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**THE ROYAL MINISTRY
OF THE ENVIRONMENT**

The Parliamentary Ombudsman for Public Administration Norway
The Parliamentary Ombudsman
P.O. Box 3 Sentrum
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Your ref.
Matter 2011/97

Our ref.
12/3880

Date
19 October 2012

Access to information and documents – legal assessments performed in connection with the preparation of the Nature Diversity Act

The Ministry of the Environment makes reference to your statement of 17 November 2011, as well as the information sent to Ole Kristian Fauchald on 2 February 2012, with a copy to the Parliamentary Ombudsman, regarding the status of the matter.

The Ministry has re-assessed the question of the scope of section 2 of the Environmental Information Act, and concluded that the provision also covers the type of legal assessments at issue in this matter. This entails that anyone is entitled to this information subject to the conditions stated in section 8 of the Environmental Information Act. Requests may be refused “if there is a genuine and objective need to do so in a specific case and the information, or the document containing the information, may be exempted from public disclosure pursuant to the Freedom of Information Act” see section 11, first paragraph, of the Environmental Information Act. We note the fact that the Parliamentary Ombudsman has let the part of the matter relating to the Freedom of Information Act “rest, now that the Ministry has provided an explanation”.

Proposition to the Odelsting [draft bill] No. 116 (2001-2002) explains in greater detail what is meant with “genuine and objective need” in section 11, first paragraph, of the Environmental Information Act:

“If the public administrative body wishes to refuse access, pursuant to the first paragraph there must a genuine and objective need to exempt the information in the specific instance. The provision establishes in law the practice recommended in respect of the Freedom of Information Act with a view to promoting transparency in the public administration, and can be said to emphasise what generally follows from current good administrative practice. Whereas the Freedom of Information Act’s requirement for a genuine and objective need is more of a guideline for application of the law in the specific instance, the rule in section 11, first paragraph, is a condition for exemption from the right of disclosure. The provision appears to express that, under the Environmental Information Act, the public administration must give particularly careful consideration to any requests for disclosure. This criterion is particularly important in respect of internal documents as mentioned in section 5, second paragraph, of the Freedom of Information Act. The genuine need-criterion entails that a mere element of risk of an adverse impact on the interests served by the exemption rule in question is insufficient. If

the information is, for instance, contained in an internal document, an assessment should be made as to whether disclosing this information will lead to adverse consequences at the time the request for disclosure of this information is made. Reference is also made to other theory and practice relating to the Freedom of Information Act, including circular G-69/98 from the Ministry of Justice, "Stricter application of the Freedom of Information Act."

It therefore follows directly from the proposition that the provision is intended to establish in law recommended practice relating to the Freedom of Information Act, as well as good administrative practice. Both the former and the current Freedom of Information Act differ from the Environmental Information Act in that the "genuine and objective need" stipulated in the Environmental Information Act is a condition for exemption, rather than a guideline for discretionary assessment. The Ministry agrees that this imposes more exacting requirements regarding assessment and the giving of reasons, but does not find any basis in the preparatory works for concluding that the requirement is significantly stricter than in the Freedom of Information Act.

The guidelines for the discretionary assessment are given in section 11, second paragraph: "When considering whether there is a genuine and objective need pursuant to the first paragraph, the environmental and public interests served by disclosure of the information shall be weighed against the interests served by refusal. If the environmental and public interests outweigh the interests served by refusal, the information shall be disclosed." Further, as regards the concrete weighing of interests, a number of factors must be considered, including the type of environmental information requested. Reference is made to Proposition to the Odelsting [draft bill] No. 116 (2001-2002), p. 161:

"In assessing which environmental and public interests are relevant, one can begin with the Act's preamble. This refers to considerations relating to the environment and the individual, and to the opportunity to participate in public decision processes. In addition, all considerations underlying the right to environmental information that are listed in the general motives in the Act's chapter 6 are pertinent when weighing interests against each other under section 11. A further factor to be considered is whether the information falls under Article 110 b, second paragraph, of the Constitution. The provision in section 12 regarding environmental information which must always be disclosed also indicates what types of information constitute the core of the right, and sheds light on the weight given to such considerations when weighing them against each other."

