	5
County administrative boards	–	2	–	2
Education	–	1	–	1
Taxation, customs	1	2	–	3
Labour market authorities	1	-	–	1
Planning, construction	–	4	–	4
Environmental protection	–	6	–	6
Communications	–	1	–	1
Immigration	–	2	–	2
Chief guardians	2	9	–	11
Access to public documents	–	2	–	2
<b>Total</b>	<b>13</b>	<b>61</b>	<b>1</b>	<b>75</b>

*Schedule of complaint cases concluded during the period 1 July 2005–30 June 2006*

<b>Activity concerned</b>	<b>Dis- missed without investi- gation</b>	<b>Referred to other agencies or state organs</b>	<b>No cri- ticism after investi- gation</b>	<b>Admo- nitions or other criticism</b>	<b>Prosecu- tions or discipli- nary pro- ceedings</b>	<b>Guide- lines for good admini- stration</b>	<b>Prelimi- nary cri- minal invest. No pro- secution</b>	<b>Total</b>
Courts of law	157	–	227	26	1	–	–	411
Administrative courts	53	–	42	4	–	–	–	99
Public prosecutors	83	–	133	15	–	–	–	231
Police authorities	219	11	265	44	–	–	–	539
Armed forces	12	–	–	4	–	–	–	16
Prison administration	447	–	304	161	–	–	–	912
Social welfare	332	12	338	74	–	–	–	756
Medical care	131	1	74	6	–	–	–	212
Social insurance	267	–	147	76	–	–	1	491
Labour market etc.	99	–	77	7	–	–	–	183
Planning, construc- tion	62	–	53	21	–	–	–	136
Enforcement	87	–	42	8	–	–	–	137
Municipal self- government	61	–	14	1	–	–	–	76
Communications	94	–	41	9	–	1	–	145
Taxation, customs	213	–	64	37	1	–	–	315
Education	95	9	91	14	2	–	1	212
Culture	10	–	1	–	–	–	–	11
Chief guardians	19	–	15	11	–	–	–	45
Agriculture, environ- ment, protection of animals	62	1	47	11	–	–	–	121
Immigration	98	–	42	14	–	1	–	155
Other cases at county administrative boards, control of lotteries etc.	17	–	4	3	–	–	–	24
Employment of civil servants etc.	84	–	13	6	–	–	–	103
Access to official documents; freedom of expression	111	–	127	94	–	–	–	332
Administration of parliamentary and foreign affairs; gen- eral elections	21	–	3	1	–	–	–	25
Miscellaneous	69	–	22	6	–	–	–	97
Complaints outside jurisdiction, com- plaints of obscure meaning	81	–	–	–	–	–	–	81
<b>Total</b>	<b>2 984</b>	<b>34</b>	<b>2 186</b>	<b>653</b>	<b>4</b>	<b>2</b>	<b>2</b>	<b>5 865</b>

The County Administrative Board of Jämtland issued a regulation placing the Storsjö monster under protection. The question of whether this regulation had any legal effect

(Reg. no. 1636-2004)

In an adjudication dated November 9, 2005, the Parliamentary Ombudsman, *Mr. Berggren*, expressed the following opinion.

### **Initiative**

During an inspection of the Environmental Court in Östersund, a part of the District Court in Östersund, examination of the files on cases which had been appealed to the court as a superior authority drew attention to the implementation of a regulation issued by the County Administrative Board of Jämtland placing the Storsjö monster under protection. The documents on file revealed the following.

The County Administrative Board of Jämtland had rejected an application for exemption from the prohibition against removing the eggs of the Storsjö monster. An appeal against this decision was rejected by the Environmental Court on the grounds that the application concerned a species of animal unknown to science and that in view of this circumstance the applicant had no legal warrant for his case to be heard.

These observations gave rise to the question of what legal force the regulation in question might have and how it could be applied. I decided to launch an inquiry into the issue on my own initiative.

### **The Inquiry**

The file dealing with the application for exemption (reg. no. 522-1123-02) that had been appealed was requested from the County Administrative Board as well as the files relating to the process that led to the issue by the Board on January 22, 1986, of the regulation placing the Storsjö monster under protection (reg. no. 11.122-142-85).

A memorandum drawn up about this case contained the following notes.

After an application for a protection order for the Storsjö monster submitted by Östersund Tourist Office had been circulated for comment, the County Administrative Board decided on January 22, 1986, by virtue of Section 14 of the Nature Conservation Act (1964:822) to place the Storsjö monster under protection. This regulation stipulated that it was forbidden in the Storsjö area (in central Jämtland) to kill, injure or capture live animals belonging to the Storsjö monster species. The prohibition also applied to removing or damaging the monster's eggs, roe or nests (23 FS 1986:3).

On November 11, 2002, a private individual named M.C. applied to the County Administrative Board for exemption from the prohibition against removing the eggs of the Storsjö monster. After the County Administrative Board had requested information to supplement the application and it had been circulated for comment, the Board decided on June 2, 2003, to reject the application. The applicant appealed against the decision, upon which it was referred by the County Administrative Board to the Government Office, The Ministry of Environment. The ministry in its turn referred the case to the Environmental Court in Östersund.

As far as can be seen from the legal arguments on which the Environmental Court based its decision of July 11, 2003, the regulation issued by the County Administrative Board was considered to lack legal force. A statement should be requested from the Board as to whether this circumstance gives reason for any changes in the regulations or the adoption of any other measure by the County Administrative Board. In addition the Environmental Court should be asked to express an opinion on the contents of this memorandum.

The County Administrative Board and the Environmental Court were requested to submit the responses proposed in the memorandum.

The following response was submitted on behalf of the Environmental Court by its senior judge, Jim Emilsson.

Article 9 of Chapter 1 of the Instrument of Government lays down that courts of law, public authorities and others performing functions within the public administration are to observe in their work the equality of all persons before the law and to maintain objectivity and impartiality. In its appraisal of case M 3033-03 the Environmental Court found that the County Administrative Board regulation in this case referred to a species of animal for which there was no scientific verification and that in issuing the regulation the County Administrative Board had failed to comply with constitutional requirement of objectivity cited above. In view of this, the Environmental Court considered that pursuant to Article 14 of Chapter 11 of the Instrument of Government there were grounds to refrain from applying the County Administrative Board's regulation by rejecting the appeal.

The response of the County Administrative Board, submitted by the county governor, Maggi Mikaelsson, read as follows.

#### Background

In 1985 Östersund Tourist Office applied for a protection order for the Storsjö monster in Lake Storsjö. After an extensive review the County Administrative Board decided on January 22, 1986, by virtue of the now rescinded Section 14 of the Nature Conservation Act to issue an order prohibiting the killing, injury or live capture of animals of the Storsjö monster species. This prohibition also applied to the removal or injury of the monster's eggs, roe or nests.

The protection order was circulated in the Statute Book for the County of Jämtland (23 FS 1986:3).

In its decision the County Administrative Board stated that despite the existing problems of determining its species, there were powerful arguments to justify protection of the animal.

In 2002 an application was submitted to the County Administrative Board for exemption from the prohibition to remove the eggs of the Storsjö monster species. The Board rejected the application, mainly on the grounds that it was considered to conflict with the purpose of the protection order for the Storsjö monster.

After the applicant had taken the application for exemption further, the Environmental Court in Östersund decided on July 11, 2003, in case number M 3033-03, to reject the appeal. The grounds cited by the court were that the application for exemption referred to a species of animal for which there was no scientific verification and that the appellant therefore had no legally warranted claim to have the case heard.

During the spring of 2004 the Parliamentary Ombudsman made an inspection of the Environmental Court.

