

Effective Access to Environmental Information in Norway?

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1 Introduction

In 2010, Hans Christian Bugge became closely involved in the implementation of the Environmental Information Act¹ through his appointment to head the Appeals Board for Environmental Information (*Miljøklagenemnda*). The Board deals with cases where environmental information sought from private parties («undertakings») is denied. Prior to this, he had shown significant interest in the Act and its implementation. In an article published in 2005 Bugge stated that the possibility of denying access to the «internal documents», i.e. documents prepared for the use by other public authorities or within the same public authority, «is a very important legal basis for denying access to information, and it can safely be claimed that this opportunity is misused in practice».² In attempting to predict the impact of the Act, Bugge identified two main factors: the knowledge about the Act among potential users, and the public authorities' use and interpretation of the Act. In relation to the latter, he stated that: «Experiences with the Freedom of Information Act justify some scepticism: the public authorities are not particularly interested in giving access to information that may serve as the basis for criticism».³

The present contribution responds to some aspects of the challenging issues raised by Bugge. The selection of topics has been influenced by my own experience in seeking access to information from Norwegian ministries, in particular the

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1 Act of 9 May 2003 no. 31. An English translation of the Act is available at: www.regjeringen.no/en/doc/Laws/Acts/Environmental-Information-Act.html.

2 Hans Christian Bugge, «Retten til å få, og plikten til å gi, miljøinformasjon etter den nye miljøinformasjonsloven», *Lov og Rett* 2005, p. 492, at 502, translation by the present author. See also Hans Chr. Bugge, *Lærebok i miljøforvaltningsrett*, Oslo: Universitetsforlaget, 2. utgave, 2009, s. 96–97. For a discussion of such issues, see also Sigrid Anderssen Cabot, *Miljøinformasjonslova overblikk og kommentarer*, Oslo: Kommuneforlaget, 2005, chapter 6.

3 Ibid. at 507. Translation by the present author.

Ministry of the Environment (MoE).⁴ In section 2, I discuss Norwegian ministries' commitment to effective implementation of the Environmental Information Act in light of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 (the Aarhus Convention). Thereafter, section 3 discusses of the concept of «environmental information» as set out in section 2 of the Environmental Information Act and in article 2(3) of the Aarhus Convention with a particular focus on information that has been issued in the form of «legal advice». Section 4 discusses problems of differences in opinion among private parties and public authorities regarding the scope of information sought. Section 5 comments upon the effectiveness of relevant remedies in Norway in light of article 9(1) and (4) of the Aarhus Convention.

2 Norwegian implementation of the Aarhus Convention

It took almost five years from Norway signed the Aarhus Convention in June of 1998 until it was ratified in May 2003. Much of this time was spent discussing how Norway should implement the Convention. Finally, the Environmental Information Act became the principal implementation measure.⁵ Otherwise, Norway concluded that the Convention would not have significant economic or administrative consequences for the public authorities.⁶ In addition, the Norwegian authorities presupposed that the Convention would facilitate environmentally-aware behaviour in Norway.⁷

In accordance with article 10(2) of the Aarhus Convention, Norway submitted

4 My initial plan for a contribution to this volume was the geographical scope of the Norwegian Nature Diversity Act of 19 June 2009 no. 100. Among the most controversial topics when the Act was adopted was whether to include Norway's continental shelf and exclusive economic zone within the scope of the Act. According to the preparatory works, an assessment of the relationship between certain provisions of the Act and public international law revealed a need for further considerations before the provisions could be applied beyond the territorial sea. The MoE rejected my request to study the assessment and refused to apply the Environmental Information Act. I have appealed the decision to the Ombudsman for Public Administration. At the time of writing, more than ten months after the appeal, the Ombudsman has announced that the case is delayed by at least another six to eight weeks.

5 See St.prp. nr. 81 (2001–2002) *Om samtykke til ratifikasjon av en konvensjon av 25. juni 1998 om tilgang til miljøinformasjon, allmennhetens deltakelse i beslutningsprosesser og adgang til klage og domstolsprøving på miljøområdet (Århuskonvensjonen)*, at 11.

6 Ibid. at 13.

7 Ibid. at 12.

its most recent Implementation Report on 22 December 2010.⁸ The Report represents an updated survey of Norwegian efforts to implement the Convention. Here it is stated that:

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 provide information on the rights provided for by the Convention and Norwegian legislation.

The MoE has announced that it will draw up guidelines for all administrative agencies with the aim of further raising awareness of the Environmental Information Act and the provisions of the Convention. It is important to consider this legislation in the context of the new Freedom of Information Act, which entered into force on 1 January 2009.

