

SUBMISSION REGARDING NON-COMPLIANCE TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE

I. Information on correspondent submitting the communication

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II. Party concerned

The communication concerns Norway.

III. Facts of the communication

The communication concerns access to environmental information and subsequent access to an effective remedy.

A request for access to environmental information was sent by e-mail to the Norwegian Ministry of the Environment 12 January 2011 (annex f). The request concerned a legal assessment referred to in the preparatory works for the Nature Diversity Act, which was adopted by the Parliament in 2009 (Act no. 100). The preparatory works (Ot.prp. no. 52 (2008-2009), section 7.2.4.3) stated that: "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 request was based on the Environmental Information Act (no. 31, 2003).

The Ministry declined the request by e-mail 19 January 2011 (annex a). The decision was based on the Freedom of Information Act (no. 16, 2006) and found the request to fall outside the scope of the Environmental Information Act.

A complaint regarding the denial of access to the information was filed to the Parliament's Ombudsman for Public Administration 20 January 2011 (annex g).

The Ministry provided its reasoned views in the case 12 April 2011 (annex h). The undersigned provided comments to the reasoned views 3 May 2011 (annex i).

The Ombudsman provided a formal statement 17 November 2011 (annex b). The statement concluded that the Ministry erred in failing to inform about the availability of administrative complaint procedures, and that there were reasons to raise questions regarding the Ministry's findings concerning the applicability of the Environmental Information Act and whether there was a genuine and objective reasons for denying access to the information. The Ombudsman requested the Ministry to reconsider its decision.

The undersigned asked the Ministry to respect the deadline for responding to request for environmental information and questioned the Ministry's practice under the Environmental Information Act 26 January 2012 (annex j). This request was also sent to the Ombudsman. The Ombudsman responded 30 January 2012 (annex k) that it would await the Ministry's response. The Ministry responded that they did not consider the deadline to be applicable in the case, and regrets that their routine under the Environmental Information Act was not followed 2 February 2012 (annex l). The relevant requests for information were subsequently refused in a separate decision (these refusals are not part of the present case). The Ombudsman did subsequently make no comment regarding the Ministry's decision not to apply any deadline when reconsidering the request.

The Ministry provided its reconsideration of the request for information to the Ombudsman 19 October 2012 (annex c). Its decision was to refuse access to the information.

The Ombudsman asked for comments to the decision 23 October 2012 (annex m). The deadline for comments was two weeks. The undersigned provided comments 31 October 2012 (annex n). These comments concerned five issues: 1) the time spent reconsidering the request, as well as the failure of the Ombudsman to ensure that the Ministry responded within a reasonable time; 2) the failure of the Ministry to communicate to the undersigned the reasons why the reconsideration was delayed; 3) disagreement regarding the justification for continued denial of access to the information; 4) disagreement regarding the decision not to provide access to parts of the information; 5) a request that the Ombudsman, on the basis of the document provided by the Ministry, consider whether the Government in this case had misled the Parliament; and 6) a request that the Ombudsman consider the Ministry's implementation of the Environmental Information Act. The fifth issue was raised because the documents identified by the Ministry as relevant to the request indicated that there had been no thorough legal assessment, but essentially a political assessment. The sixth issue was raised due to the systematic failure of the Ministry to implement the Environmental Information Act, documented through an academic article by the undersigned. The undersigned therefore asked the Ombudsman to consider the case under Section 12 of the Act according to which: "If the Ombudsman becomes aware of negligence or errors of major significance or scope he may make a special report to the Storting [Parliament] and to the appropriate administrative agency." The Ministry declined to provide further comments in the case.

The Ombudsman provided his final views on the case 10 June 2013 (annex d). The Ombudsman found the reconsideration provided by the Ministry to be "somewhat general". He found, with some doubt, that he will not further pursue the case. He stated that he will keep the comments from the undersigned in mind in further communication with the Ministry, but declined to take further action.

The undersigned claims that the following issues in the present case represent specific and general instances of non-compliance with the Aarhus Convention:

- 1) The denial of access to a legal assessment regarding the limits that public international law implies for the Parliament in a case concerning its decision regarding the geographical scope of the Nature Diversity Act (non-compliance with Art. 4). It should be noted that the request for information was made two years after the adoption of the Act, and was made for the purpose of writing an academic article concerning the geographical scope of the Nature Diversity Act and the establishment of marine protected areas. The Ministry has consistently

failed to consider and specify how it has taken into account the “public interest served by disclosure”. It is not sufficient that the Ministry merely states that it has considered the issue.