In a memorandum dated May 24, 2004, the Parliamentary Ombudsman expressed the opinion that as far as can be judged from the legal arguments on which the Environmental Court based its decision of July 11, 2003, the regu-

lation issued by the County Administrative Board on January 22, 1986, could not be considered to have any legal force. The County Administrative Board has been requested by the Parliamentary Ombudsman to express its opinion on whether the decision of the court gives the Board reason to amend the regulations or adopt any other measures.

#### Considerations

The County Administrative Board has enabled Jämtland County Museum and the Storsjö Monster Society to submit opinions on this case.

Jämtland County Museum has maintained that the Storsjö monster exists when there are (and have been) individuals who assert that it does irrespective of whether its physical existence can be proved in the scientific sense or not. The County Museum stresses how important it is for us in the modern world, in Europe, in Sweden and in Jämtland, to endeavour to sustain the preservation of phenomena of precisely this kind, which appear to be magical, mysterious and inexplicable. It is the conviction of the museum that an approach of this kind means that preservation of these magical, mysterious and inexplicable phenomena begins and ends with the solicitude expressed in the order issued by the County Administrative Board on January 22, 1986.

The Storsjö Monster Society has expressed the following opinion. The society raises the question of whether a protection order requires scientific determination of the species of animal. The material existence of the Storsjö monster has been confirmed by a large number of observations by trustworthy individuals over a long period of time. These have often been brief and from some distance and, because of its size, in an excited state of mind, so that no reliable determination of its species can be expected. More active attempts to ascertain the monster's species would probably involve actions that contravene the intentions underlying the protection order. It would appear to be impossible to attain any clear determination of the species unless a dead monster floats to the surface to permit examination. At the moment, however, the Storsjö monster is a crypto-zoological phenomenon, perhaps a species that has been officially declared extinct.

The question of the existence of the Storsjö monster depends on the premises adopted to determine the issue. The Environmental Court claimed that it has not been possible to verify its species in a scientific manner. The County Administrative Board refrains from taking a definite position on the extent to which the monster may exist in such a way that it can become the subject of a protection order. What is however clear, in the opinion of the County Administrative Board, is that it does exist in that it has an existence in the people's perception of the world.

The County Administrative Board concurs with the opinion of the Parliamentary Ombudsman that the finding of the Environmental Court in the judgment referred to above was that the decision made by the County Administrative Board on January 22, 1986, to issue a protection order for the Storsjö monster lacked legal force.

The County Administrative Board's decision to issue a protection order has therefore been judged by the court to lack legal effect. As the constitution lays down that public authority in Sweden must be exercised under the law (Article 1 of Chapter 1 of the Instrument of Government) and as it is primarily the role of the courts to interpret current legislation, no other course of action is open to the County Administrative Board as a public authority but to rescind the decision to place the Storsjö monster under protection.

#### Appraisal

The supervision exercised by the Parliamentary Ombudsmen is intended first and foremost to ensure that those who exercise public authority comply with



the statutes and other regulations and otherwise discharge their obligations fully. According to their instructions the Parliamentary Ombudsmen are to pay particular attention to the compliance of the courts of law and public authorities with the provisions in the Instrument of Government on, for instance, objectivity.

With this background, there are reasons to question the decision of the County Administrative Board in 1986 to place the Storsjö monster under protection, this in spite of the fact that one of its tasks is to encourage tourism. I have then weighed the protection order and the circumstances around it against the self-evident requirement that those who discharge duties in the public administration must not devote time and energy to matters that do not fall within their obligations and responsibilities. Furthermore, I have also taken into account how important it is for an authority not to use its powers in unintended ways and in addition considered the question of whether the extensive review that preceded the decision to issue the protection order was justifiable. Another question to which I have devoted some thought is whether in the future there can be any justification for County Administrative Boards and appeal courts to be burdened, as in this case, with cases relating to the protection order.

According to their instructions the Parliamentary Ombudsmen should not deal with cases that date from more than two years previously unless there are special grounds for doing so. In my opinion, there are no such grounds apart from those adduced above to look any more closely into or refer to what preceded the decision by the County Administrative Board in 1986 to issue the regulation placing the Storsjö monster under protection.

Nor can I see any grounds for further consideration of the manner in which the County Administrative Board dealt with the application for exemption in 2002 and 2003.

The Environmental Court found that the constitution contained provisions that prevented the application of the County Administrative Board's regulation placing the Storsjö monster under protection. I share the opinion of the court on this matter. In view of the fact that the regulation must therefore be considered to lack any legal force there are, in my opinion, good grounds for the County Administrative Board to consider the issue of the continued validity of the regulation. I note that according to its statement the County Administrative Board intends to review this issue without delay and request the County Administrative Board to forward its decision to the Parliamentary Ombudsmen for their information.

After the Parliamentary Ombudsman had concluded the case, the County Administrative Board forwarded the following decision for his information.

Revocation of a decision

#### DECISION

The County Administrative Board revokes the decision issued on January 22, 1986.

(Reg. no. 11.122-142.85)

This decision is to take force immediately.

Appeal against this decision may be made to the County Administrative Court of Jämtland, see annex (form F4).

#### BACKGROUND

After an application in 1985 by Östersund Tourist Office the County Administrative Board decided to prohibit the killing, injury or live capture of animals of the Storsjö monster species. In addition the order prohibited the removal or injury of the monster's eggs, roe or nests. This decision was published in the Statute Book for the county (23 FS 1986:3).

#### APPLICABLE STATUTES

The Administrative Procedure Act (1986:223) lays down that if an authority finds that a decision that it has issued as a first instance is manifestly incorrect because of a change of circumstances or for some other reason, it must amend the decision if this can be arranged rapidly and simply and is not to the disadvantage of any individual party.

#### THE ASSESSMENT OF THE COUNTY ADMINISTRATIVE BOARD

The decision to place the Storsjö monster under protection resulted from a manifestly incorrect application of the law as there are no statutory grounds for protecting an animal of an indeterminate species. Therefore the decision is to be rescinded.

---

The decision was added to the Parliamentary Ombudsmen's file on the case.

## Prosecution of employees of Gothenburg University for breach of duty arising from failure to comply with judgments of the Administrative Court of Appeal concerning the release of documents etc.

(Reg. no. 1568-2003 and 1606-2003)

In an adjudication dated June 26, 2006, the Parliamentary Ombudsman, *Ms André*, included the following.

### **Background**

The fundamental provisions on public access to official documents can be found in Chapter 2 of the Freedom of the Press Act. This also contains regulations on the provision of public documents. These must be provided without delay. Section 15 of Chapter 2 of the Freedom of the Press Act and Section 7 of Chapter 15 of the Secrecy Act (1980:100) also provide that appeal may be made to an administrative court of appeal against the decision of an authority to reject the request by an individual to be shown documents or to provide public documents with restrictions that limit the applicant's right to disclose their contents or otherwise dispose of them.

In adjudications dated June 10, 2003 (reg. nos. 3591-2002) and June 11, 2003 (reg. no. 3781-2002) I dealt with the complaints made by L. E. and E. K. about the excessive time taken by Gothenburg University to deal with their requests for access to documents relating to research material and also to the delay in referring their appeals against the decisions on these requests to the Administrative Court of Appeal.

In my adjudications I expressed grave criticism of the way in which the university had dealt with these cases.

The hearing by the administrative courts into the entitlement of L. E. and E. K. to the requested access to the research material took place in the following circumstances.

In decisions dated February 6, 2003 (case nos. 6208-2002 and 5741-2002) the Administrative Court of Appeal in Gothenburg ordered that L. E. and E. K. were to be allowed the access to the requested research material and that the university was to determine the restrictions that would then apply to protect the interests of individuals according to certain specified provisions of the Secrecy Act.