In spite of the actions already taken, the authorities desire even more information about the Environmental Information Act and the rights and duties it provides.⁹

Against this background, we will now consider how the Environmental Information Act is implemented in practice. When seeking information from public authorities, it is common to make use of electronic post journals.¹⁰ I systematically searched such journals, including those of the MoE, and found that when they state that a document is exempted from access to information, the reference is consistently *only* to relevant provisions of the Freedom of Information Act.¹¹ Hence, there are no routines, even within the MoE, for basing a decision to deny access to environmental information on the Environmental Information Act. Moreover, the post journals do not

8 The Norwegian Implementation Report is available at: live.unece.org/env/pp/reports_implementation_2011.html.

9 Ibid. at 2.

10 Concerning post journals, see Report, at 4–5. The post journal of the MoE can be accessed at: www.regjeringen.no/nb/dep/md/aktuelt/Offentlig-elektronisk-postjournal---OEP.html (only in Norwegian).

11 Act of 19 May 2006 no. 16. An English translation of the Act is available at: www.ub.uio.no/ujur/ulovdata/lov-20060519-016-eng.pdf.

offer any information on the possibility of invoking the Environmental Information Act as a basis for access to environmental information.

We may thus ask whether Norway's public authorities, including the environmental authorities, consider whether environmental information can be exempted according to the Environmental Information Act. In practice, they might be taking the Act into consideration, without stating that they do so in the post journals. I have attempted to get access to some documents containing environmental information that the post journals listed as not available to the public. In all cases, I was denied access to the information. The ministries consistently based their decisions on the Freedom of Information Act and never referred to the Environmental Information Act.¹² Moreover, searches in the post journals of all public authorities to identify decisions on access to information on the basis of the Environmental Information Act proved essentially negative. In only very few cases have persons requested information and made explicit reference to the Environmental Information Act.¹³ Against this background, we can conclude that the public authorities generally do not on their own initiative take the Environmental Information Act into consideration when determining whether access to environmental information shall be denied. This applies at least when the authorities make their initial decision on whether to deny access to the document. It seems also to be the case when public authorities are asked to reconsider their initial decision, at least as long as those seeking access do not invoke the Environmental Information Act. One factor which may be of some importance is that it would require a certain amount of additional administrative resources to first determine whether the information in question is environmental information, and thereafter assess whether the information can be exempted according to the Environmental Information Act.

This attitude to the Environmental Information Act may also reflect the point of view that this Act does not provide private parties with rights of access to information beyond the rights that follow from the Freedom of Information Act. One reason might be that the relationship to the existing Environmental Information Act was

12 Access to information was denied in six cases, five by the MoE and one by the Ministry of Transport and Communication: decisions on file with the author.

13 Eight cases were found: two involving the Ombudsman, two where students at the University of Oslo sought access to information from various ministries, as well as cases where a journalist, environmental NGOs (2), and a private person have sought information. The search identified only cases that have been appealed and where «miljøinformasjon» is mentioned in the case file name or in the letter headings.

hardly discussed in the preparatory works to the new Freedom of Information Act.¹⁴ While at least one professor supports the view that the Environmental Information Act does not add significant rights of access to information,¹⁵ other authors, including Bugge,¹⁶ the Ombudsman,¹⁷ and the Legislation Department at the Ministry of Justice¹⁸ are of the opinion that the rights of access to information under the Environmental Information Act go beyond those under the Freedom of Information Act. Moreover, as stated in Norway's 2010 Implementation Report, which was prepared by the MoE, the «purpose of the Environmental Information Act is precisely to strengthen the right of access to information on the environment.»¹⁹ Further:

If a public authority wishes to refuse a request for public information, the Environmental Information Act lays down that there must be a genuine and objective need to do so in the specific case. This is considered an additional requirement to the rules laid down in the Freedom of Information Act, which always applies alongside the Environmental Information Act. The provision can be regarded as expressing a requirement for the public administration to make particularly careful assessments of requests for information under the Environmental

14 There is nothing of relevance to this in Ot.prp. nr. 102 (2004–2005) *Om lov om rett til innsyn i dokument i offentlig virksomhet (offentleglova)*, and only brief references and discussions in NOU 2003: 30 *Ny offentlighetslov*, see pp. 101, 213–14, 219.

15 Such a view has been expressed by Jan Fridtjof Bernt, «Allmennhetens innsyn i det offentlige virksomhet – en oversikt», *Jussens Venner* 2009, at 281.

16 Bugge, *supra* note 2, at 502, Bugge Lærebok, *supra* note 2 at 93–94, and Cabot, *supra* note 2, at 60, and 156–69.

17 See, most recently, case no. 2010/479: «Som det fremgår, stiller miljøinformasjonsloven § 11 to kumulative krav for at opplysninger skal kunne unntas: For det første kreves at opplysningene kan unntas med hjemmel i offentlighetsloven. For det andre må det foreligge et «reelt og saklig behov» for å kunne avslå innsynsbegjæringen. Det er således ikke tilstrekkelig at opplysningene kan unntas med hjemmel i offentlighetsloven; det må i tillegg foreligge et reelt og saklig behov for det.» See also cases 2008/571, 2007/557, 2005/1317, 2005/1463, 2005/1472, and 2005/1763.

