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Aarhus Convention Compliance Committee
Attn. Fiona Marshall

Comments to draft report from the communicant in the case concerning compliance by Norway in connection with access to the legal assessment carried out prior to the adoption of the Nature Diversity Act (ACCC/C/2013/93)

I would like to thank the Committee for this opportunity to present comments to its draft findings.

I have a significant number of comments. I consider many of the comments to be serious and that they are important to ensure that the Committee's findings address all aspects of the case thoroughly and in light of all the documents and arguments presented, including in particular the proceedings of the Committee in December 2014. I would argue that the Committee has a particular duty in accordance with the principle of "equality of arms" to ensure that the views and arguments of the communicant is fairly represented in its findings since the communicant's only opportunity to counter arguments and materials presented by the government occurs in the context of the proceedings before the Committee. While the Committee refers to the opening statement of the Party concerned (see footnote 71 of the draft findings), there is no similar reference to the any of the communicant's statements during the proceedings. The comments below are based on and to some extent further explain and elaborate on documents submitted to and arguments made before the Committee, either in my communication or in the context of the proceedings.

I have general concerns relating to paragraphs 33-62 of the findings. These paragraphs are, as I read them, based on my submission to the Committee and the Party concerned's responses to my submission. I was given the possibility of countering the Party concerned's responses during the oral hearing. The main arguments I made during the oral hearing were summarized in the documents "Communicant's opening statement" and "Communicant's closing statement". As far as I can see, the arguments I made during the oral hearing have not been reflected in paragraphs 33-62. Therefore, the paragraphs do in my view not represent a sufficiently balanced account of the arguments presented. Since the Committee's account of the arguments presented in the case in essence is based on my initial submission and the Party concerned's response, it does in my view unfairly favour the perspective of the Party concerned. I therefore propose a number of revisions to paragraphs 33-62 and hope that the Committee will revise its account of the arguments made accordingly.

Moreover, I observe that the Committee has on many occasions found the communicant's allegations to be "unsubstantiated" (paras. 69, 79 and 83, see also paras. 91 and 94, as well as para. 68). Such findings

not only indicate that the Committee has found that the facts and arguments before it were insufficient to convince the Committee that a violation had occurred. They indicate that the Committee found that the allegations were not substantiated in the case as presented by the communicant. Such findings represent strong rejections of the claimant's allegations and should be based on a thorough examination of all the materials before the Committee. In light of the principle of "equality of arms" and the limited opportunities for the communicant to present materials and arguments to the Committee, it is important that the Committee pose questions to and seek clarifications from the communicant should there be issues where the Committee needs further explanation or facts. Against this background, I hope the Committee will reconsider its findings in paragraphs 67-94 in light of its revisions to paragraphs 33-62 and the comments below.

Finally, I hope that if the Party concerned is allowed to present new facts or arguments in response to my comments, the Committee will provide me an opportunity to comment on such facts or arguments.

Comments by paragraph:

1. Para. 1: Please use my full name: Ole Kristian Fauchald.
2. Para. 2: Please revise the statement regarding my allegations in accordance with section V of my submission: "The communicant alleges non-compliance with article 4, paragraphs 3(c), 4, 6, 7, and article 9, paragraphs 1 and 4."
3. Para. 7: Please revise in order to make clear that the communicant represented himself: "The Committee discussed the communication at its forty-seventh meeting, with the participation of the communicant and of representatives of the Party concerned."
4. Para. 21: It would be good if the quote from the Parliamentary Ombudsman Act could include the following from Section 4 on the "Sphere of responsibility" of the Ombudsman, as it is of particular importance to the case: Section 4(2): "The sphere of responsibility of the Ombudsman does not include: … b) decisions adopted by the King in Council".
5. Para. 23: The text should not leave the impression that the information request concerned a specific set of documents. The scope of documents relevant to the request has been a point of controversy between the communicant and the Party concerned. I have on several occasions claimed that the Party concerned has included a number of documents of little or no interest to the request. This was brought up very early in the case (from the moment it was clear that the Ministry had submitted 25 documents to the Ombudsman). I quote the following from my comments to the Ministry's submission to the Ombudsman (annex 9 to the communication, p. 4):

   > "As a final comment, I remark that I have no possibility of commenting on the interest of confidentiality in the internal procedures in the present case. However, 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 ot.prp. 52. 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. The inclusion of such documents in the case should not provide a basis for

concluding that access to the legal assessment would provide a "clearly misleading impression of the contents" of the case, see section 11(3) of the Environmental Information Act."