- 2) The failure of the Ministry to consider whether parts of the information can be subject to disclosure (non-compliance with Art. 4). The documents of the case indicate that the Ministry has not conducted any real assessment of whether parts of the information can be made available. In any case, the documents provide no reasons for why disclosure of parts of the documents is rejected.
- 3) The time spent by the Ministry to reconsider the request for information (non-compliance with Art. 4 and 9). The Ministry spent approximately eleven months to reconsider the request, despite a reminder sent from the undersigned. The Ministry also stated explicitly that it considered itself not to be bound by any deadline when reconsidering the request. It is the view of the undersigned that the request from the Ombudsman to reconsider the initial decision must be regarded as a request for information. Regardless of this, the reminder sent by the undersigned January 26, 2012 should in any case be regarded as a request for information.
- 4) The failure of the Ministry to provide sufficiently reasons for its decisions (non-compliance with Art. 4). The initial decision of the Ministry failed to provide sufficient reasons for the refusal since it merely stated that “The Ministry has considered the question of providing access to the information under section 11 of the Freedom of Information Act, but has concluded that the interest in safeguarding internal decision making procedures in the Government is most important.” This statement does not indicate whether and how the Ministry has considered the interests in providing access to the information. This reflects the general attitude of the Ministry throughout the procedures; it has limited its reasons to explain why it is important to keep the information confidential, and has failed to explain which aspects of the interest in providing access to the information it has taken into account, how it has considered such interests, and how it has weighed these interests against the interest in keeping the documents confidential.
- 5) The failure of the Ombudsman to effectively follow up the case (non-compliance with Art. 9). The undersigned claims that the procedure of the Ombudsman was in non-compliance in the following respects: a) the time it took to provide the first formal statement (ten months), b) the failure to follow up the case while the Ministry reconsidered its decision, c) the time it took for the Ombudsman to provide the final statement (seven months), and d) the failure of the Ombudsman to address properly the issues raised in the initial complaint (annex g) and the subsequent comments from the undersigned (annexes i and n). As regards the latter, the major issue of non-compliance in this regard is the omission of the Ombudsman to address complaints regarding the use of time in the case. In addition, 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 where this had been a core claim by the undersigned 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.”

- 6) The failure of the Ministry of the Environment to effectively implement the Environmental Information Act (non-compliance with Art. 4). The Ministry of the Environment and other public authorities have failed to effectively implement the Environmental Information Act in three main respects: a) There is no procedure for determining whether information is to be regarded as “environmental information”, and thereby is covered by the Act, when public authorities make their initial decisions to categorize the information as publicly available or confidential. The administrative procedures in this regard are only based on the Freedom of Information Act. This can easily be confirmed by using the electronic service for seeking access to information – all references to legal basis for confidentiality refer to the Freedom of Information Act (see <http://www.oep.no/nettsted/fad?lang=en>). b) When seeking access to information that has been classified as confidential, public authorities, including the Ministry of the Environment, have failed to implement procedures that automatically consider whether the Environmental Information Act is applicable and whether access to information shall be provided in accordance with the Act. Even in cases where the requester invokes the Act, there seem systematically to be omissions, even with the Ministry of the Environment, to consider the requests under the Environmental Information Act. c) There seems to be no effective procedure within the Ministry of the Environment, and perhaps more broadly within Norwegian public authorities, to effectively address requests regarding those parts of the information that can be exempted from confidentiality.

IV. Nature of alleged non-compliance

The first five claims concern specific instances of non-compliance, the latter concerns a general situation of non-compliance. Claims 1)-4) and 6) concern access to environmental information, and claim 5) concerns access to effective remedy.

V. Provisions of the Convention relevant for the communication

Claim 1) concerns non-compliance with Art. 4.3(c) and with Art. 4(3)(c) taken in together with Art. 4(7).

Claim 2) concerns non-compliance with Art. 4.6 and with Art. 4.6 taken together with Art. 4(7).

Claim 3) concerns non-compliance with Art. 4.7.

Claim 4) concerns non-compliance with Art. 4.7.

Claim 5) concerns non-compliance with Art. 9.1, second and third paragraphs, and 9.4.

Claim 6) concerns non-compliance with Art. 4 to the extent that aspects of this provision are not sufficiently implemented through the Freedom of Information Act. The claim relates to the last sentence of Art. 4(4) as related to section 11 of the Freedom of Information Act, Article 4(6) as related to section 12 of the Freedom of Information Act, and Article 4(7) as related to section 31 of the Freedom of Information Act.