18 See Lovavdelingens uttalelser, doc. 2008/07049 EO MHG/mk, para. 4: «... er det et nødvendig, men ikke tilstrekkelig, vilkår for å gjøre unntak fra innsyn for miljøinformasjon etter miljøinformasjonsloven § 11 første ledd at informasjonen eller dokumentet informasjonen finnes i, kan unntas fra innsyn etter offentleglova. ... Vurderingen som skal foretas etter miljøinformasjonsloven § 11 annet ledd, er ... et stykke på veg lik meroffentlighetsvurderingen som skal skje etter offentleglova § 11 i situasjoner der dokumenter eller opplysninger kan unntas fra innsyn etter offentleglova. Men mens utfallet av meroffentlighetsvurderingen etter offentleglova § 11 ... hører under forvaltningens frie skjønn, vil forvaltningen etter miljøinformasjonsloven § 11 annet ledd ha en plikt til å gi innsyn i miljøinformasjon når de miljø- og samfunnsmessige interessene som varetas ved offentliggjøring, veier tyngre enn de hensyn som varetas ved avslag.»

19 Report, *supra* note 8, at 5.

Information Act. The requirement that there must be a genuine need to withhold information means that it is not sufficient that there be a certain risk of negative consequences for the interests that are protected by the exemption provision discussed here.

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.²⁰

An additional right of access to information follows from section 11(3) of the Environmental Information Act, which has no parallel in the Freedom of Information Act. Norway highlighted this provision in its Implementation Report:

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 contents²¹

Against this background, we can conclude that the Environmental Information Act contains rights of access to information that go beyond those of the Freedom of Information Act. These provisions constitute significant elements of Norway's implementation of the Aarhus Convention. While Norway is eager to invoke the Environmental Information Act as an essential means of implementing the Aarhus Convention, there are very few traces of the Act when we examine the decisions of public authorities regarding access to environmental information. Moreover, the material examined in this study indicates that those cases where the Act has been invoked, including cases where the Ombudsman has criticized the practice of public authorities, have not resulted in any discernible changes in the administration of the Act.

20 Ibid. at 7.

21 Ibid. at 8. The rule in the Freedom of Information Act is different, see sections 11 and 12.

The Norwegian authorities' lack of interest in the practical effects of the Act can be observed in the Implementation Report. The format for implementation reports asks countries to «[p]rovide further information on the practical application of the provisions on access to information, e.g. are there any statistics available on the number of requests made, the number of refusals and their reasons?» Norway responded as follows:

Regarding the practical application of the provisions, the reader is referred to the general text above. There has not yet been established any statistics on the number of requests for information the public administration as a whole receives that concern environmental information. However, the Ministry of the Environment's statistics for 2009 show that it received about 2,844 requests for information under the Freedom of Information Act and provided the information in 91,49 per cent of these cases (and about 90 per cent of these again received the information within 1–3 days).²²

What is telling here is the absence of any statistics regarding the Environmental Information Act, including information on whether the Act was applied in decisions of the MoE or its related directorates, or invoked by private parties.

3 «Environmental information»

It has frequently been held that «environmental information» shall be understood in a broad sense – this is noted *inter alia* in the preparatory works of the Environmental Information Act,²³ in a Supreme Court decision,²⁴ and in relevant literature.²⁵ One consequence could be that the MoE and its associated directorates decide that the information they have is to be regarded as «environmental information» unless otherwise specified. As follows from the above discussion, no such decision has been made. Indeed, the current approaches of these authorities seem to establish the contrary starting point: the Environmental Information Act will be applied only when a decision has been taken that classifies the information as «environmental». Moreover,

22 Ibid. at 9.

23 See Ot.prp. nr. 116 (2001–2002) *Om lov om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (miljøinformasjonsloven)* section 8.3.4, pp. 37–38.

24 See Rt 2010 p. 385, para. 32.

25 Bugge, *supra* note 2, at 495–97, and Cabot, *supra* note 2, at 87–92.

such decisions regarding classification of information will be taken only when the authorities are explicitly asked to do so by private parties. There is thus a tension between the broad concept of «environmental information» as referred to in theory, and the narrow concept of «environmental information» as applied in practice.

