Opening statement – Ole Kristian Fauchald

Preliminary issues

The scope of the request:

- The Ministry has confused the case by identifying 25 documents which it claimed to be relevant to the legal assessment. I have repeatedly stated that I only want access to the legal assessment referred to in the preparatory works and indicated that most of the documents are irrelevant to the request. It is apparent from the description of the documents provided by the Ministry itself that most of the documents are irrelevant to the request. I draw your attention to the list provided on page 4 of Annex 3 of the Ministry's submission to the Committee (which was only available to me when the Ministry submitted its views to the Committee, see also pages 6-7 of the Ministry's submission). My reading of the list would identify only four documents as potentially relevant, documents no. 3, 5, 10 and 21. These are the only documents that may contain advice from legal experts within the Ministry of Foreign Affairs regarding the legal problems of applying the Act beyond the territorial sea. The other documents are clearly not relevant as they essentially contain political considerations or other legal considerations (one example: document no. 7 which contains the minutes from a meeting among State Secretaries). As soon as I suspected that the Ministry misrepresented my request for information, I made clear before the Ombudsman and the Ministry that: "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 the preparatory works. 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." (see page 4 of Annex 9 and pages 2-3 of Annex 14 to my submission to the Committee).
- The Ministry still argues before this Committee as if I have asked for access to all these documents, which is clearly not the case. Hence, the Ministry continues to confuse the case before this Committee.

Claim 1) and 4): The right of access to the information and the Ministry's explanation of reasons for refusal

- Norwegian authorities are as a matter of routine making available legal assessments provided by the Ministry of Justice through a web site. Such assessments mainly concern national law, but may also concern international law issues.
- The assessment in question here was provided by the Ministry of Foreign Affairs.
    - While it can be argued that legal assessments based on international obligations may be politically sensitive in relation to other countries, the Ministry has not claimed any such reasons for confidentiality in this case.
    - I would ask the representative of the government whether she is of the view that other standards of confidentiality should apply to the Ministry of Foreign Affairs than to the Ministry of Justice in cases where they provide legal advice to other organs of the state.

- The effect of the legal advice was that the Parliament decided not to apply most of the provisions of the Nature Diversity Act beyond the territorial sea. One example is that the provision regarding marine protected areas is not to be applied. (Additional examples: it was considered acceptable to apply the precautionary principle and principle of ecosystem approach, while unacceptable to apply the user-pays principle and the principle concerning environmentally sound techniques).
- The geographical scope of the act was very controversial: the Parliamentary Committee was divided on the issue and four parties (including both the parties currently in government) put forward proposals indicating that they were not convinced by the Ministry's reference to the legal assessment. This is also indicated in the Ministry's submission (bottom of page 9), but contrary to what is suggested by the Ministry, this is an argument in favour of providing access to the legal assessment and not an argument for keeping it secret.
- The considerations of the public interest of access to the information consisted of one sentence when the Ministry provided its reconsideration (bottom of page 2 of Annex 3 of my submission, no translation provided by the Ministry. My translation: "The Ministry considers that ... scientific articles can provide important premises for public debate.") In its submission, the Ministry indicates that it has made a much more thorough assessment of public interest (see pages 9-10 and top of page 12 of its submission). The fact is that the Ministry explained why the authorities had interest in keeping the information secret, it did not provide any consideration of the public interest beyond the statement referred above.
- The duty under Art. 4.3(c) is to take "into account the public interest served by disclosure" and according to Art. 4.7 the authorities shall "state the reasons for the refusal". The Ministry spent almost one year to reconsider the request.
- It must be clear from the mere wording of Art. 4.7 that a duty to provide "reasons" means more than providing a reference to the legal basis for the decision. It must also mean more than a statement that the conditions for refusing access have been fulfilled. In the case at hand, where the public authorities are explicitly asked to consider the public interest in providing access to the information, it must as a minimum make clear which case-specific public interests it has considered. It should in my view also explain the reasons why the public interests were outweighed in the specific case.
- It is self-evident that public authorities are able to see the arguments against providing access to information. This is in my view the very reason why art. 4.3(c) when read together with art. 4.7 explicitly requires countries to specify the public interest in access to the information in the case in question. This is also about building trust in public authorities, which can be achieved when those asking for access to information see that the public interest has been seriously considered and is fairly presented in the final decision. In this case, even in its submission to the Committee, the Ministry has failed to provide any fair explanation of the public interests served by providing access to the information in this case.