Professor Christopher Gillberg, head of the Section for Child and Adolescent Psychiatry in the Department of Women's and Children's Health at Gothenburg University, who was responsible for the research involved in this case, then lodged a petition for a new hearing of the cases in the Administrative Court of Appeal. At the same time he sought inhibition of the judgments of the court. In a decision dated April 4, 2003, the Supreme Administrative Court rejected Christopher Gillberg's applications for rehearings on the grounds that even though he was indirectly affected by the judgments of the Administrative Court of Appeal, he lacked any interest in the case that could be acknowledged in law as entitling him to apply for a rehearing of the issues.

When the judgments of the administrative court of appeal had gained legal force, on April 7, 2003, Gothenburg University decided on the restrictions that were to apply to the provision of the documents. L. E. and E. K. appealed against some elements of the university's decision. In judgments issued on August 11, 2003 (case nos. 3395-2003 and 3396-2003) the Administrative Court of Appeal in Gothenburg set aside some of these restrictions.

Christopher Gillberg then lodged a petition for a new hearing of these cases as well and also for inhibition of the Administrative Court of Appeal's latest judgments. In a decision dated November 5, 2003, the Supreme Administrative Court rejected his petitions for a new hearing on the same grounds as for its previous decision.

### **Complaints, enquiry etc.**

In complaints submitted to the Parliamentary Ombudsmen on April 16 (reg. no. 1568-2003) and on April 23, 2003 (reg. no. 1606-2003), L. E. and E. K. expressed criticism of Gothenburg University for its failure to provide the research material after the judgments of the Administrative Court of Appeal of February 6, 2003. They alleged that the university was trying to thwart execution of these judgments. They claimed that the university was once again contravening the constitutional requirement to act without delay in providing public documents and now the judgments of the Administrative Court of Appeal and the decision of the Supreme Administrative Court as well.

L. E. and E. K. supplemented their previous complaints in September 2003. In these documents they now also criticized the actions of the university after the Administrative Court of Appeal issued its judgments on August 11, 2003. L. E. and E. K. referred, for instance, to a letter dated September 1, 2003 that had been sent to both of them by Gunnar Svedberg, who had been appointed Vice-Chancellor of Gothenburg University in the summer of 2003. The main contents of his letter were as follows.

In a letter dated August 14, 2003, I have asked Professor Christopher Gillberg section for Child and Adolescent Psychiatry in the Department for Women's and Children's Health to ensure the documents in question will be available for collection on August 19, 2003, so that they can be transported to the university premises specified in the restrictions that the university decided to impose. That is where you would be able to examine the documents.

However, in a letter dated August 18, 2003, Gillberg has notified me that in his capacity of head of the section, physician, researcher and private individual he does not intend to supply the material requested and does not intend to relinquish the keys to the filing cabinets containing the material itself. In his letter Gillberg refers the reasons for his refusal, among them customary ethical standards and statutory requirements that apply to medicine and to research.

A large number of researchers at different universities in Sweden have written to me to state that ethical reasons prevent the release of the material concerned to outsiders without the consent of the participants. They also claim that it is difficult to comprehend fully the impact on future medical research that release of this material would have.

I can, on the one hand, understand Gillberg's ethical grounds for not releasing the research material because of the confidentiality he guaranteed those

who took part in his research studies. On the other hand, in its judgment in February the Administrative Court of Appeal came to the conclusion that it is quite clear that release, subject to restrictions, of the requested documents to E. would not give rise to the kind of risk of injury or damage to individual interests that the Secrecy Act is intended to safeguard.

Gothenburg University is required to comply with judgments and decisions made by Swedish courts of law. The university has therefore undertaken enquiries into the possibilities of providing you with the opportunity to examine the documents in question despite Gillberg's refusal to release the material. This has involved detailed clarification of the legal situation and also the practical possibilities of gaining access to the material so that it can be moved from the premises in which it is presently housed. The material is stored in locked metal cupboards and the premises are equipped with a vault that cannot be broken into without a great deal of force if the keys are not available. Our enquiries also show that the staff of the units occupying these premises are not going to allow any outsiders to gain access to material.

As the university's Vice-Chancellor I have overall responsibility for all of its operations and its entire staff. In the prevailing circumstances, if any of the university's employees were ordered to enforce collection of the material and its removal to some other place, it is almost certain that they would be resisted by other members of the staff. The mental violence that is more than likely to ensue would in itself cause substantial harm to the staff involved and to the university as a whole. It would have a damaging impact on the workings of the university now and for many years to come. More than six months ago, senior members of the department concerned wrote to the Vice-Chancellor to inform him that the situation was already critical in all of its units because of the situation that has arisen.

Against the background described above I am forced to conclude that Gothenburg University has done everything that can reasonably be expected of it to comply with the judgments of the Administrative Court of Appeal. If the university resorts to internal coercive measures to provide you with the material concerned, a number of members of its staff will be harmed as will the operations of the university as a whole in a way that is indefensible in terms of the object of these measures. I have therefore decided that for the moment no further action will be taken within the university organization to provide you with the documents in question.

Gothenburg University intends to refer Gillberg's refusal to release these documents to the Disciplinary Board for State Employees.

On October 14, 2003, the Parliamentary Ombudsman obtained information from the Disciplinary Board for State Employees that no complaint had been lodged concerning Christopher Gillberg.

On October 16, 2003, information was received from Gunnar Svedberg by telephone that the documents concerned had not been released, one reason being that in the opinion of the section involved it was doubtful whether the conditions in the judgments of the Administrative Court of Appeal had been fulfilled.

On October 21, 2003, the Parliamentary Ombudsman requested the Vice-Chancellor of Gothenburg University to submit an enquiry into and opinion on the measures taken by the university to release the research material in accordance with the judgments issued by the Administrative Court of Appeal in Gothenburg on August 11, 2003.

The response, dated November 4, 2003, submitted by the Vice-Chancellor, Gunnar Svedberg, included the following.

The documents in question are stored at the Section for Child and Adolescent Psychiatry at Kungsgatan 12 in Gothenburg. The head of this section is Professor Christopher Gillberg.

According to a decision made by the university on April 7, 2003, L. E. is to have access, subject to certain conditions, to the documents requested in the university's premises at Medicinaregatan 16 in Gothenburg.

On August 14, 2003, the Vice-Chancellor sent a letter to Christopher Gillberg in which he was requested to ensure that the documents were ready for collection at 9 a.m. on August 19, 2003. /.../

When two members of the university's administrative staff went to the section on August 19 to collect the documents they were not permitted to do so by a member of the staff of the section, who had been ordered by Christopher Gillberg to refuse to release the material. (/.../)

In view of what had occurred, the Vice-Chancellor has attempted to arrange a meeting with Christopher Gillberg to persuade him to comply with the judgments of the Administrative Court of Appeal. However, this meeting did not take place until October 10, 2003, as Gillberg, who has partial leave of absence, was abroad. During this meeting Gillberg expressed his continued determination not to release the material. /.../

The possibility of gaining access to the documents with the help of some enforcement agency has been investigated but has not been considered viable, as the documents are already stored in premises rented by the university. However there seems to be nothing to prevent Leif Elinder/Eva Kärfve from requesting enforcement themselves.

The Vice-Chancellor regrets that the university has not succeeded in complying with the judgments of the Administrative Court of Appeal. As the documents are locked into a vault, in the Vice-Chancellor's opinion Christopher Gillberg must himself cooperate with the university to enable L. E. / E. K. to have access to the documents.

