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To the Ombudsman for Public Administration and the Ministry of the Environment

Concerning access to a legal assessment regarding the geographical scope of the Nature Diversity Act, SOM case 2011/197

I refer to previous correspondence in this case, in particular the statement of the Ombudsman dated 17 November 2011, my reminder sent to the Ministry of the Environment and the Ombudsman 26 January 2012, the response to the reminder from the Ombudsman 30 January 2012, the response to the reminder from the Ministry 2 February 2012, the Ministry's letter containing a reconsideration of the case 19 October 2012, and the Ombudsman's letter and request for comments dated 23 October.

My comments to the procedure up until the statement of the Ombudsman are set out in attachment 1. These comments are provided in the form of a published article which concerns the fundamental aspects of the Ministry's follow-up of chapter 3 of the Environmental Information Act. The article also contains a discussion of the right of access to legal assessments.

In the following, I will provide my comments to the process subsequent to the statement of the Ombudsman, and to the Ministry's reconsideration of the case. I provide comments on the following issues: 1) time spent preparing the case, 2) communication with the Ministry, 3) the justification for continued refusal of access to information, 4) the decision not to provide access to parts of the information, and 5) fundamental aspects of the case and the further handling of the case by the Ombudsman.

1) Time spent preparing the case

My request for access to information was dated 12 January 2011. It has taken the Ministry more than one year and ten months to provide a final assessment of the request. It is particularly serious that the Ministry has spent almost one year from the statement of the Ombudsman until it finalized its reconsideration. In my view, the deadlines of the Environmental Information Act apply from the date that the Ombudsman requests the Ministry to reconsider its decision. I made this clear in my letter to the Ombudsman and the Ministry 26 January 2012. The Ombudsman omitted to comment on this point in his letter of 30 January. The Ministry responded February 2 that they considered that there was no new deadlines since the "case was already in process". It is particularly noteworthy that the Ministry explicitly states that there "is … no new deadline". In my view, this is an erroneous application of the Act. My principal opinion is that the statement of the Ombudsman must be regarded as a new request for information and that the procedural rules of section 15(3) of the Act must apply. My subsidiary opinion is that according to customary norms regarding appropriate public administration, the case should be dealt with and prioritized on an equal footing with ordinary administrative complaints. I also refer to the duty that Norway has according to Article 9 of the

Aarhus Convention to provide “access to an expeditious procedure” for reconsideration of a refusal of access to environmental information. It is in my view obvious that the Ministry has violated this duty in the present case.

As a side comment: While the Ministry has spent one year reconsidering the case, the Ombudsman provides the undersigned only 14 days to provide comments on the reconsideration. I have problems understanding why the Ombudsman maintains strict deadlines in relation to private parties while the Ministry is subjected to almost no deadlines when making its reconsideration.

Regardless the views that the Ombudsman might have in relation to the above, it is my view that the Ministry should be criticized for spending almost one year to reconsider this case. There is nothing in the statement of the Ombudsman or in the reconsideration provided by the Ministry that can justify the time used.

2) Communication with the Ministry

I have not received any messages from the Ministry besides the letter from the Ministry 2 February 2012. The Ministry indicates in its letter that final reconsideration will “at the earliest take place by 15 February 2012”. According to the letter from the Ombudsman dated 30 January 2012, which was sent as a copy to the undersigned, the ”reason that the Ministry had not followed up the case was that the case had been moved to a new employee”. The lack of communication from the Ministry to the undersigned concerning the reasons for the delay is in my view not in accordance with customary norms concerning appropriate administration, and must in my view be subject to criticism.

I also note that the Ministry has directed its final reconsideration to the Ombudsman and only sent a copy to the undersigned. This indicates that the Ministry does not have clear procedures defining the parties to the case and to whom its decisions shall be directed.

3) The justification for continued refusal of access to information

I note that the Ministry has finally provided an assessment of the request for information in accordance with the Environmental Information Act. I do not agree with the Ministry’s view that the ”information requested does not lie within the core of the right of access to information and the purposes pursued by the Act” (page 2). In my view, it is erroneous when the Ministry introduces a distinction between information that is within and outside the core of the Act. Neither the Act nor its preparatory works provide for such a distinction. It is also highly unclear which legal consequences such a distinction shall have. In my view, the Ministry shall conclude whether the information falls within the scope of the Act, and thereafter conduct a specific assessment of the interests in favor of and against providing access to the information in accordance with the criteria provided in section 11. A general consideration that the information falls within or outside the core area of the Act might undermine an appropriate assessment of the interests, and will make it impossible for a requester to assess whether the refusal of access is appropriately justified.

I have requested access to information regarding the legal assessment. According to ot.prp nr. 52 (2008-2009) regarding the Nature Diversity Act, section 7.2.4.3: ”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.” I request access to this assessment. In its response to the Ombudsman, the Ministry has listed a

number of documents that are irrelevant to the request for information. In my view, this has contributed to make the case excessively complex and contributed to prolong the case. This should in my view be criticized.