Claim 2) and 4): The duty to provide access to parts of the information and associated reasons

- The confusion of the case by the Ministry by including a number of irrelevant documents is particularly important for this part of the claim.
- In the reconsideration, the Ministry stated: "All documents that are relevant for Fauchald's request for information ... touches upon questions where the reasons that the Ministry has

emphasized above, are relevant." (page 4 of Annex 3 to the submission, my translation, the translation provided by the Ministry at pages 13-14 is not correct). This approach was to the issue of access to parts of the information is also reflected in the Ministry's submission to the Committee (see top of page 27: "The conclusion was however that all the documents ... and consequently also the information contained therein, are covered by the exceptions in Sections 14-15 of the FIA for the same reasons as explained earlier.")

- As clearly stated, the ministry has considered the documents as such and not whether access can be provided to parts of the documents. Despite the fact that I pointed out the duty to consider access to parts of documents in my comments to the Ombudsman (pages 3-4 of Annex 14 to my submission), the Ministry refrained from further comments, and the Ombudsman commented that "It would have been preferable if the Ministry had provided more specific and extensive reasons regarding access to parts of the information according to section 11(3) of the Access to Information Act, but I have decided to let the case rest also in regard to this issue." (page 2 of Annex 4 of my submission, my translation).
- In my view, it is clear that the Ministry has failed to consider whether information can be "separated out without prejudice to the confidentiality of the information exempted" in accordance with Art. 4.6, and that it consequently also has failed to provide reasons for its decision in accordance with Art. 4.7.

Claim 3): Time spent reconsidering the request

- It is essential that the Committee does not regard the Ministry's reconsideration of my request, as requested by the Ombudsman, as part of the complaint procedure, as suggested by the Ministry.
- The Ministry blurs the distinction that must be made between a complaints procedure (such as the one before the Ombudsman, which will be considered separately below), and the Ministry's reconsideration of the request.
- The complaint was explicitly directed to the Ombudsman, and not to the Ministry. The reconsideration was undertaken as a result of the Ombudsman's findings in the complaint procedure. The complaint procedure considered whether the Ministry had dealt with the request in the manner prescribed in the legislation, and concluded that the Ministry had failed to do so. The Ombudsman thus requested the Ministry to reconsider, and the Ministry accepted that it should reconsider.
- The reconsideration is therefore to be clearly distinguished from the complaints procedure.
- In my view, it should be clear that the deadline prescribed in art. 4.7 should have been applied to the reconsideration. However, even if the Committee should conclude that the deadline does not apply, it should be consider whether spending 11 months to reconsider the case is in accordance with the duty under the Convention to ensure appropriate consideration of requests for access to information.

Claim 5): The failure of the Ombudsman to effectively follow up the case

- Claims a) and c): the time used by the Ombudsman: These issues are closely related to the failure of the Ombudsman to ensure that the case focused on the claims of the complaint and not on the 25 documents provided by the Ministry. This happened despite warnings from the undersigned (see final paragraph in Annex 9 to my submission to the Committee).