On December 1, 2003, the Parliamentary Ombudsman was informed by Gunnar Svedberg that he had neither taken nor considered any further enforcement measures than those accounted for in the university's response to the Parliamentary Ombudsman. The university had made no complaint to the Disciplinary Board for State Employees but this was still under consideration.

On December 19, 2003, Gunnar Svedberg informed the Parliamentary Ombudsman that no documents in this case had been released. The Vice-Chancellor was still involved in discussions with Christopher Gillberg on this issue. Arne Wittlöv, chairman of the board of Gothenburg University had expressed the opinion that the case was of such significance that it "should be taken up" by the board. For this reason it had been placed on the agenda for the board meeting on December 17, 2003, but then postponed until its January meeting on the grounds that the restrictions should be reviewed by the board once more. Arne Wittlöv had also urged the Vice-Chancellor to look further into the question of submitting a complaint to the Disciplinary Board for State Employees.

In view of what had come to light I considered that there were reasons for assuming that misuse of office as laid down in Section 1 of Chapter 20 of the Swedish Penal Code had been committed by officials at Gothenburg University and therefore on December 19, 2003, I launched a preliminary investigation into a crime of this nature. I assigned Kerstin Skarp, Deputy Director of the Västerås Public Prosecution Authority to conduct this enquiry.

On January 22, 2004, the board of Gothenburg University decided both “to recommend that the Vice-Chancellor should inform E. K. that the relevant conditions in the judgment of the Administrative Court of Appeal had not been fulfilled and that she was not therefore entitled to access to the research material as requested” and also to “entrust the Vice-Chancellor with the task of formulating additional restrictions to ensure that L. E. had the justifiable interest in examining the research material claimed in the presentation of the case”.

On January 27, 2004, Kerstin Norén, Pro Vice-Chancellor of Gothenburg University, informed E. K. that the Vice-Chancellor had determined that she could not have access to the research material in question in view of the conditions set by Gothenburg University and accepted by the Administrative Court of Appeal. This decision was not accompanied by any information about how to appeal.

In a letter dated February 13, 2004, E. K. expressed her opinions on this new decision to the university and said that she wanted her letter to be regarded as an appeal, unless the decision was to be considered notification of the university’s refusal to execute the judgment of the Administrative Court of Appeal.

On February 20, 2004, Gunnar Svedberg decided to consider the letter from E. K. as an appeal and after ascertaining that it had been submitted in due time, forwarded it to the Administrative Court of Appeal.

Where L. E. was concerned, on February 2, 2004, Gunnar Svedberg imposed another condition – in addition to those that already applied – stipulating that L. E. was to show that his duties for the City of Uppsala included reviewing or otherwise acquiring information about the basic material on which the research in question was based.

After receiving letters from L. E., on February 10 and February 18, 2004, the Vice-Chancellor made further decisions on this issue in which he confirmed that L. E. did not fulfil the condition laid down in the decision of February 2.

In judgments issued on May 4, 2004 (case nos. 1070-2004 and 1148-2004) the Administrative Court of Appeal in Gothenburg stipulated that the university’s “new” decisions concerning the entitlement of L. E. and E. K. to examine the public documents were to be set aside.

On May 6, 2004, Gothenburg University, through Bengt Wedel, the Principal Administrative Officer, informed the Section for Child and Adolescent Psychiatry that it was to ensure that the documents concerned were made available.

Christopher Gillberg announced by e-mail on the same day that he did not intend to cooperate in the release of these documents.

On May 9, 2004, three of Christopher Gillberg’s colleagues informed Gunnar Svedberg that between May 7 and May 9 they had destroyed all of the research material in question. (*In a judgment issued on March 17, 2006, Gothenburg City Court sentenced all three officials to a conditional sentence and fines for the grave offence of suppression of documents; Parliamentary Ombudsman’s comment*).

After conclusion of the preliminary enquiry, I decided on January 18, 2005, to initiate the prosecution in Gothenburg City Court of Christopher Gillberg, Gunnar Svedberg and Arne Wittlöv on the following charges.

In two judgments issued on February 6, 2003 (case nos. 6208-2002 and 5741-2002) the Administrative Court of Appeal has laid down that L. E. and E. K. are to be allowed access to some of the documents that constitute the research material (known as the "Gothenburg Study") kept by Gothenburg University in rented premises. The Administrative Court of Appeal stipulated in the judgments that the university was to draw up the conditions required to safeguard the interests of individuals pursuant to certain defined provisions of the Secrecy Act (1980:100). Gothenburg University subsequently specified a number of conditions, against some of which L. E. and E. K. appealed. In judgments issued on August 11, 2003 (case nos. 3395-2003 and 3396-2003) the Administrative Court of Appeal set aside some of these conditions.

From that date onwards until May 7, 2004, when the material is said to have been destroyed, Christopher Gillberg, in his capacity as head of the Section for Child and Adolescent Psychiatry at the Department for Women's and Children's Health at Gothenburg University, has intentionally disregarded the regulations that apply to his exercise of office by failing to comply with the judgments of the Administrative Court of Appeal and allow L. E. and E. K. to examine the documents. In this connection Gillberg has not only refused to release the documents on his own account but also refused to make the documents available to the administration of Gothenburg University.

During the autumn of 2003 and until May 7, 2004, when the material is said to have been destroyed, Gunnar Svedberg has intentionally or through negligence disregarded the statutory requirements that apply to his exercise of office by failing to comply with the judgments of the Administrative Court of Appeal and allow L. E. and E. K. to examine the documents. Svedberg has in this connection failed to ensure that the documents were available for release and in drawing up new conditions and interpreting previous conditions also attempted to prevent L. E. and E. K. from gaining access to the documents.

From December 2003 when this case was discussed by the board of Gothenburg University and up until May 7, 2004, when the material is said to have been destroyed, Arne Wittlöv, in his capacity as Chair of the Board of Gothenburg University, has intentionally or through negligence disregarded the statutory requirements that apply to his exercise of office by failing to comply with the judgments of the Administrative Court of Appeal and allow L. E. and E. K. access to the documents. Wittlöv has failed, in this connection, to take action to ensure that the documents would be released to L. E. and E. K. but on the contrary, together with Gunnar Svedberg, in drawing up new conditions and interpreting previous conditions has also attempted to prevent L. E. and E. K. from gaining access to the documents.

These offences cannot be considered minor.

### **The judgment of Gothenburg City Court**

In a decision issued on June 27, 2005 (case no. B 2894-04) Gothenburg City Court sentenced Christopher Gillberg to a conditional sentence and fines and Gunnar Svedberg to fines. The court rejected the charges against Arne Wittlöv. In the grounds for its judgment the court included the following observations.

#### *Christopher Gillberg*

The prosecutor has charged Christopher Gillberg with refusing to release the documents to the injured parties after reading the judgments of August 11,



2003. The obligation to release the research material had already arisen in February and continued to exist as long as the documents had not been made available. Christopher Gillberg bore the responsibility in his section for issues of this kind. According to Bengt Wedel, however, the question of releasing the documents was already being dealt with at Vice-Chancellor level in the summer of 2002. The Vice-Chancellor's assumption of responsibility for the release is also demonstrated by the fact that it was Gunnar Svedberg who issued instructions to Mårten Persson (*Senior Administrative Officer at Sahlgrenska Academy; Parliamentary Ombudsman's comment*) about the removal of the documents. As Christopher Gillberg no longer had responsibility for the release of the documents during the period to which the charges apply, he cannot be blamed for refusing on his account to provide the complainants with the documents.

The prosecutor has also alleged that Christopher Gillberg refused to make the documents available to the university's administration. Christopher Gillberg has denied this refusal.

