Ole Kristian Fauchald
The Faculty of Law
University of Oslo
Postbox 6707 St. Olavs plass
0130 Oslo

Ombudsman for Public Administration

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Case concerning access to information – Ministry of the Environment

I refer to the letter in this case from the Ministry of the Environment, dated 12 April 2011. I have the following remarks in this case, in addition to those that I have previously conveyed to the Ombudsman.

Concerning the legal basis: I request access to information on the basis of the Environmental Information Act. This represents an independent legal basis for the request. I cannot see that the Ministry of the Environment addresses this legal basis sufficiently in its letter, as the Ministry partly abstains from determining whether the Act is applicable and partly abstains from providing a full and independent evaluation of whether the rule concerning access to information according to section 11 of the Act is applicable.

First, the latter is related to the discussion of section 11(2) of the Environmental Information Act in section 3 of the letter. The relevant section only refers to evaluations carried out under the Freedom of Information Act. The Ministry does not follow the obligation under the Environmental Information Act to assess the environmental interests involved in access to the information. I also refer to pages 6-8 of the letter, where the environmental interests are not mentioned explicitly. The only reference to environmental interests can be found on page 9, and this only represents part of a conclusion and not an assessment. The environmental interests of this case concern the application of several of the provisions of the Nature Diversity Act on the continental shelf and in marine areas beyond the territorial sea. This concerns, inter alia, section 6 concerning a general duty of care, section 11 concerning the user pays principle, section 12 concerning environmentally sound techniques and methods of operation, section 13 concerning quality norms for biological diversity, as well as some other provisions of the Act. It is of particular interest to acquire information concerning why these provisions were considered to constitute problems in relation to Norway's international law duties in the marine areas, in particular since there are no similar rules that apply in such areas. The assessment is also of importance in order to be able to discuss whether such provisions could be included in other legislation concerning marine areas. I also refer to the significant criticism voiced by environmental NGOs against the Government's proposal for Nature Diversity Act based on the narrow geographical scope of application. This criticism shows that there was significant interest for these topics, the following web sites are of interest: [two of the four internet links provided are still valid: http://www.wwf.no/dette_jobber_med/miljopolitikk_og_lovverk/naturmangfoldloven/;

http://www.politikkavisen.no/www__Dwwf__Dno/_frame_56_1114921_9677_25744_90_116_70_11126_76107_EUTF8.html]

Secondly, the Ministry avoids carrying out any assessment according to section 11(3) of the Environmental Information Act. The Ministry's statement indicates that many of the documents can partly be assumed to contain political assessments. I underline that I have only requested access to the legal assessment. I cannot see that there is any consideration of whether the legal assessment can be separated out from other assessments in one or more of the documents referred to. The sentence in Ot.prp. no. 52 p. 69: " 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" does in my view show that there is an assessment that has a high degree of inner connectivity, and that is legally based. It is hard to argue that access to such an assessment would provide a "clearly misleading impression of the contents" of the case, see section 11(3), since the information requested is the legal assessment. This indicates that it should be possible to provide access to the assessment that has been carried out, unless the sentence in the preparatory works is misleading or should be interpreted otherwise. Whether the legal assessment is incomplete cannot in itself be relevant for the question of providing access to it.

The Ministry claims on page 9 of its letter that the information is not "of a character that falls is within the core of the right of access to information according to the Environmental Information Act, see section 12." I remark that section 12 concerns information that shall always be freely available, and does not say anything regarding the "core" area of the Act. It should be apparent that all information that falls within the scope of the definition of environmental information in the Act is covered by the provisions of the Act. The Ministry has failed to determine whether the information requested falls within the definition of the Act, but it nevertheless finds it opportune to determine whether the information falls within the "core" of the Act. As the authority responsible for the Act, the Ministry should have a particular interest in clarifying the scope of the Act, both for itself and for others. The Ministry's argument is very unfortunate, and does rather serve to obscure than to clarify the content of the Act. I also note that the Ministry refers to the "particular preparatory works to section 11 (pages 160 ff.)". One has to read until page 165 to find the relevant passage, which states: "the provision indicates that there is a core area where the right to environmental information shall always be respected". Hence, the preparatory works refer to a core area for the right of access to environmental information, not to a core area for the purpose of the applicability of the Act as such.