According to the statistics provided by the MoE in its Implementation Report, access to information is denied in only 8.51 per cent of the cases. At first glance, this would seem to indicate a high degree of transparency. When consulting the post journals of the MoE, we can easily observe that approximately 90 per cent of the information is open to the public. Hence, if we assume that the probability that private parties will request information is independent of the authorities' initial decisions on whether to restrict access to the information, we can conclude that reconsideration of the initial decision is unlikely to change the decision. However, further information regarding the environmental authorities' reconsideration of initial decisions is unavailable.²⁶

In the following, we shall consider in some detail one category of information that is of particular interest to legal experts: legal advice. Legal advice can be provided in various ways within the same public authority, or from one authority to another. In the following, I will limit the discussion to legal advice provided in writing from one authority to another authority. Such written advice can easily be identified by private parties, and is also more likely to be invoked in discussions between the authority that has received the advice and the other authorities or external parties.

In Norway, as in many other countries, there are two ministries with particular responsibility for providing such legal advice to the public authorities: the Ministry of Justice on topics regarding national law, and the Ministry of Foreign Affairs on topics regarding international law. The two ministries pursue very different practices as to access to such legal advice. While such legal advice provided by the Ministry of Justice is available and actively distributed,²⁷ the legal advice provided by the Ministry of Foreign Affairs is generally unavailable. Since there is less transparency regarding legal advice provided by the Ministry of Foreign Affairs, we shall focus on such advice in the following.

Main reasons for not providing access to legal advice issued by the Ministry of

26 The only ministry to make such statistics readily available is the Ministry of Agriculture and Food. See www.regjeringen.no/nb/dep/lmd/aktuelt/Offentlig-elektronisk-postjournal---OEP1/landbruks--og-matdepartementets-oppfolgn.html?id=546590.

27 Legal advice from the Ministry of Justice has been issued in separate publications and is now available in a separate database, see www.lovdato.no. This database contains more than 2000 documents dating back to 1976.

Foreign Affairs are that availability of such information may negatively affect Norwegian interests in international negotiations, limit Norway's freedom to choose arguments in future negotiations or disputes, or damage relations to other countries or international institutions. Accordingly, section 20 of the Freedom of Information Act states:

(1) Exemptions from access may be made in respect of information when this is required out of regard for Norway's foreign policy interests where: ... (c) the information relates to Norwegian negotiating positions, negotiating strategies or the like and such negotiations have not been concluded. After conclusion of negotiations, exemptions may still be made in respect of such information where there is reason to believe that negotiations on the same matter will be resumed. ...

(3) In cases other than those mentioned in the first and second paragraphs, exemptions from access may be made in respect of information when this is required by particularly weighty foreign policy interests.

In addition, we may assume that legal advice concerning international law is inherently more political than legal advice concerning national law. One main reason is that international legal obligations in general are more «open-textured», i.e. less specifically defined, than national law. Another reason is that official statements concerning how Norway interprets its international obligations may have significance for subsequent interpretation and application of those obligations in international contexts. Even if the latter would be relevant also for the legal advice provided by the Ministry of Justice in relation to the national legal system, it would be easier for Norwegian authorities to initiate amendment of national rules than to initiate changes of international law as a reaction to unfavourable legal advice.

The first question is whether access to legal advice concerning international law can be denied on the basis of section 20 of the Freedom of Information Act. Provided that such advice is based on existing obligations, the advice can be exempted only if «there is reason to believe that negotiations on the same matter will be resumed» or there are «particularly weighty foreign policy interests». According to the preparatory works, these exemptions should be applied restrictively.²⁸ In almost all cases, access to such advice would thus have to be denied on the basis of section 15 of the Act, which concerns documents obtained externally for internal preparation of a case.

28 Ot.prp. no. 102 (2004–2005) *Om lov om rett til innsyn i dokument i offentlig verksemd (offentleg-lova)*, pp. 67–68 and 140.

According to the preparatory works, this provision should be applied restrictively.²⁹

The next question is whether information issued in the form of «legal advice» can be regarded as «environmental information». According to section 2(1) of the Environmental Information Act:

Environmental information means ... assessments of: ... b) factors that affect or may affect the environment, including ... administrative decisions and measures, including individual decisions, agreements, legislation, plans, strategies and programmes, as well as related analyses, calculations and other assumptions used in environmental decision-making ...

International law has become an increasingly important factor when designing domestic policy measures.³⁰ While Norway does to some extent take initiatives that go beyond the standards defined by multilateral environmental agreements, it is recognized that international law plays an essential role for the design of Norwegian environmental policy.³¹ We can begin by observing that there is no specific regulation of legal advice concerning international law in the Environmental Information Act beyond section 11(1), which refers to the exemptions under the Freedom of Information Act, including sections 15 and 20. Moreover, it seems clear that legal advice concerning international obligations that are significant for the design of national environmental policy would fall within the scope of «environmental information» as defined in Section 2(1)(b) of the Environmental Information Act, but it is unclear whether such advice would be covered by the corresponding provision of the Aarhus Convention (article 2(3)(b)). The key difference between the Environmental Information Act and the Aarhus Convention is the omission of the word «economic» in the former. Hence, while the Aarhus Convention is limited to «cost-benefit and other economic analyses and assumptions used in environmental decision-making», the Environmental Information Act extends to any «analyses, calculations and other assumptions used in environmental decision-making».