Christopher Gillberg's own testimony makes it clear that he strongly disapproved of the judgments of the Administrative Court of Appeal, which he considers incorrect, and that he held and still holds the opinion that the documents should not be released.

In his letter to Christopher Gillberg of August 14, 2005, Gunnar Svedberg stated clearly that the judgments of the Administrative Court of Appeal must be executed and directed Christopher Gillberg to ensure that the documents would be available for collection from August 19 and any necessary keys surrendered.

On August 18, 2005, Christopher Gillberg responded in writing to Gunnar Svedberg stating that he was not going to release the material or the keys. The testimonies of Kerstin Lamberg (*financial controller at the Section for Child and Adolescent Psychiatry; Parliamentary Ombudsman's comment*) and Mårten Persson show that Mårten Persson did not gain access to the material on August 19 because of the instructions that Christopher Gillberg had given to Kerstin Lamberg. In his e-mail to Gunnar Svedberg of September 23, Christopher Gillberg asserts that he had "rejected" Mårten Persson's request to remove the documents. In his e-mail to Gunnar Svedberg of October 15, Christopher Gillberg explained that he had received a directive about the removal but also that he would never accept removal of the documents. Christopher Gillberg also asserted in an e-mail to Gunnar Svedberg of December 4 that he had reached a "conclusion not to provide the material" and had considered in this context the risk that this could lead to its release to L. E. and E. K. To this can be added the impression formed by Christopher Gillberg's own staff, expressed in their petition of August 28, that he had decided not to release the research material. All of these circumstances show clearly that Christopher Gillberg had the possibility of making the documents available to the university's administration but that he refused to do so.

Christopher Gillberg has claimed that the university's administrators agreed with him on this issue and that the instructions he received about providing the documents were merely a smokescreen. The possible agreement of the university administration with Christopher Gillberg on the issues relating to secrecy raised in the Administrative Court of Appeal no longer has any relevance in this case. After the judgments were issued on August 11 the university administration explicitly instructed Christopher Gillberg to make the documents available and also made concrete preparations to enable their removal. Once the attempt to collect the documents had failed, the university administration continued during the autumn and winter to work on the issue of releasing the documents. Here it is relevant to point out that in June the Parliamentary Ombudsman had criticised the university for its failure to release the documents and that the university administration was fully aware of this. The circumstances referred to here show that the university administ-

ration reacted to the judgments of the Administrative Court of Appeal in earnest and that the instructions given to Christopher Gillberg were not the mere smokescreen that he claims them to have been.

The information that the individuals participating in the study had been assured confidentiality and that release of the material would be in breach of the World Medical Association Declaration of Helsinki pertains to the issue of secrecy and is therefore of no relevance in this case.

Releasing or failing to release the documents requested constitutes the exercise of public office. After the issue had been transferred from his section to Vice-Chancellor level, Christopher Gillberg was no longer responsible for implementation of the measure. His refusal to provide the documents was however an executive measure that immediately preceded the actual exercise of public office and which had consequences for L. E. and E. K. Christopher Gillberg's refusal therefore took place in the context of the university's exercise of public office. His refusal must therefore be considered intentional misuse of office.

#### *Gunnar Svedberg*

As the Vice-Chancellor had assumed responsibility for the release of the documents, it was the responsibility of Gunnar Svedberg to ensure compliance with the judgments of the Administrative Court of Appeal.

After the Administrative Court of Appeal has issued its judgments on August 11, 2003, Gunnar Svedberg arranged on August 14 for a letter on the subject to be drawn up and sent to Christopher Gillberg, in whose possession the material was stored. He also initiated the practical preparations considered necessary for the removal of the documents. Up to this point no criticism can be made of Gunnar Svedberg's actions. After the collection attempt had failed on August 19, there is uncontested evidence, which is also supported by the testimony of Mårten Persson, to show that Gunnar Svedberg looked into the possibility of seeking the assistance of the landlord and of the Enforcement Service. Police involvement was also considered. He also consulted Rein Rooseniit, a lawyer, and sought the advice of the Vice-Chancellor of Umeå University and representatives of the Ministry of Education. In the light of the situation that had arisen, these measures may, in the short term, also be considered adequate.

However, on September 1 Gunnar Svedberg sent a letter to L. E. and E. K. in which he declared that he had done everything that could reasonably be demanded and that he did not intend to take any further steps within the framework of the university organisation. Even though he stated his intention in the same letter of raising Christopher Gillberg's refusal with the Disciplinary Board for State Employees, these letters give the firm impression that Gunnar Svedberg had given up and did not intend to do anything more to comply with the judgments. During the following month no concrete action seems to have been taken on the issue, which can be explained by the attempts being made by Gunnar Svedberg to arrange a meeting with Christopher Gillberg, but that his response was that he did not have time to meet his principal before October 10.

The contacts that Gunnar Svedberg had with the Vice-Chancellor of Umeå University and representatives of the Ministry of Education seem not to have been of the kind that would lead to progress on the issue of release of the documents. Contacts with the landlord provided the information that no extra keys were available and also the assumption that the documents had been deposited in a vault. No further enquiry was made into their whereabouts even though Mårten Persson has said that he made an "ocular inspection" of the documents and should therefore have known where they were kept. It can hardly have seemed likely to Gunnar Svedberg that Christopher Gillberg would agree to release the documents at the meeting planned for October 10.

There is therefore no excuse for waiting until this meeting before invoking more forceful measures. During the period from September 1 to October 10, 2003, Gunnar Svedberg displayed unacceptable passivity in a case in which effective measures should have been taken without delay. In this respect he is guilty of misuse of office.

In the opinion of the City Court it was Gunnar Svedberg's intention to release the documents during the period in question. His offence is therefore not intentional but the outcome of negligence. In determining whether an action or failure to act is negligent the offender's personal circumstances may be taken into account. Gunnar Svedberg is the university's Vice-Chancellor. Stringent requirements have to apply to his ability to deal with administrative issues correctly in discharging his official powers. In view of this and also of the long period that elapsed without the adoption of any forceful measures, the offence cannot be considered a minor one.

At the meeting between Gunnar Svedberg and Christopher Gillberg on October 10, a newspaper article was presented that had been written by Madeleine Leijonhufvud, a professor of jurisprudence, in her capacity as Assistant Director General of the Swedish Research Council. In this article Madeleine Leijonhufvud expressed the opinion that the Research Council found it difficult to see that the judgments provided any grounds for the release of the material to E. K. Gunnar Svedberg has declared that in his conversation with Madeleine Leijonhufvud he received the response that E. K. could only be allowed to examine the documents in a project funded by the Research Council, which was not the case here. In connection with the meeting Christopher Gillberg also handed over the draft of an article written by Nils O. Wentz, a former President of the Administrative Court of Appeal. In the draft it is claimed that L. E. and E. K. had misled the Administrative Court of Appeal and that its judgments were hardly correct in substance.

The circumstance that one of the parties considers that a court has been misled or that a judgment is for some other reason erroneous can hardly permit it to decide whether or not to comply with the judgment. The research material should therefore have been released. In this context, however, it should be taken into account that Gunnar Svedberg had received two opinions on October 10 or a few days later on how the judgments of the Administrative Court of Appeal should be interpreted and dealt with. On the whole, these opinions suggested that the judgments of the court may not have required immediate compliance.

As the City Court has previously indicated, stringent demands must be made of the way in which Gunnar Svedberg exercises his official powers. However, importance must be attached to the situation in which he found himself. The documents in question had for some reason not been released in connection with the establishment of the conditions in April 2003. What Gunnar Svedberg was called upon to determine in August therefore could not be described as a routine release of documents. The opinions expressed by Madeleine Leijonhufvud and Nils O. Wentz were those of two well-reputed legal experts who could be presumed to be cognizant with issues concerned. In the view of the City Court, these circumstances taken as a whole mean that Gunnar Svedberg did not intentionally act incorrectly or display criminal negligence in interpreting the substance of the conditions that had been set and approved. Gunnar Svedberg cannot therefore be considered culpable for his actions during the period from October 10 until the board meeting on December 17.

