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Subject: Complaint to the Ombudsman for Public Administration regarding the Ministry of the Environment's refusal to provide access to information

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To the Ombudsman for Public Administration

I refer to the refusal from the Ministry of the Environment to provide access to a legal assessment undertaken during the preparations of the Nature Diversity Act. The application and the refusal are attached below.

In my view, this case concerns issues of significant general and fundamental interest.

I complain against the refusal for the following reasons:

1) The legal basis: The Ministry errs in finding that the information is not within the scope of the Environmental Information Act. According to section 2(1)(b), the Act covers "assessments of ... b) factors that affect or may affect the environment, including ... administrative decisions ... including ... legislation ... as well as related analyses". The information sought is an analysis that is part of an administrative decision regarding rules. There is no doubt that the rules in question are of considerable importance for the environment. There is nothing in the preparatory works that favors a narrow interpretation of this provision.

2) The considerations regarding access to information: The duty to consider access to information and to provide such access is stricter under the Environmental Information Act than under the Freedom of Information Act. Regardless of the Act to be applied, I consider that the decision to refuse access to the information is erroneous due to the following reasons:

a) The arguments in favor of access to information are significant: As stated in the application: "The information shall be used in an academic article in law and must be considered to be of significant general interest. The information sought was decisive for the relevant provisions of the Nature Diversity Act, but was not referred in detail in the preparatory works." It can be observed that the assessment and decision made on the basis of the assessment led to significant criticism from environmental NGOs and significant discussion in the media. However, no specific information regarding the content of the assessment was provided by public authorities during the public debate concerning the adoption of the Act.

b) The arguments against access to information are weak: The Ministry argues that "the interest in ensuring secrecy of the internal decision-making processes in the Government is the most significant". In this context, I remark the following description of the assessment in question: "An assessment of the relationship of the provisions to international law has been carried out, which has shown the necessity for amendments and adjustments of the provisions if they are to be applied outside of 12 nautical miles", see ot.prp. nr. 52 (2008-2009) Om lov om forvaltning av naturens mangfold (naturmangfoldloven) section 7.2.4.3. Hence, the assessments are legal. The current practice is to make such assessments public, as exemplified by the publication of the legal assessments provided by the Legal Department of the Ministry of Justice. The Ministry does only base its decision on the interests associated with internal decision-making processes. A legal assessment shall be “objective” in the sense that it shall be based on law and legal methodology. Hence, a legal assessment should not be exempted from the public due to the associated political choices and assessments that take place in the administration. Moreover, there is significant interest in making legal assessments available to scrutiny among peers. This is particularly important because legal assessments are in general considered to set clear limits for political decisions. Incomplete or erroneous legal assessments can therefore have significant negative effects in a democracy. A critical examination of such assessments is therefore of great importance to ensure that decisions that in reality are political are erroneously claimed to follow from a duty. This is particularly important in cases where decisions refer to obligations under international law, partly because such obligations frequently are unclear and subject to considerable margins of appreciation, and partly because international law obligations may have implications for legislation, which is the situation in the present case. In this case, it is of great importance that the assessment had direct effect for the Act, and that the assessment was not presented to the Parliament (there is nothing to indicate that the assessment was so presented). It is also of importance that the Act is of fundamental importance for environmental protection, and that the Ministry spent five years from the expert proposal was presented to the Ministry (2004) until a proposal for an Act was presented to the Parliament (2009), a fact that should imply that the legal assessments that presumably were drafted early in this period should be uncontroversial.

It is my view that the Ministry should have concluded in favor of providing access to the information, independent of whether the request is based on the Environmental Information Act or the Freedom of Information Act.

Your sincerely,

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