Moreover, I quote the following from my comments to the decision by the Ombudsman (annex 14 to the communication, pp. 2-3):

"I have requested access to information regarding the legal assessment. According to ot.prp nr. 52 (2008-2009) regarding the Nature Diversity Act, section 7.2.4.3: "An assessment of the relationship of the provisions to international law has been carried out, which has shown the necessity for amendments and adjustments of the provisions if they are to be applied outside of 12 nautical miles." I request access to this assessment. In its response to the Ombudsman, the Ministry has listed a number of documents that are irrelevant to the request for information. In my view, this has contributed to make the case excessively complex and contributed to prolong the case. This should in my view be criticized."

Against this background, it would be good if the text could reflect the disagreement regarding the scope of the request, for example along the following lines: "The Ministry of Climate and Environment identified 25 documents, partly internal documents, partly documents exchanged between the Ministry of Climate and Environment and other Ministries which it considered relevant to the request. The communicant repeatedly asked that only documents containing the legal assessment be considered."

6. Para. 27: The text seems to indicate that the letter sent to the Ombudsman and the Ministry only was a "reminder". This reflects the terminology that I used when translating the document. However, as how the letter was phrased in the original seems to have become an important issue in the case, I would like to indicate that the original language of the letter differs somewhat from my translation. The first sentence of the letter ends by stating "I deem it necessary to take a new initiative in this case" (in the original: "finner jeg det nødvendig å ta et nytt initiativ i denne saken"). I ask that the translation be corrected accordingly.
7. Para. 34: It would be good if the text could be clarified in light of Section 4(2) of the Parliamentary Ombudsman Act as quoted in my comment no. 4 above as well as in light of the general characteristics of the Norwegian procedure for administrative complaints. As to the latter, I refer to section VI in my submission. I admit that the statement in my submission was somewhat unclear in this regard. In this case, the initial decision was made by the Ministry, and the only superior authority to the Ministry is the Government. As set out in Section 4(2) of the Parliamentary Ombudsman Act, the Ombudsman cannot review a decision by the Government. Hence, my options were either to direct my complaint to the Government or to the Ombudsman. As indicated in my submission, my assessment was that the chances of getting a fair review of the decision were higher with the Ombudsman than with the Government, and this was the reason why I chose that option. Against this background, I propose the following reformulation of paragraph 34:

"The communicant submits that the Ombudsman was the preferred option since the decision was made by the Ministry and an administrative complaint would have to be brought to the superior administrative body, in this case the King in Council. The communicant voiced concerns that such a complaint procedure would be ineffective due to the joint interest in maintaining confidentiality of the reviewing authority and the authority that originally took the decision. If a complaint had been brought to the Government, the case could not subsequently have been

dealt with by the Ombudsman. He further points out that a submission to the Ombudsman pre-empted other remedies, largely due to the time that the Ombudsman process took."