When the question of the release of the documents had been referred to the board of the university and raised at its meeting on December 17, it was reasonable for Gunnar Svedberg to wait for it to reach a decision. Nor can he be held culpable for his passivity between the board meetings.

At the meeting of the board on January 22, 2004, the decision made was that Gunnar Svedberg was to notify E. K. that she was not entitled to examine

the research material on the grounds that the conditions accepted by the Administrative Court of Appeal had not been fulfilled. Even though this decision was based on a memorandum written by Gunnar Svedberg in which he cited Madeleine Leijonhufvud's article, he should not be held culpable of any intentional error or criminal negligence in complying with the recommendation of the board.

The board also decided at this meeting to give Gunnar Svedberg the task of drawing up new conditions before the documents could be released to L. E. This decision was also based on the grounds provided in Gunnar Svedberg's memorandum. In this respect Gunnar Svedberg had drafted his memorandum with the support of a new opinion written by Nils O. Wentz on January 18, 2004, in which he declared that he could find nothing to prevent the university from imposing new conditions on L. E. Here too, no blame may be attached to Gunnar Svedberg for discharging the task assigned to him by the board.

*Arne Wittlöv*

The prosecutor has alleged that from the meeting of the board on December 17, 2003, and onwards Arne Wittlöv failed to comply with the judgments of the Administrative Court of Appeal.

The release of the documents was on the agenda for the board meeting in December but was adjourned until its next meeting. This adjournment was justifiable in view of the complicated nature of the issues involved.

The decisions made by the board on January 22, 2004, were incorrect. As in the case of Gunnar Svedberg, the fact that in this complicated situation the board took heed of the opinions expressed by two well-reputed legal experts means that Arne Wittlöv cannot be found culpable of any intentional offence or criminal negligence. For this reason the charge against Arne Wittlöv is to be dismissed.

/---/

## **SENTENCE**

Christopher Gillberg acted with intention. His actions included not only defiance of the decision of a court of law but also refusal to comply with the instructions of his employer. A financial penalty alone would be inappropriate in this case. Christopher Gillberg is therefore sentenced to a conditional sentence combined with a financial penalty.

For Gunnar Svedberg a financial penalty will be sufficient.

Two members of the court were of a different opinion and wanted the charges against Gunnar Svedberg dismissed on the grounds that the offence was to be considered a minor one.

## **Appeals etc.**

Christopher Gillberg appealed against the judgment of the City Court and moved that, in the first instance, the charges should be dismissed or, secondly, that a financial penalty alone was appropriate. Gunnar Svedberg appealed to have the charge dismissed in its entirety. I moved that Gunnar Svedberg should be found guilty as charged, i.e. for the entire period covered by the charge and sentenced to a more severe penalty and also that Arne Wittlöv should be found guilty of misuse of office as charged. All parties contested the amendments sought by the others.

In the Court of Appeal the charge against Gunnar Svedberg was amended by the addition of the words “after September 1”. The beginning of the third paragraph of the description of the offence therefore read “During the autumn after September 1, 2003, and until May 7, 2004, Gunnar Svedberg ...”.

### **The judgment of the Court of Appeal for Western Sweden**

In the judgment issued on February 8, 2006 (case no. B3339-05) the Court of Appeal for Western Sweden upheld the judgment of the city court. The grounds for the decision of the Court of Appeal contained the following observations.

#### **4 Actual circumstances**

##### **4.1 Gothenburg study**

From the mid-1970s a longitudinal research project in neuro-psychiatry was conducted at Göteborg University that focused on the phenomenon of what is referred to as MBD (DAMP/ADHD) in children. The aim of the project was to cast light on the significance of MBD and related problems from a long-term perspective. The study finally covered 141 pre-school children who were monitored every third year until adulthood. Participation in the study was voluntary. The children’s parents, and later the adolescents themselves, were given certain assurances of confidentiality.

The research material, known as the Gothenburg Study, which occupies 22 metres of shelving comprises a large number of records, test results, interview responses, questionnaires and video and audio tapes. The research material contains a great deal of information that is of a sensitive nature for the personal integrity of the children and their next-of-kin. The Gothenburg Study has provided the material on which several PhD theses have been based.

The material was stored in the Section for Child and Adolescent Psychiatry, whose head has for a long time been Professor Christopher Gillberg, in the section’s locked premises at Kungsgatan in Gothenburg. Originally the study was organised and launched by other researchers, but Christopher Gillberg eventually became responsible for its completion. He himself had assured the participants in the study of some degree of confidentiality.

/---/

#### **5 The judgment of the Court of Appeal**

##### **5.1 General observations on the university’s management of the case**

In its two initial judgments of February 6, 2003, the Administrative Court of Appeal laid down that E. K. and L. E. were entitled to examine the documents requested. In its two subsequent judgments, issued on August 11, 2003, the Administrative Court of Appeal decided on the conditions that were to apply in connection with the release of the documents to them. The judgments of the Administrative Court of Appeal therefore settled the question of whether the documents were to be released to E. K. and L. 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 E. K. and L. E. Once the judgments, against which there was no appeal, had been issued in February 2003, whether or not the university considered that they were based on erroneous or inappropriate grounds has no significance. After the February judgments the university was only required to formulate the conditions it considered necessary to avoid any harm that individuals might sustain through release of the material. Subsequently the university had the possibility of presenting its arguments to the Administra-

tive Court of Appeal for the formulation of the conditions it had opted for. After the court had determined which conditions could be accepted, the question of the terms on which the applicants could be allowed access to the documents requested were also settled once and for all. There was then no scope for the university to undertake any new appraisal of E. K.'s and L. E.'s entitlement to access to the documents.

During the period referred to in the charges, therefore, it was no longer a question of how the interpretation and application of the legislation on secrecy but of the judgments of the Administrative Court of Appeal. Their contents were straightforward. Gunnar Svedberg's letters to Christopher Gillberg of August 14, 2003, and to E. K. and L. E. on September 1, 2003, 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. In spite of this, in its interpretation of the conditions and in laying down additional conditions the university has made it more difficult for E. K. and L. E. to examine the documents.

## 5.2 Christopher Gillberg's culpability

The prosecutor has alleged that after the judgments of the Administrative Court of Appeal on August 11, 2003, and until May 7, 2004, when the material is said to have been destroyed, Christopher Gillberg, in his capacity as head of the Section for Child and Adolescent Psychiatry, has disregarded the obligations of his office by failing to comply with the judgments of the court and allow L. E. and E. K. access to the documents. According to the charges, in this respect Gillberg has not only refused to release the documents on his own account but also refused to make the documents available to the administration of Gothenburg University.

The research material was the property of the university and therefore considered to be in the public domain. It was stored in the Section for Child and Adolescent Psychiatry, of which Christopher Gillberg was the head. Gunnar Svedberg's letter of August 14, 2003, to which copies of the judgments of the Administrative Court of Appeal relating to the conditions were attached, made it clear to Christopher Gillberg that the material involved must be released. As head of the section, Christopher Gillberg was responsible for making the material available to E. K. and L. E. Christopher Gillberg's awareness of his immediate responsibility is revealed not least by the instructions that he gave to Kerstin Lamberg before the visit of Mårten Persson not to allow the university administration access to the material. This can also be seen from the written response sent by Christopher Gillberg to Gunnar Svedberg on August 18, 2003.