VI. Use of domestic remedies or other international procedures

Bringing the case to the Ombudsman has been the preferred option (and is in general the preferred option in cases concerning access to information from ministries), and has in reality preempted other remedies, much due to the time that the Ombudsman process has taken. The undersigned has not brought the case before Norwegian courts. Bringing such cases to courts has been considered excessively expensive and time-consuming, and would consequently not provide any effective remedy. It can be noted that cases concerning access to information are hardly ever brought to Norwegian courts (a reference to one such case can be found here:

<http://offentlighet.no/Nyhetsarkiv/2013/Dokumentinnsyn-til-tingretten> (only in Norwegian). The claimant in this case states that he has spent more than one year of work on the case).

Administrative complaints procedures were also preempted by bringing the case to the Ombudsman. Moreover, such complaints are in general directed to the administrative organ immediately superior to the initial decision-making organ, and such complaints are prepared by same administrative organ that made the initial decision (see chapter VI of the Public Administration Act). The initial decision-making organ is supposed to provide the superior organs with the facts of the complaint and its views on how the complaint should be resolved. Such a complaints procedure cannot be considered to fulfill requirements concerning independency, and it is very unlikely to overturn the initial decisions. This is in particular the case in complaints concerning access to information, since the initial organ and the superior organ are very likely to have joint interests in maintaining confidentiality.

No other international procedure has been initiated in this case.

VII. Confidentiality

There is no need for confidentiality in this case.

VIII. Supporting documentation

- Relevant national legislation, the English versions are translations provided by the Government:
 - The Environmental Information Act (see sections 10 to 15) is available at:
 - English version: <http://www.regjeringen.no/en/doc/Laws/Acts/Environmental-Information-Act.html?id=173247>
 - Norwegian version: <http://lovdata.no/all/hl-20030509-031.html>
 - The Act concerning the Storting's Ombudsman for Public Administration (see sections 4, 10 to 12) and is available at:
 - English version: <http://www.ub.uio.no/ujur/ulovdata/lov-19620622-008-eng.pdf>
 - Norwegian version: <http://lovdata.no/all/hl-19620622-008.html>
 - The Freedom of Information Act (see sections 11, 12, 15, and 31) is available at:

- English version: no version of the Act from 2006 is available.
- Norwegian version: <http://lovdata.no/all/hl-20060519-016.html>
- The Nature Diversity Act (see section 2) is available at:
 - English version: <http://www.regjeringen.no/en/doc/Laws/Acts/nature-diversity-act.html?id=570549>
 - Norwegian version: <http://lovdata.no/all/hl-20090619-100.html>
- The Public Administration Act (see chapter VI) is available at
 - English version: <http://www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>
 - Norwegian version: <http://lovdata.no/all/hl-19670210-000.html>
- Decisions/results of other procedures.
 - a) Decision of the Ministry of the Environment 19 January 2011
 - b) Formal statement by the Ombudsman 17 November 2011
 - c) Reconsideration by the Ministry of the Environment 19 October 2012
 - d) Final statement of the Ombudsman 10 June 2013
- Any other documentation substantiating the information provided under VII.
 - e) An academic article providing the substantive basis for issue 4. of the complaint: Ole Kristian Fauchald: Effective Access to Environmental Information in Norway? Published in Inge Lorange Backer, Ole Kristian Fauchald and Christina Voigt: Pro Natura. Festskrift til Hans Christian Bugge på 70-årsdagen 2. mars 2012. Oslo: Universitetsforlaget, 2012.
- Relevant pieces of correspondence with the authorities.
 - f) Request for access to information 12 January 2011
 - g) Complaint to the Ombudsman 20 January 2011
 - h) Reasoned views of the Ministry of the Environment 12 April 2011
 - i) Comments on the reasoned views from the undersigned 3 May 2011
 - j) Reminder to the Ministry and the Ombudsman of 26 January 2012
 - k) Letter from the Ombudsman of 30 January 2012
 - l) Letter from the Ministry of 2 February 2012
 - m) Letter from the Ombudsman of 23 October 2012

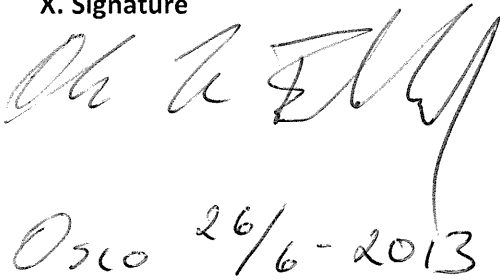
n) Comments regarding the Ministry's reconsideration 31 October 2012

Regarding translation of documents: The undersigned provides translation of the documents that he has authored. The undersigned has no resources to provide translation of the documents authored by the public authorities, and asks the Secretariat to request necessary translations from the Ministry of the Environment and the Ombudsman.

IX. Summary

A summary is included in annex o).

X. Signature



Handwritten signature in black ink, appearing to be 'Oscar' followed by a stylized surname.

Oscar 26/6-2013