29 Ibid. pp. 53–54 and 132–36, see in particular p. 134: «Dersom dokumentet berre inneheld generelle premisser som skal inngå i avgjerdsgrunnlaget til mottakaren, f.eks. generelle utgreiingar av faktiske tilhøve eller av gjeldande rettstilstand, vil det derimot som hovudregel ikkje vere høve til å unnata det.»

30 See *ibid.* p. 67: «Dette tilseier at reglane legg til rette for auka innsyn, særleg når det gjeld prosessar om internasjonal normutvikling i internasjonale organisasjonar.»

31 See OECD, *Environmental Performance Review of Norway, 2011* and St.meld. nr. 26 (2006–2007) *Regjeringens miljøpolitikk og rikets miljøtilstand*.

The question is thus whether section 2(1)(b) of the Environmental Information Act must be interpreted restrictively in light of the corresponding provision of the Aarhus Convention. The preparatory works of the Act show that the definition of «environmental information» in the Act was considered in great detail and commented upon by many interested parties. The definition was also one of few issues on which there were diverging opinions in the committee that prepared the initial proposal for the Act.³² According to the preparatory works, the reference to «analyses» and «assumptions» in the proposed Act was intentionally broad.³³ As indicated above, there is support in subsequent practice for applying a broad understanding of the reference. Arguably, such a broad understanding is also supported by the link between the Act and section 110b of the Norwegian Constitution, which refers to the right to information about the environmental effects of future activities. The conclusion is therefore that there is no convincing reason for a narrow interpretation of this part of the Act's definition of «environmental information». The Environmental Information Act is thus applicable to legal advice, including such advice concerning international law.

4 Scope of information sought

Legal advice concerning international law may be provided in various forms, including during informal consultation among public authorities, for example in the form of e-mails. Thus, for the requester it might be difficult to limit a request to specific documents containing such advice. Provided that the requester has fulfilled the initial requirement to identify the information sought with sufficient precision,³⁴ we may ask whether the public authorities have incentives to refer to a broad range of potentially relevant documents when faced with an appeal of a decision not to allow access to such legal advice. In other words, would the public authorities have incentives to pursue strategies that would frame requests for such legal advice as resource-

32 See NOU 2001: 2 *Retten til miljøopplysninger. Allmennhetens rett til å få miljøopplysninger fra offentlige og private aktører og retten til å delta i offentlige beslutningsprosesser*, chapter 8.

33 See Ot.prp. nr. 116 (2001–2002) *Om lov om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (miljøinformasjonsloven)*, at 53–54.

34 See sections 3, 4 and 28 of the Freedom of Information Act, and section 10(3) of the Environmental Information Act.

demanding, complex and disproportionate?³⁵

Such strategies might be successful in cases where the appeals are to bodies inclined to be sympathetic to the perspectives presented by the authorities, e.g. where the appeals are to superior administrative authorities. Where the appeals go to independent bodies, such strategies are arguably less likely to succeed. Nevertheless, such strategies may delay cases and present independent bodies with additional difficulties when deciding cases. Such strategies could thus delay cases to the extent that the requester loses interest in the case, or the information arrives too late to be used for the purposes intended. Attempts to delay access to information might be particularly tempting in politically sensitive cases, for example in controversial cases prior to elections or in politically controversial cases where the press seeks additional information.

We must also ask whether authorities following strategies based on references to broad ranges of potentially relevant documents would risk negative reactions from appeals bodies. The authorities may claim that they are fulfilling their duty to identify all potentially relevant information and that this is in accordance with principles of good administration. It would be hard for appeals bodies to reject such claims unless there are clear indications that the authorities are exaggerating. Consequently, there seems to be little risk that such strategies would backfire on the public authorities during appeals.

Statistics regarding appeals are not readily available in Norway, so it is difficult to assess whether the public authorities pursue such strategies in practice. Theoretically, we can observe that public authorities may have significant incentives to identify broad ranges of documents of potential relevance to the request for information. While such approaches might directly or indirectly be to the advantage of the authorities, they might also represent efforts to follow principles of good governance to the advantage of the requesters. It is important for appeals bodies to be aware of these issues and take measures to prevent abuse. In order to gain insight into and provide opportunities for critical analyses of the practice of public authorities, countries should be expected to gather and make available information concerning appeals cases. In Norway, such information is generally available for appeals to the

35 The case referred to in note 4 above is illustrative. While the request concerned information referred to as «an assessment» in the preparatory works (see Ot.prp. no. 52 (2008–2009) p. 69: «en vurdering»), the MoE in its letter to the Ombudsman (dated 12 April 2011, on file with author) indicated that the legal advice was contained in 25 documents representing communication between the MoE and mainly the Ministry of Foreign Affairs, but also between the MoE and a range of other ministries.