8. Para. 39: The arguments made by the Party concerned as referred leave the impression that judicial review in Norway is expeditious and inexpensive. In the article submitted to the Committee as part of my communication (annex 5), I elaborate on the remedies available and make the claim that "bringing a case to court would in most instances be excessively costly" (p. 185). In order to further elaborate this point, I encourage the Committee to take into account the following: According to statistics from 2015 (annual report from the Norwegian Court Administration), the average time for a civil case in the first instance was 5.6 months in Norway. An appeal must be made within one month. The average time for an appeal in a civil case was 6.1 months. The decision of the appeals court can be further appealed to the Supreme Court. The average time for an appeal to the Supreme Court was between 0.8 and 8 months in 2016. Altogether, an average civil case is likely to take between one and two years before a final decision if appealed all the way to the Supreme Court. In my case, I considered it unlikely that the Government would refrain from appealing should it lose the case in the lower courts. Moreover, in light of the 25 documents presented by the Government to the Ombudsman as relevant to the case and my lack of success in limiting the scope of the case, I considered it likely that the Government would continue to argue the case based on those documents before the courts. The time it took the Ombudsman to reach a decision in the case and the time the Ministry needed to reconsider its decision illustrate the complexity of the case. I therefore considered it likely that a court would need more than just one day to deal with the case and that preparation of the case would require considerable time and resources. Moreover, I would clearly not be eligible for free legal aid. These were the reasons why I considered that it would be excessively time-consuming and expensive to bring the case to courts.

   In light of the comments of the state regarding the case I referred to in my submission, and the statements of the Party concerned regarding costs of judicial review in Norway as referred in paragraph 39, I have tried to find a recent environmental case that would be comparable to my case. The closest I have come is a case where private property owners claimed that the Ministry of Climate and Environment through a dispensation according to Section 48 of the Nature Diversity Act had permitted the construction of a very significant power line through a nature reserve (the Sørdalen case). The nature reserve had been established on private properties. The private parties won the case and the dispensation was found unlawful. The time and costs of the cases were as follows:

   - Court of first instance: Case started 5 July 2013, decided 23 December 2013, two days in court. The claimants were sentenced to pay the Government NOK 166 000 in costs. If the claimants had similar expenses as the Government, their total costs would have amounted to NOK 332 000 (€ 35 265).
   - Appeal case: Decided 12 March 2015, three days in court, the Government lost the case and was sentenced to pay the claimants NOK 1 482 000 in costs, these costs included costs for the first instance proceedings. The Government asked the court that it be awarded the costs in the case. If the claimants had lost and we assume that both parties had similar costs, the total costs for the claimants so far could have been NOK 2 964 000 (€ 324 615).
   - Appeal to the Supreme Court: The Court decided not to accept the case to be brought forward on 20 August 2015. The Government was sentenced to cover claimants' costs of NOK 94 000. If

we assume that the claimants had lost the case and would have to cover similar costs of the Government, their total costs for the Supreme Court case could have been NOK 188 000 (€ 20 590).

While this case might have been more complex than my case since it involved more parties and required presentation of more evidence, it remains illustrative of the costs and risks involved in bringing cases to Norwegian courts. The case took more than two years to resolve. The Government asked for its costs to be covered before all instances. The Government also appealed the case all the way to the Supreme Court which found the case not to be sufficiently significant to be brought forward. The cost risks of the claimants in this case turned out to be a staggering NOK 3 152 000 (€ 345 205). These were the costs without a full Supreme Court hearing of the case. Their total cost risk was in fact higher if we assume that the Supreme Court would have accepted to deal with the case and concluded in favour of the Government. Even if we assume that the cost risk of my case would be only a fraction (for example 10%) of the cost risks in this case, the risk of such high costs would certainly be prohibitive to me.

Against this background, I encourage the Committee to revise the text of paragraph 39. I attach the court decisions (attachments 1, 2 and 3, only in Norwegian).

9. Paras. 41-43: From the text, it seems that the EIA has been effectively implemented. However, in my "opening statement" I point to two main problems associated with the implementation of the Act:

"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."

I hope that the text above can be reflected in the Committee's account of the arguments made.

10. Paras. 44-48: The text concerning the reasons for exempting the information (article 4.3(c)) does not refer my arguments set out in the "Communicant's opening statement":

"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."

I hope that the text above can be reflected in the Committee's account of the arguments made.

11. Paras. 49-52: The text concerning transmission of environmental information which can be separated out (article 4.6) does not refer my arguments set out in the "Communicant's opening statement":

"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 … 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 …"

I hope that the text above can be reflected in the Committee's account of the arguments made.