I accept that the Ministry wishes to keep confidential the political discussions in the case. Nevertheless, I still want access to the legal assessment. The assessment concerns obligations under international law and the limits that such obligations impose on the Parliament. I assume that such assessments are of general character and do not involve assessment of specific facts. I also remark that the proposition indicates in clear terms that the assessment was decisive for the Government's position. As the Government controls the legal competence available for such matters, and given the fact that the Parliament lacks such competence, statements regarding legal assessments in preparatory works are likely to be very influential for the Parliament's subsequent decisions. This is in particular the case for assessments of international law since it is perceived as imposing limits on the competence of the Parliament. It is important in such cases that other legal experts are provided the opportunity to consider the assessments and discuss their reliability. These are essential issues where limitations on access to information should only be available for very significant reasons. I cannot see that the Ministry has sufficiently considered these issues.

I note that the Ombudsman states that the Ministry has conducted "no real and complete analysis of the legal issues. There is no final report or similar document. The legal assessments concerning the scope of the Nature Diversity Act appears mainly through correspondence in the form of notes, comments and the like. Such notes with added comments and questions which are included in the documents of the case, do not provide any clear picture of the standpoints that were subsequently taken in relation to the legal interpretative questions. This impression is reinforced by the fact that the documents from time to time refer to discussions that shall have taken place in meetings, but without such views and conclusions being referred in the documents of the case. Anyway this may be, I have difficulty understanding that these facts justify the conclusion that there is a genuine and objective need to refuse all the requested information." I cannot see that the reconsideration provided by the Ministry has placed this statement in any new light.

I note that the Ministry emphasizes the interest in preparing cases in confidentiality. This is acceptable. However, such interests do no longer have the same importance after the case has been finally decided, and the importance of this factor is gradually reduced with time. The view that subsequent access to information may prevent open and free discussions should not be attributed much weight. This is in particular the case for legal assessments. It cannot be taken into consideration whether the legal assessments appear to be controversial or unreliable.

Against this background, it is my view that the Ministry, at this point, many years after the final decision, should have provided access to the legal assessments.

4) The decision not to provide access to parts of the information

Despite the fact that the Ministry has spent almost one year reconsidering the case, it does not seem to have undertaken any independent assessment of whether parts of the information can be separated from the information that must be kept confidential. The only statement in the reconsideration relating to this topic is that this is a "question for which the interests that the Ministry has considered above apply." I find this statement strange in light of the statement by the

Ombudsman relating to the information (quoted above). The Ombudsman's assessment concludes that the fact that various kinds of information are mixed together cannot justify the conclusion that "there is a genuine and objective need to refuse access to all the requested information." I cannot see that the Ministry's reconsideration has conducted any real assessment of whether access can be provided to parts of the information, as the Ombudsman requested. This should in my view be criticized.

5) Views on fundamental aspects of the case and the further handling of the case by the Ombudsman

One particularly interesting aspect of this case is the relationship between the Parliament and the Government in cases concerning legislation. My intention has been to author an article concerning this relationship in light of international law. A phenomenon in recent years has been claims that international law increasingly limits the freedom of action of the Parliament. This subsequently leads to critique against initiatives to undertake international obligations. In this situation, it is particularly important to ensure a well informed and thorough discussion of the legal assessments that justify the kind of statements that we find in the preparatory works of the Nature Diversity Act. The fact that the Government's position was controversial and met with significant resistance among the public are additional factors that indicate a need for access to information (more on this in attachment 1).

The Ombudsman's statement (quoted above) indicates that the Government misled the Parliament when stating the following in the preparatory works: "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." The Ombudsman's statement indicates that no uniform and independent assessment was carried out regarding the relationship to international law. The statement indicates that the assessment made was an overall assessment where both legal and political issues led to the conclusion. For these reasons it becomes misleading when the Government in its statement to the Parliament indicates that a legal assessment was decisive for its position.

I ask the Ombudsman to assess the reliability of the above considerations in light of the materials he has considered. If the Ombudsman on this basis finds that the Government has provided a misleading picture of the assessments justifying its statement regarding international law, I encourage the Ombudsman to state this in a separate report to the Parliament in accordance with section 12(2) of the Act concerning the Storting's Ombudsman for Public Administration.

As appears from my comments above and attachment 1, I am of the opinion that there has been significant omissions in the administration's implementation of the Environmental Information Act. Against this background, I encourage the Ombudsman to provide a statement regarding the errors and omissions that attach to the Ministry of the Environment's implementation of chapter 3 of the Environmental Information Act, in accordance with section 10 of the Act concerning the Storting's Ombudsman for Public Administration. I also encourage the Ombudsman to specify whether and to what extent the Ministry in this case, according to the views of the Ombudsman, has a duty to provide access to the information requested.

Yours sincerely,

Ole Kristian Fauchald