Ombudsman: but, with one minor exception,³⁶ I have not been able to identify information on cases where appeals were directed to superior authorities or to the courts.

5 Remedies

In Norway, when faced with a refusal of access to information from a ministry, the requester has three main options for appealing the case: 1) bring the case to the Ombudsman for Public Administration, an inexpensive and flexible option; 2) appeal the refusal to the Government, which would block the possibility of bringing the case before the Ombudsman; 3) bring the case to court, probably a costly exercise.³⁷ In this section, we will examine the extent to which these options are effective remedies in accordance with article 9(1) and (4) of the Aarhus Convention.

The procedure followed in the first option, appeals to the Ombudsman, is as follows.³⁸ The Ombudsman sends the appeal to the public authority in question with a request that copies of the documents relevant to the case be sent to the Ombudsman. On the basis of the documents presented, the Ombudsman takes a preliminary decision on whether to proceed to examine the case. The preliminary decision and a request to clarify the case in light of specific issues raised by the Ombudsman are sent to the public authority. The response from the public authority is sent to the requester for comments. These are thereafter sent by the Ombudsman to the public authority for further comments before the Ombudsman proceeds to decide the case. If the case is not resolved or withdrawn during this process, the case may take in excess of seven months from the appeal to the decision by the Ombudsman.³⁹ In addition, it will take time for the public authority to re-

36 See note 26 above. The statistics provided by the Ministry of Agriculture and Food show that very few decisions denying access to information are appealed (only ten out of 679 where the requests were fully or partially rejected); further, that of the ten cases appealed between January 2009 and July 2011, six were rejected and four were successful.

37 On the costs of bringing cases to court in Norway, see Ole Kristian Fauchald, «Environmental Justice in Courts – a Case Study from Norway», *Nordic Environmental Law Journal* 2010: 1, p. 49, at 53–4 and 61.

38 The main elements of the procedure of the Ombudsman is described at: www.sivilombudsmannen.no/klage/saksgang_2/

39 This estimate is based on the deadlines that the Ombudsman applies in its correspondence with the parties to the case. In complex cases, the time spent to process the cases may extend beyond seven months (see *supra* note 4). The statistics of the Ombudsman shows that in 2010 the average case-processing time for cases closed after being raised with the public administration was 170 days, see The Parliamentary Ombudsman, Annual Report 2010. Summary in English, p. 9.

spond to the findings of the Ombudsman, should the appeal succeed. The findings of the Ombudsman are not binding on the public authority, but it is unlikely that the authority would deny access to documents to which the Ombudsman recommends granting access.

There are at least two elements of this procedure that may give rise to concern. First, the public authorities have the benefit of the final word. This procedural element might serve to inform the case, secure a high quality of the final decision, and strengthen the probability that the public authorities will comply with the decision of the Ombudsman. However, in light of the purpose of the Ombudsman, which is to «endeavour to ensure that injustice is not committed against the individual citizen by the public administration and help to ensure that human rights are respected»,⁴⁰ we may question the appropriateness of this element of the procedure. It can be argued that the public authorities should be sufficiently professional to be able to present their case appropriately in the initial decision and the subsequent elaboration. Moreover, the Ombudsman deals with the public authorities on a day-to-day basis, and must in general be presumed to be well informed regarding their arguments and interests. It is also relevant that the decision of the Ombudsman is not binding on public authorities, so they have the opportunity of disregarding decisions with which they disagree fundamentally. It is therefore hard to see that there is a real need to give public authorities the final word.⁴¹ Providing the public authorities with such opportunities may undermine the trust of private parties that the process will be fair and unbiased. It can thus be questioned whether this procedural element is in accordance with the requirement in article 9(4) of the Aarhus Convention that the procedure be «fair» and «equitable».⁴² Moreover, if the objective is to enable the public authorities to reconsider their decision in light of the comments of the private party, the authorities could be given this opportunity without the possibility of further arguing their case. Finally, this part of the procedure extends the time spent by the Ombudsman on cases by at least three weeks. Against this background, I would argue that the Ombudsman should reconsider the need for this element of the procedure. One

40 Section 3 of the Act of 22 June 1962 no. 8 concerning the Storting's Ombudsman for Public Administration.

41 It has not been possible within the framework of this article to explore the extent to which public authorities in practice make use of this opportunity to get the final word.

42 It can be questioned whether the requirements in article 9(4) apply to each individual procedure in article 9(1), or whether the requirements apply to all available procedures considered together. Before addressing this question, it is necessary to determine the extent to which each procedure available to a requester fulfils the requirements of article 9(4).

option could be to apply this part of the procedure only in exceptional cases where further information is needed in light of the comments received.