The Ministry assumes that the interests served by Fauchald being given access to the information for use in his academic article are relevant pursuant to section 11, and that academic articles may play an important role in setting the agenda for public debate. Nevertheless, the Ministry is of the view that the information to which access has been requested does not fall within the primary focus area of the right of disclosure or of the objectives to be furthered by the Environmental Information Act, see the statement in the preparatory works, above.

The interests being served by not disclosing the information are the safeguarding of internal decision processes in the government and the protection of confidential correspondence among ministries.

In Proposition to the Odelsting [draft bill] No. 116, p. 161, the Ministry stated the following regarding the latter assessment:

"As regards assessing the interests served by refusal, reference must be made to the grounds for refusing disclosure of information. The pertinent grounds are the considerations that underlie the relevant legal authority for making an exemption. As regards internal documents, for example, a specific assessment has to be performed of the document's content and how disclosure of the information might be harmful to the public administration in general and the processing of individual cases in particular."

We are assuming that the Parliamentary Ombudsman does not have any comments on the Ministry's discretionary assessment of the legal authority for exemption in section 15, paragraph one, see also paragraph 3, of the Freedom of Information Act, and that the considerations underlying this provision are relevant for the assessment in the present case. We quote from Proposition to the Odelsting [draft bill] No. 102 (2004-2005):

“The condition that the exemption must be a prerequisite for proper decision processes must also, in principle, be interpreted in the same manner as pursuant to the first sentence. Because the ministries work very closely together on numerous cases, and since the ministries largely handle matters forming part of political processes, this condition will nevertheless, in practice, more frequently be met in the case of inter-ministerial correspondence than in the case of correspondence between superior and subordinate administrative agencies.”

Work on the Nature Diversity Act was a process that was both comprehensive and demanding. In connection with the submission to the ministries, many points of disagreement were resolved. Several of the topics, including the question of the geographical scope of the Nature Diversity Act, were important questions of principle for the ministries and/or the political parties. Delimiting the scope of the Act was therefore not merely a question of legal assessments, but also of political deliberations, as is evident in the documentation. The confidential nature of the negotiations and correspondence between the ministries and the cabinet ministers was important in order to advance the process and reach an agreement. Although the matter was resolved, releasing this information at the present time may have unfortunate consequences. We would point out that the involved persons, both the members of the civil service and those holding political office, are to continue co-operating on the implementation of the Act. Further, in future the ministries and the government will also have to resolve issues requiring confidentiality. As we see it, such co-operation will be less smooth and efficient if negotiations and correspondence are not protected by an element of confidentiality. The Ministry believes that great importance must be given to these considerations in the discretionary assessment of this matter. We would point out that the preparatory works to the Environmental Information Act state that these are relevant issues that should be emphasised.

The Ministry has re-assessed the matter pursuant to section 11 of the Environmental Information Act, but finds that the interests being served by not disclosing the information far outweigh those being served by disclosure. The Ministry sees reason to emphasise that not all types of information contained in correspondence between ministries and the government may be exempted from disclosure under section 11 of the Environmental Information Act, see also section 15 of the Freedom of Information Act; however, in this case a concrete assessment has been performed of various interests and what type of issue and environmental information are at stake. The Ministry anticipates that the assessment of the information in this case may produce a different outcome at a later point in time, but that this is unlikely to occur for a while.

Although it is possible to refuse disclosure of parts of the information, it follows from section 11, third paragraph, of the Environmental Information Act that the remaining information may be released if it does not create a clearly misleading impression of the contents. All documents relevant to Fauchald's disclosure request, except for the Ministry of Foreign Affairs' official consultation comments relating to Official Norwegian Report (NOU) 2004:28 (available on the Ministry of the Environment's website), touch on questions to which the considerations stressed by the Ministry above are applicable.

Yours sincerely

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Director General

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The document has been approved electronically, and therefore does not contain a handwritten signature.

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