12. Para. 53: The text does not sufficiently clarify that there are two separate claims regarding the failure to state sufficient reasons as it does not refer to the reasons required regarding why access was not provided to parts of the information. I therefore propose that the following sentence be added at the end of the paragraph: "The communicant also submits that as the Ministry had failed to consider whether information could be 'separated out without prejudice to the confidentiality of the information exempted' in accordance with Art. 4.6, and that it consequently failed to provide reasons for this part of its decision."
13. Paras. 53-55: The text concerning statement of the reasons for the refusal of providing information (article 4.7) does not refer my arguments set out in the "Communicant's opening statement". In addition to my disagreement regarding the reasons stated by the Ministry in the relevant documents, as commented on in the text quoted above, the following text of the "Communicant's opening statement" is relevant:

    "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."

    I hope that the text above can be reflected in the Committee's account of the arguments made.
14. Paras. 56 and 57: The findings refer to the communicant's "reminder". In light of my comment no. 6, I encourage the Committee to replace the word "reminder" in these paragraphs with "new initiative".

15. Paras. 56-59: The text concerning time frames for reconsidering the decision to refuse access to information (article 4.9) does not refer my arguments set out in the "Communicant's opening statement":

> "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 is essential that the Committee builds on a correct understanding of the complaints procedures involved in this case. The Ombudsman has no power to amend the initial decision made by the Ministry. The Ombudsman can merely consider whether the decision was made in accordance with relevant legislation and if it is considered necessary the Ombudsman can request the Ministry to reconsider its decision. The complaints procedure therefore starts with the filing of the case with the Ombudsman, and stops when the Ombudsman issues the findings. The subsequent reconsideration must therefore be regarded as a new filing of the request for information. Had the case been brought as an ordinary administrative complaint, the Ministry and the Government's reconsideration of the decision would have been part of the complaints procedure. However, this was not the situation in the current case.

I hope that the text above can be reflected in the Committee's account of the arguments made.

16. Para. 68: The following statements concerning the facts of the case do in my view not provide any well balanced account of my claims and the evidence provided:

> "The communicant's allegation might have been framed as an allegation under article 3, paragraph 1 of the Convention that the Party concerned had failed to take the necessary measures to establish and maintain a clear, transparent and consistent framework to implement article 4, paragraph 1 of the Convention. However, in this case, nothing turns on this point, since the communicant has provided no evidence that would indicate that Party concerned's public authorities systematically fail to correctly identify environmental information in practice and that the measures in place in the Party concerned to handle information requests are therefore inadequate in this regard."

Initially, I would like to draw the Committee's attention to the following statement on p. 5 of the "Communicant's opening statement":

"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."

In addition, I draw the Committee's attention to the following elements included in the files of the case. First, I attached an academic article that sets out my criticism regarding the implementation of the EIA. In my submission, the article is described as follows:

"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."

The reference to "issue 4" was an error on my part, as the article according to its title concerns "Effective Access to Environmental Information in Norway" and therefore is of interest to issue no. 6: "The failure of the Ministry of the Environment to effectively implement the Environmental Information Act". Regardless of this error on my part, the article was submitted to the Committee and should be acknowledged as presenting evidence of relevance to the claim. The relevance of the

article in this regard was also made clear in my comments to the Ombudsman submitted 31 October 2012 (p. 1 of annex 14 of the communication):

> "My comments to the procedure up until the statement of the Ombudsman are set out in attachment 1. These comments are provided in the form of a published article which concerns the fundamental aspects of the Ministry's follow-up of chapter 3 of the Environmental Information Act."

Secondly, I refer to the statements in my comments to the first findings of the Ombudsman (bottom of p. 2 to p. 4 of annex i) of my submission) where I provide remarks and evidence regarding Norway's implementation of relevant parts the Aarhus Convention.