The second concern is the time the procedure takes. In most cases, the information is needed for immediate use. As access to information is increasingly easy, and social, technological and scientific processes are accelerating, the expiry date of information is becoming shorter. Norway claims in its Implementation Report that requests for information «must be responded to ‘without undue delay’, normally 1–3 working days.»⁴³ Against this background, a procedure that takes at least eight months before access to information is provided can hardly be termed «expeditious», as required by article 9(1), second paragraph of the Aarhus Convention. Indeed, this procedure is less expedient than the complaint procedure available under the Environmental Information Act to a private party that is denied access to environmental information by another private party («undertaking»)⁴⁴ It can also be questioned whether such a procedure provides an «adequate and effective» and a «timely» remedy in accordance with article 9(4) of the Convention.

Space constraints do not allow detailed consideration of the two other remedies mentioned above, so some brief comments are offered to provide the context of the Ombudsman procedure. First, appealing a decision by a ministry to the Government would prevent the Ombudsman from dealing with the case subsequently.⁴⁵ However, this applies only in cases where the appeal goes to the Government. Otherwise, the case could be brought to the Ombudsman subsequent to an appeal to a superior authority. Moreover, an appeal to the Government would go through the authority that initially made the decision, with the latter authority thus getting the final word in the presentation of cases to the Government. This raises the same concerns regarding fairness and equity as pointed out above. Finally, a search in the post journals of the MoE has indicated that, even though the MoE denies access to information in more than 250 cases per year,⁴⁶ very few decisions refusing access to environmental

⁴³ Report, *supra* note 8, at 5.

⁴⁴ See chapter 4 «Environmental information concerning undertakings of the Environmental Information Act», whereby a *Miljøklagenemnd* is established. This body meets four times per year; it spent an average of less than five months on its ten most recent decisions (cases 2009/4-2011/1, see www.miljoklagenemnda.no). Unlike the decisions of the Ombudsman, the decisions of the *Miljøklagenemnd* are legally binding.

⁴⁵ See section 4(b) of the Act of 22 June 1962 no. 8 concerning the Storting's Ombudsman for Public Administration.

⁴⁶ See Report, *supra* note 8, at 9.

information are appealed to superior authorities.⁴⁷

Secondly, as indicated above, bringing a case to court would in most instances be excessively costly.⁴⁸ In addition, Norwegian court cases take an average of some five months for the first instance (*Tingretten*).⁴⁹ Finally, although full information is admittedly unavailable,⁵⁰ a search in the cases registered in the relevant database of Norwegian court decisions reveals that hardly any cases concerning access to information are in fact brought before the courts.⁵¹

Against this background, it seems justified to question whether Norway is fulfilling its obligations under article 9(1) and (4) of the Aarhus Convention to provide access to remedies in cases where information is denied. A full assessment of administrative appeals and court procedures needs to be undertaken before any final conclusions can be drawn. Such an assessment will need to identify the actual use of such procedures and potential reasons for non-use. Should this assessment conclude that these procedures do not in themselves fulfil the requirements of article 9(1) and (4), the above findings regarding the Ombudsman procedure demonstrate that its procedure would not compensate for such shortcomings. Against this background, there is reason for the Aarhus Convention Secretariat to request statistics regarding the use of various remedies in Norway.⁵²

47 See note 13 above and accompanying text. The findings above concerning the Ministry of Agriculture and Food point in the same direction; see notes 26 and 36.

48 See note 37 above. As indicated in Norway's Implementation Report (*supra* note 8 at 21), the less expensive alternative of bringing the case before a conciliation board would not be an option in these cases.

49 See Domstolsadministrasjonen, *Domstolene i Norge. Årsmelding 2010*, at 68.

50 The database contains only approximately one per cent of cases decided by courts in the first instance.

51 No cases concerning the Environmental Information Act were found (cases concerning access to environmental information from private persons are not counted). Only seven cases based on the Freedom of Information Act were identified as potentially relevant (the original Act was adopted in 1970). These were Rt 2010 p. 1404, Rt 2010 p. 740, Rt 1977 p. 1035, RG 2006 p. 1511, RG 1995 p. 1213, LB-2005-36164, and LG-1993-502. The search was made on www.lovdato.no as follows: 'offentlighet*' in the search option 'Lovhenvisninger' provided 201 hits, among which the cases were identified.

52 See Report, *supra* note 8, at 21, where Norway is requested to provide the following information: «Provide further information on the practical application of the provisions on access to justice pursuant to article 9, e.g. are there any statistics available on environmental justice and are there any assistance mechanisms to remove or reduce financial and other barriers to access to justice?» The Norwegian reply was as follows: «There are no such statistics available. Regarding financial barriers, reference is made to the general text above.»