Through Gunnar Svedberg the university also instructed Christopher Gillberg to release the material to the university so that it could be moved to premises where E. K. and L. E. could examine it. In view of this, the Court of Appeal, like the City Court, does not feel that Christopher Gillberg can be held culpable because he refused on his own account to hand over the documents. However it was incumbent upon him to make the documents available for removal in accordance with the instructions he had received from the university.

Christopher Gillberg has protested that he did not consider that there was any serious intent behind the instructions he received from Gunnar Svedberg on August 14, 2003. Here he has referred in particular to the meeting on August 18, 2003, to the fact that Mårten Persson did not follow up his visit to the section and that he received no new directive to make the material available.

Gunnar Svedberg, however, has stated that on no occasion did he withdraw the instructions issued on August 14, 2003, and that it must have been quite clear to Christopher Gillberg that they continued to apply, even though they were not explicitly repeated. According to Gunnar Svedberg, nothing transpired at the meeting on August 18, 2003, that could have given Christopher Gillberg the impression that these instructions no longer applied or that they were not intended seriously. Gunnar Svedberg's statements in this respect are corroborated by the Principal Administrative Officer in the Vice-Chancellor's office, Bengt Wedel. They are further borne out by fact that after the meeting on August 18, 2003, Bengt Wedel was given the task of drawing up a complaint to the Disciplinary Board for State Employees on the subject of Christopher Gillberg's refusal and that Gillberg was aware that a complaint of this kind was being considered. In addition, it can be seen from a number of e-mails from Christopher Gillberg to Gunnar Svedberg 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 December 17 Gunnar Svedberg still considered making a complaint to the disciplinary board. Finally, Arne Wittlöv has testified that at a meeting with Christopher Gillberg shortly after the beginning of 2004, when asked whether he still persisted in his refusal, Christopher Gillberg confirmed that this was the case.

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

Christopher Gillberg has stated that he was never prepared to participate in the release of the documents to E. K. or L. E. His actions were, in other words, intentional and their result has been that E. K. and L. 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 Christopher Gillberg's actions mean that he disregarded the obligations that applied to him as head of section in such a manner that the offence of misuse of office should be considered. Christopher Gillberg has, however, also objected that his actions should be regarded as pardonable in view of the other considerations that he had to bear in mind.

Christopher Gillberg 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 next-of-kin. He has referred in particular to the international declarations drawn up by the World Medical Association and also to the European Convention.

The features of the international declarations agreed by the World Medical Association do not categorise them as undertakings that can be considered to take priority over Swedish law. Christopher Gillberg's objections on the basis of the contents of these declarations therefore lack significance in this case.

Article 8 in the European Convention lays down that everyone has the right to respect for his or her private and family life, home and correspondence and also that this right may not be interfered with by a public authority except in certain specified cases. The provisions of the Secrecy Act are intended, in accordance with Article 8 of the European 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 in the European Convention and the judgments of the Administrative Court of Appeal lay down how they are to be interpreted in this particular case. Chris-

topher Gillberg's objection that his actions were pardonable in the light of the European Convention cannot therefore be accepted.

Christopher Gillberg has also objected that he risked criminal prosecution for breach of his oath of confidentiality, if he released the documents to E. K. and L. E. However, the judgments of the Administrative Court of Appeal had 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 his oath of secrecy, which, in the opinion of the Court of Appeal Christopher Gillberg must have realised.

Christopher Gillberg 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 demands that applied for research. These assurances were given in 1984 and had the following wording:

"All information will be dealt with in confidentiality and classified as secret. No computer analysis 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 Eastern Hospital and its results will, as 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 treated so that nobody apart from those of us that meet you and have direct contact with you will be able to find out anything at all about you."

The assurances of confidentiality given to those participating in the study go, at least in some respects, further than the Secrecy Act permits. The Court of Appeal is of the opinion that there is no possibility in law to provide greater secrecy than that laid down in 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 cannot take priority over the law as it stands or a court's application of the statutes. Christopher Gillberg's objections therefore have no relevance in assessing his criminal liability.

Finally, Christopher Gillberg 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 confidentiality were then to be disclosed to private individuals. The Court of Appeal notes that there are other possibilities of safeguarding research interests, for instance by removing details that enable identification from research material so that sensitive information cannot be divulged. What Christopher Gillberg has adduced on this issue cannot exonerate him from liability.

Christopher Gillberg's actions were not therefore pardonable. 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. Christopher Gillberg should therefore be found guilty of misuse of office for the period after August 14, 2003, when he was informed of the judgments of the Administrative Court of Appeal. The offence is a serious one as Christopher Gillberg wilfully disregarded the constitutional right to access to public documents.

On the question of the sentence, the Court of Appeal concurs with the judgment of the City Court.



### 5.3 Gunnar Svedberg's culpability

The Parliamentary Ombudsman has alleged that from September 1, 2003, and until May 7, 2004, when the material is said to have been destroyed, Gunnar Svedberg, in his capacity as Vice-Chancellor, has intentionally or through negligence disregarded the regulations that apply to his exercise of office by failing to comply with the judgments of the Administrative Court of Appeal and allow L. E. and E. K. to examine the documents. More precisely the Parliamentary Ombudsman's charge against Gunnar Svedberg is that he failed to ensure that the documents were available for release and in drawing up new conditions and interpreting previous conditions he also attempted to prevent L. E. and E. K. from gaining access to the documents.

Where the actions of Gunnar Svedberg before October 10, 2003, are concerned, the Court of Appeal concurs with the appraisal of the City Court. Therefore during the period from September 1, 2003, until October 10, 2003, because of his passivity, Gunnar Svedberg is guilty of misuse of office through negligence and his offence cannot be considered a minor one.

During the ensuing period the Court of Appeal does not consider that Gunnar Svedberg acted with sufficient determination to gain access to the research material either. However, Gunnar Svedberg has claimed that no blame can be attached to his actions after this date as he had been shown two articles that gave him the impression that certain additional conditions could be imposed before the material could be released to E. K. and L. E. The enquiry shows that for this reason Gunnar Svedberg proposed to the board that E. K. should be informed that she was not allowed access to the material because she did not fulfil the conditions that had been laid down and that additional conditions should apply to L. E. Gunnar Svedberg has stated that his impression that this was the correct procedure was shared by certain well-reputed legal experts and that he followed their advice. He has also pointed out that the board of the university endorsed his proposal.

The enquiry shows that during the autumn Christopher Gillberg sent a number of e-mails to Gunnar Svedberg which made it clear that he still considered that he was required to hand over the documents. It has also been shown that at the board meeting in December Gunnar Svedberg was of the opinion that Christopher Gillberg should be reported to the Disciplinary Board for State Employees for his refusal to release the documents. Arne Wittlöv's testimony makes it clear that at a meeting with Christopher Gillberg shortly after the beginning of 2004 the question was raised of whether he persisted in his refusal to release the material. These circumstances suggest that Gunnar Svedberg, on behalf of the university, realised that the material should be released as laid down in the judgments of the Administrative Court of Appeal, but that at the same time, with the support of the two articles, was attempting to find a solution in view of his failure to persuade Christopher Gillberg to hand over the material.

If Gunnar Svedberg's failure to comply with the judgments of the Administrative Court of Appeal is to be considered pardonable, in the opinion of the Court of Appeal, a great deal more is required than his perusal of the two articles and seeking the advice of their authors. As Vice-Chancellor, Gunnar Svedberg had access to internal expertise in the form of the university's legal officers and the officials on his own staff. It has also come to light during the enquiry that the university turned to the lawyer it normally consulted. Gunnar Svedberg has only referred in vague terms to the counsel and points of view he acquired from anyone other than the authors of the two articles. As far as can be seen, no written opinions were sought. All things considered, the Court of Appeal does not find that Gunnar Svedberg can be exculpated. Nor does the circumstance that the board endorsed his proposal exonerate him from liability.