Finally, I refer to the fact that the Act represents Norway's implementation of the Aarhus Convention (1998). Norway reported its implementation of the Aarhus Convention in December 2010 (see http://www.unece.org/env/pp/reporting/NIRs%202011/Norway_NIR_2011_no.pdf). I quote the following from the report:

Pages 1-2: “To introduce the Environmental Information Act, a brochure and web pages were published to provide information both for public officials and authorities who have duties under the legislation and for the general public, who have been granted rights by the Act and the Convention. Information about the new Act was also provided in letters sent to public authorities, organizations, the business community, etc., and in a documentary film. The Ministry of the Environment’s website provides information on the rights provided for by the Convention and Norwegian legislation.”

In this context, I remark that I have recently on several occasions tried to request access to information from the Ministry of the Environment, and the ministry has consistently and exclusively referred to the Freedom of Information Act as the basis for refusing access to information. The Environmental Information Act is not mentioned. This can be documented through my e-mail correspondence with the Ministry.

Page 2: “It should be noted that the general aim of the information policy followed by the Ministry and its subordinate agencies is to promote awareness of environmental issues.”

In light of this statement, I remark the following: The Ministry’s letter states that: “We cannot see that the environmental and societal interests that would be enhanced by providing Fauchald access to the information so that he *inter alia* can author an academic article in law, are more significant than the interest in safeguarding the internal decision-making processes in this case.” It is not my interest in writing a scholarly article that is relevant in this case, but rather participation in and the contribution to public debate of core environmental issues. An academic article will be a solid basis for informed debate concerning the issues in question, independent of its author. In light of the statement in the letter and the practice of the Ministry, it can be asked whether the Ministry has provided a correct description of how it has implemented its domestic rules vis-à-vis the bodies of the Convention.

Pages 6-7: “Section 11, subsection 2, also requires the public administration to weigh up the different interests involved before refusing a request for information pursuant to the exemption provisions. The need to make an exemption in a specific case must be weighed against the grounds for making the information available. If the environmental and public interests outweigh the interests served by refusal, the information will be disclosed. This is in accordance with the last paragraph of Article 4, para. 4, of the Convention, which specifies that grounds for refusing a request for environmental information be interpreted in a restrictive way and taking into account the public interest served by disclosure. The so-called increased access to information in the Freedom of Information Act did not represent a full implementation of Article 4, para. 4, last sentence, and the above rule was therefore included in the Environmental Information Act.” [Comment: the latter sentence was included in the Norwegian language version of the report, see the web-link included above, but does not appear in the English language version on the web page of the Convention]

These statements are, in my view and as commented above, in contrast to the general attitude of the Ministry in its letter to the relationship between the Freedom of Information Act and the Environmental Information Act.

Page 7: “In accordance with the Convention, a separate provision in the Environmental Information Act explicitly requires that in cases where part of the requested information is exempted from disclosure, the remaining information shall be disclosed provided that this does not give a clearly misleading impression of the contents”

As indicated, section 11(3) implements Art. 4(6) of the Convention. The failure to apply section 11(3) in this case does in my opinion represent a violation of both the Act and the Convention.

Page 8: “Article 4, para. 7, of the Convention lays down requirements relating to written answers, reasons for refusal of requests and time limits for refusals of requests for information. The provisions implementing these requirements are to be found in section 13, subsection 4, of the Environmental Information Act, which states that a refusal shall always be given in writing, that a brief explanation of the refusal shall be provided, and that the applicant shall be informed of the right of appeal and the time limit for lodging an appeal.”

I refer to section 4 of the letter from the Ministry of the Environment. In my view, the procedure of the Ministry is in violation of both section 13(4) of the Environmental Information Act and Art. 4(7) of the Convention. This is the case regarding both the lack of references to the Environmental Information Act as a relevant legal basis, and thereby also as the relevant basis for a justification for the refusal, and the lack of information about the access to complaint mechanisms.

As a final comment, I remark that I have no possibility of commenting on the interest of confidentiality in the internal procedures in the present case. However, I am concerned that the high number of documents referred to by the Ministry of the Environment could result in obscuring the case. I specify that I am only interested in the legal assessment referred to in ot.prp. 52. I do not ask for access to the political assessments that may have been related to the legal assessment. Many of the documents referred to by the Ministry seem to focus on the political assessments. The inclusion of such documents in the case should not provide a basis for concluding that access to the legal assessment would provide a “clearly misleading impression of the contents” of the case, see section 11(3) of the Environmental Information Act.

Yours sincerely,

Ole Kristian Fauchald