6 Concluding remarks

In his article concerning the Environmental Information Act in 2005, Bugge observed uncertainties regarding the effects of the Act and indicated that its effects would depend partly on the extent to which the Act would be actively promoted by the authorities, and partly on how the Act would be interpreted and applied by the public authorities.⁵³ As to the former, a search in a database covering printed newspapers in Norway has shown that the Environmental Information Act was mentioned 87 times since its adoption in 2003, including instances where the Act was related to access to information from private parties, and that the frequency of referring to the Act seems to be decreasing.⁵⁴ Against this background, as well as in light of the limited use that has been made of the Act in order to gain access to information from public authorities, as shown above, we may question the success of Norwegian authorities' attempt to promote the Act. However, one bright spot regarding the practical effects of the Act is its effects on access to environmental information from private parties. The Appeals Board, *Miljøklagenemnda*, deals with an average of more than ten cases each year, and has rendered a total of 52 decisions.⁵⁵ Moreover, one case concerning the right of access to information has been successfully brought all the way to the Supreme Court by a NGO.⁵⁶ This has probably heightened public awareness of the Act and demonstrated that it may be put to effective use.

As to the latter factor, this contribution has shown lack of will within the MoE to establish or contribute to appropriate procedures for application of the Environmental Information Act. Moreover, the materials examined above indicate that the MoE in its practice interprets the Act narrowly, to an extent where we can justifiably question whether section 11 of the Act constitutes any value added when private parties seek access to information from public authorities.

⁵³ Bugge, *supra* note 2, at 502.

⁵⁴ The search in the database 'A-tekst' for 'miljøinformasjonsloven' provided the following results: 3 references in 2003, 12 in 2004, 24 in 2005, 6 in 2006, 17 in 2007, 8 in 2008, 4 in 2009, 8 in 2010, and 5 in 2011 (covering the period until mid-August). The Act was most frequently referred to in the news media *Aftenposten* (13), *Stavanger Aftenblad* (10), *Adresseavisen* (9), NTB tekst (9) and *Klassekampen* (5).

⁵⁵ The Board has had the following case load during its existence: 13 cases in 2004, 14 cases in 2005, 8 cases in 2006, 12 cases in 2007, 12 cases in 2008, 6 cases in 2009, and 12 cases in 2010; see www.miljoklagenemnda.no. See note 44 above for further information on case-processing time.

⁵⁶ See Rt 2010 p. 385.

These findings demonstrate the importance of effective administrative action to follow up new legislation. The lack of such action in relation to access to environmental information from public authorities has rendered section 11 of the Environmental Information Act largely ineffective. Moreover, whereas this contribution has pointed out significant concerns regarding the remedies available to those who have been denied access to environmental information by public authorities, the initiative to establish a *Miljøklagenemnd* has proven relatively effective. These observations have implications for how one should address cases concerning denial of access to information in the future. In my view, the decision not to establish an independent complaints procedure under the Freedom of Information Act may need to be reconsidered.⁵⁷

Finally, the above findings indicate some weaknesses in the processes dealing with country reports under the Aarhus Convention. Norway's Implementation Report describes the following national process before the Report was submitted:

The draft report was circulated on 26 October 2010 to private organizations and local and central authorities for comments (about 100 recipients). At the same time, it was also placed on the Internet. The deadline for replying was set for 20 November 2010. The Ministry of the Environment (MoE) received 20 comments, none of which were critical to the draft report. All comments have however been taken into account when submitting this report, and the comments will also provide valuable input in future improvements in the Norwegian implementation of the Convention.⁵⁸

This domestic process, previously applied twice with similar results, seems impressive. In fact, however, it has failed to identify any of the above weaknesses regarding Norway's implementation of the Aarhus Convention. This is surprising, as we should assume that private parties who are denied access to information would seize the opportunity to criticize the same public authorities. In my view, the primary reasons are probably failure among those participating in the hearing to understand the opportunity presented by the hearing, as well as fatigue among NGOs regarding participation in public hearings. Another reason could be the lack of appropriate follow-

57 See Ot.prp. nr. 102 (2004–2005) *Om lov om rett til innsyn i dokument i offentlig verksemd (offentleglova)*, pp. 102–4. See also the thorough discussion in NOU 2003: 30 *Ny offentlighetslov*, pp. 235–46.

58 Report, *supra* note 8, at 1.

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up procedures after implementation reports have been submitted to the Secretariat of the Aarhus Convention.⁵⁹ Many options are available for designing follow-up procedures to ensure more effective implementation. Any deeper discussion of such options, however, would take us beyond the scope of this contribution.

59 See decisions I/8, II/10, III/5 and IV/4 of the Meeting of the Parties to the Aarhus Convention.