The Court of Appeal therefore finds that Gunnar Svedberg, during the entire period referred to in the charges, disregarded, through negligence, his

obligations as Vice-Chancellor by failing to ensure that the documents were available for release. Further, through negligence, Gunnar Svedberg has failed to comply with his obligations by laying down new conditions and interpreting previous conditions. These offences cannot be considered minor ones. Gunnar Svedberg is therefore to be convicted of misuse of office.

The sentence imposed by the City Court is, in the opinion of the Court of Appeal, well considered even though the Court of Appeal upholds the charges for the entire period.

### **5.5 Arne Wittlöv's culpability**

The prosecutor has charged that from December 2003 when the question was dealt with by the board of the university until May 7, 2004, Arne Wittlöv, in his capacity as Chair of the Board of Göteborg University, has intentionally or through negligence disregarded the statutory requirements that apply to his exercise of office by failing to comply with the judgments of the Administrative Court of Appeal and allow L. E. and E. K. access to the documents. More precisely the prosecutor alleges that Wittlöv failed to take action to ensure that the documents would be released to L. E. and E. K. and that on the contrary, together with Gunnar Svedberg, in drawing up new conditions and interpreting previous conditions, he also attempted to prevent L. E. and E. K. from gaining access to the documents.

In the Court of Appeal Arne Wittlöv has also denied that he is guilty of misuse of office. He claims that the responsibility for the release of public documents rested with Gunnar Svedberg as the head of the agency and that it was not part of his duties as chair of the university board to comply with the judgments of the Administrative Court of Appeal or take any other action to ensure release of the documents. In addition Arne Wittlöv has stated that the only role of the board was to seek information and provide guidance for Gunnar Svedberg as Vice-Chancellor.

Section 2 of Chapter 2 of the Higher Education Act lays down that the governing body of an institution of higher education is to supervise all matters concerning the institution of higher education and be responsible for the performance of its duties. Thus the board is required to decide on all major matters concerning the overall orientation of activities and organisation of an institution of higher education, on its annual reports, background information for budgets and other important reports, on important regulations, certain staffing questions and other significant issues of principle (Higher Education Ordinance, Chapter 2, Section 2). On the whole, other issues are to be decided on by the Vice-Chancellor, who according to Chapter 2, Section 3 of the Higher Education Act is responsible for the management of its activities and is accountable to the board. As the head of an agency, the Vice-Chancellor is to ensure that it operates efficiently and in accordance with the law (Section 7 of the Public Authorities Ordinance).

In the opinion of the Court of Appeal, issues relating to the release of public documents in individual cases must be classified as the kind of administrative and executive tasks that the Vice-Chancellor of an institution of higher education is required to deal with. In normal cases, therefore, it is unlikely that the board would be called on to make a decision in cases of this kind. In this case, however, the question was dealt with by the board. The circumstance that the board then endorsed the measures proposed by Gunnar Svedberg is not, however, sufficient, in the opinion of the Court of Appeal, to mean that Arne Wittlöv can therefore be assumed to have become criminally liable for misuse of office. The charge against him is therefore to be dismissed.

### **Appeal against the judgment of the Court of Appeal**

Christopher Gillberg lodged an appeal against the judgment of the Court of Appeal and moved that the charge should be dismissed. The Supreme Court decided on April 25, 2006, not to issue a review permit. The judgment of the Court of Appeal therefore gained legal force.

-----

### **Other issues**

In addition to the release of the material which was the subject of this preliminary investigation, these two cases submitted to the Parliamentary Ombudsmen also involved a number of other issues relating to the “Gothenburg Study”.

One of the letters with supplementary material submitted by L. E. to the Parliamentary Ombudsman in September 2003 contained another complaint about the way in which the same department at Gothenburg University – the Department for Women’s and Children’s Health – had dealt with another case concerning the release of public documents. Its contents included the following.

In a letter dated July 10, 2003, followed by a reminder on August 19, 2003, L. E. requested access to public documents dealing with the ongoing appraisal of the research ethics of the “Gothenburg study”. Two months after his request had been submitted, he had still received no reply. On the other hand, as a result of his request, the department had written to the Chief Executive of the City of Uppsala. In his work as a paediatric physician for the City of Uppsala, L. E. is attached to the Research and Knowledge Centre of the Social Services. The university’s letter questioned his right to use his office address in his letterhead and an official city envelope. The letter also contained the allegation that he was conducting a “mass-media campaign” in a “markedly aggressive manner” and it claimed that it was “common knowledge” that he was “wont to complain about delays to the Parliamentary Ombudsmen”. Another letter on this subject was sent to various senior officials employed by the City of Uppsala. L. E. claims that the department’s contacts with the City of Uppsala had no relevance to the question of whether the documents should be released or not but that the department was attempting to blacken his name with his employers because he was taking advantage of his constitutional right to provide information and because he had requested access to public documents.

As can be seen from the account above of the Parliamentary Ombudsman’s enquiry into the cases, the Vice-Chancellor of Gothenburg University was asked to investigate and submit a statement on what had been said in the letters in question. In his response, dated November 4, 2003, his statements on this issue were as follows.

On July 10, 2003, L. E. applied to the Department for Women’s and Children’s Health to be allowed access to public documents concerning the appraisal of research ethics. The address to which he sent this request was Kungs-

gatan 12, i.e. the address of the Section for Child and Adolescent Psychiatry, which is one section of the Department of Women's and Children's Health.

L. E.'s request was dealt with by an employee at the Section for Child and Adolescent Psychiatry. Instead of referring the question of whether or not to release the documents requested to an appropriate official on the staff of Gothenburg University, this individual started a correspondence with L. E.'s superiors at the City of Uppsala where he was employed.

The Chair of the Department of Women's and Children's Health did not learn of L. E.'s request or his reminder of August 19, 2003, until the formal request arrived from the Parliamentary Ombudsmen on October 21, 2003.

There can be no doubt that members of the university's staff need to be better informed about public access to official documents, secrecy and the specific requirements that apply to the management of these issues. In view of what has occurred the university intends to take measures to avoid any repetition. The university will also deal promptly with L. E.'s request to be allowed access to the public documents concerning the ongoing appraisal of the research ethics status of the "Gothenburg Study".

This request by L. E. was linked to the "Gothenburg Study" in that it concerned the release of "all the documents relating to the ongoing appraisal of the research ethics of the Gothenburg Study".

As pointed out in the university's response, the application for the release of the documents should have been forwarded to the university administration so that an official decision could be made. This did not, however, occur and instead a member of the department's staff sent letter to officials employed by the City of Uppsala. At the time the university's response was received, i.e. almost four months after L. E. had submitted his request, the university had still not initiated any real action in this matter. Its management of the request merits grave criticism.

L. E. subsequently submitted additional letters and other documents to illustrate the way in which his request for release of the documents was being dealt with, i.e. during the period after the university's official response. What they revealed – for instance that L. E. had still not been provided with the documents requested, at least by September 2004, and this was because they could not be located in the university archives – raised, for instance, questions about the university's archiving routines. The material submitted revealed, however, that L. E. had asked the university to explain its failure to transfer the documents to the archives and that an enquiry into this was taking place at the time. In view of this, I did not consider there were sufficient grounds for taking any further action in the matter.

What has come to light in other respects in these cases gives no cause for any further measures or statements on my part.

-----

This concludes the cases