- Claim a): The Ombudsman had gathered the relevant documents and comments from the Ministry and me in mid-June (five months after having received the complaint). Normally, his decision should be made within four to six weeks after that date. However it took the Ombudsman five months to provide the decision.
- Claim c): The Ombudsman had received the requested comments from the Ministry and me by primo December. Normally, the Ombudsman decision should be provided within four to six weeks. However, it took the Ombudsman more than six months to provide the final statement.
    - Altogether it took the Ombudsman almost one year to consider the case. In my view, this is clearly too long.
    - The Ministry's argument that a "thorough procedure is in the best interest of the complainant" is clearly one-sided (page 20 of the Ministry's submission), and can be countered by the saying that "justice delayed is justice denied". This is particularly so in cases concerning access to information.
- Claim b): The Ministry claims that the Ombudsman followed up the case while it was reconsidering the request. As is made clear in the Ministry's submission, the Ombudsman was inactive from the end of January to mid-September, a period of more than seven months.
    - The Ombudsman has a duty under the Convention to ensure that his procedures are expeditious. In this case, the procedures of the Ombudsman started with the complaint and were terminated with his final statement.
    - This does in my view mean that where, during this procedure, the Ombudsman asks one of the parties to provide materials, comments or (re)considerations, he must set clear deadlines and ensure that the deadlines are met. The Ombudsman did not set any deadline for the Ministry, he left the case unattended for more than seven months, and did not criticize it for taking so long to reconsider the case.
    - In my view, the Ombudsman has failed to fulfil his duty under article 9.1 to ensure access to an expeditious procedure.
- Claim d): the failure of the Ombudsman to address properly the issues raised in the initial complaint (annex g to my submission) and the subsequent comments from the undersigned (annexes i and n to my submission).
    - As regards the latter, the major issue of non-compliance is the omission of the Ombudsman to address complaints regarding the use of time in the case.
    - The failure of the Ombudsman to address in more detail the claim under section 11(3) of the Environmental Information Act to be provided access to parts of the information represents, in my view, a denial of justice in non-compliance with the Convention, when he, after almost two and a half year of proceedings only addressed this issue by stating: "The Ministry could, with advantage, have justified its decision on access to parts of the documents under to the Environmental Information Act more concretely and in greater depth, but I have also on this point concluded not to pursue the matter further." It should be noted that this had been a core claim of the undersigned all the time.

Claim 6): Failure to effectively implement the Environmental Information Act (EIA)

We should note that the Ministry acknowledges that there is still need for the EIA, despite the fact that the current Freedom of Information Act was adopted after the EIA. The three main points of difference are the following:

- The duty to always make available information (e.g. information regarding emissions, see art. 4.4(d)).
- The duty to consider and weigh the public interest in access to the access to information that otherwise could have been exempted (art. 4.3(c) and 4.4 final sentence).
- The duty to make available part of the information where so can be done without prejudice to the confidentiality of the information exempted (art. 4.6).

As has been made clear in my case, Norway had not taken the measures needed to ensure effective implementation of the relevant provisions of the EIA. The government has admitted shortcomings in the Ministry's submission to the Committee (bottom of page 25 and page 26). The question before the Committee is whether the Norwegian measures are sufficient.

In my view, there are mainly two weaknesses of the measures taken:

- The measures do not provide for any procedure for determining whether the information is environmental information when initial decisions are taken to make the information confidential. Such initial decisions are made by those handling the case. I argue that the Ministry needs to make sure that such decisions are not only taken based on the Freedom of Information Act. Such decisions should clearly also take into account the EIA where relevant.
- The measures taken by the Ministry are almost exclusively taken within the Ministry of Climate and Environment. Such an approach is clearly inadequate, as it does not take into account that access to environmental information is equally relevant for, inter alia, the Ministry of Petroleum and Energy, the Ministry of Trade, Industry and Fisheries, and the Ministry of Transport and Communications.

Norway has therefore, in my view, not taken the necessary legislative, regulatory and other measures, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, in accordance with art. 3.1.

Final remark

It is unfortunate that the Ministry has not provided translation of its documents. This means that the Committee has only the Ministry's subsequent "summary" and explanations in its submission as a basis for its considerations. I hope that members of the Committee who are able to read Norwegian have read the material submitted by the undersigned, and I will be happy to respond to questions that members of the Committee might have.