Against this background, I encourage the Committee to make the amendments it considers needed in paragraph 68 and to reconsider its findings in paragraph 69 that my "allegation that the Party concerned has failed to comply with article 4, by not having put in place a procedure to assess whether requested information is environmental information" was "unsubstantiated" in light of amendments made to paragraph 68. In this context, I refer to p. 2 of the "Communicant's closing statement":

> "I encourage the Committee to ask Norway:
>
> - to take appropriate and effective measures to ensure that environmental information is considered under the Environmental Information Act when decisions are made by public servants concerning confidentiality of the information;
> - … to ensure that those measures that are implemented within the Ministry of Climate and Environment are also implemented by other ministries and public authorities that are likely to handle significant environmental information."

17. Paras. 74 and 75: In light of comment no. 10 above, I encourage the Committee to reconsider the text of para. 74 and its finding in para. 75. In this context, I refer to p. 1 of the "Communicant's closing statement":

> "I encourage the Committee to recommend that:
>
> - Norwegian authorities reconsider the request for information;
> - the authorities pay close attention to the public interest served by providing access to the information;
> - the authorities explicitly consider whether access can be provided to parts of the documents;
> - Norway specifies the public interest that will be served by providing access to the information and indicates the relative importance of such interests when weighted against the need for confidentiality."

18. Paras. 78 and 79: The Committee's discussion of the failure to have in place appropriate procedures to ensure partial disclosure of information refers to para. 68, and I refer to my comment no. 16 above. I also refer to the excerpts of the Guidelines on the Freedom of Information Act submitted by the Party concerned (see e-mail dated 23 March 2015). These Guidelines would be the relevant place to look for instructions and guidelines on how to decide on issues of partial disclosure. There is no reference to partial information in the second paragraph of sub-section 3.6 which explains how the "right to disclosure of environmental information under the Environmental Information Act is broader than the right of disclosure under the Freedom of Information Act." There are some

references to partial access to information in sub-section 5.4, but none of these references mention the EIA and the references are only related to the general issue of pre-classification of documents as being exempted from disclosure. Finally and most importantly, the sub-section on "enhanced access to information in the case of internal documents" makes no reference to the EIA. Many of the statements in this sub-section are very restrictive as to the possibility of providing enhanced access to certain categories of documents, including such as the ones considered in the current case. In sum, this represents in my view very clear indications that there are no effective procedures for implementing article 4.6. To the contrary, the effect of the Guidelines is most likely that the duty contained in article 4.6 is disregarded. Moreover, I draw the Committee's attention to comment no. 11 above which contains materials of relevance to the Committee's assessment of partial disclosure. Finally, I reiterate the issues mentioned in comment no. 16.

Against this background, I encourage the Committee to consider the need for amending the text of paragraph 78 and to reconsider its findings as set out in paragraph 79. In this context, I refer to the text quoted under comment no. 17 from the "Communicant's closing statement".

19. Para. 82: The current wording refers to "paragraphs 74-71 above". It remains unclear to me which paragraphs the reference is intended to cover. Moreover, I refer to my comment no. 13 which should be taken into account by the Committee here, and encourage the Committee to reconsider its assessments and findings. In this context, I refer to the two last bullet points of the text quoted under comment no. 17 from the "Communicant's closing statement".
20. Para. 83: The Committee's reasoning seems to build on a somewhat flawed understanding of the exchanges between the communicant and the Ministry and of the complaints procedure. The Committee's understanding of these issues may be partly due to the imprecise translation of my letter to the Ombudsman and the Ministry. I have asked that the translation be corrected in comment no. 6. The letter was meant as an initiative to get a prompt decision on access to the information, and must therefore clearly be regarded as a "request for environmental information" in accordance with article 4. As explained in comment no. 8, the request cannot be regarded as part of the complaint procedure before the Ombudsman.

    It would also be good if the Committee could explain in more detail why it finds that the Ombudsman cannot make a request for information to the Ministry. It is unclear to me whether this is based on an interpretation of Section 10 of the Parliamentary Ombudsman Act (i.e. a statement that the Ombudsman does not have such powers under the Act) or the Committee's interpretation of article 4.1 of the Convention (i.e. that public authorities may not enjoy a right under the Convention to request environmental information from other public authorities).

    Against this background, I encourage the Committee to reconsider the text and its findings as set out in paragraph 83. In this context, I refer to p. 1 of the "Communicant's closing statement":

    "I … encourage the Committee to conclude that:

    - where a complaints procedure leads to a request for public authorities to reconsider a request for information, public authorities are bound by the deadlines of art. 4.2 and 4.7;
    - Norwegian authorities should ensure application of the deadline in future cases of reconsideration, including in the potential reconsideration of my request should the Committee ask for such reconsideration."

21. Para. 85: The text indicates that the two routes (the administrative complaints procedure and the Ombudsman procedure) are mutually exclusive on a general basis. As follows from the text proposed in comment no. 4 as well as my comment no. 15, the two procedures are only mutually exclusive when the initial decision is taken on the ministerial level. I therefore suggest that the relevant sentence be reformulated along the following lines: "Additionally, in cases such as the present the Party concerned provides for two mutually exclusive alternative routes (see paragraph 37 above) of which the Ombudsman proceedings constitute one."
22. Paras. 86 and 88-91: In light of comments nos. 6, 14, 15 and 20 and possible adjustments of associated paragraphs, I encourage the Committee to revise the first sentence of paragraph 86 and the text of paragraphs 88-90 accordingly. For this purpose, I also refer to the following text on p. 4 of the "Communicant's opening statement":

    "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."

    In addition, the Ombudsman may have a duty to follow up cases after having made a statement. As is made clear in Section 10 of the Parliamentary Ombudsman Act and Section 9 of the associated Regulation the Ombudsman procedure ends when the Ombudsman pronounce findings. The findings of the Ombudsman may contain follow-up procedures, but there is no requirement in this regard in the Act or the Regulation. I have in my submissions to the Committee criticized the Ombudsman for not following up the case after its first findings. The first findings of the Ombudsman were the following (pp. 4-5 of annex 4 to e-mail from the Party concerned of 2 February 2015):

    "The Ministry has acknowledged that it made a mistake in not providing information on the right of appeal in its letter refusing the disclosure request. I am assuming that the Ministry will follow up on this in the future, and will therefore refrain from further comment on this issue.

    As regards the assessments made pursuant to the Freedom of Information Act, including the assessment of enhanced access to information, I have–in light of the fact that the complainant has only requested disclosure of the legal assessments–not found it necessary to comment further on whether the Ministry's assessments are tenable with respect to every single document.

    As regards the request for environmental information, however, I have concluded that the Ministry, in assuming that legal assessments do not generally fall under the Environmental

Information Act, has adopted an overly general approach to the matter. The Ministry has not provided a satisfactory explanation of the "genuine and objective" need to refuse the request for information.

I have therefore concluded that there is reasonable doubt relating to factors that materially impact on the conclusion, see section 10, third paragraph, of the Parliamentary Ombudsman Act of 22 June 1962 No. 8.

The Ministry should therefore re-assess the request for environmental information. Please keep me informed of the outcome of the Ministry's re-assessment."

The question that remains before the Committee in this regard is whether the Committee finds that the Convention requires the procedure mentioned in article 9.1 to include a follow-up mechanism to ensure that the findings are complied with in a timely manner. In this regard, I refer to the following text on p. 4 of the "Communicant's opening statement":

"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."

I regret that my statements in this case as regards the Ombudsman procedure might have been somewhat confusing, including the statement in the first bullet-point above, which I acknowledge can be read to indicate that the Ombudsman procedure continued while the Ministry was reconsidering the case. As I have clarified in comment no. 15, this is an erroneous understanding of the Ombudsman's procedures. I also observe that the Party concerned's submissions regarding the Ombudsman's procedures have been confusing. It is essential that the Committee secure a correct presentation of the Ombudsman procedure in its findings.

Against this background, I encourage the Committee to reconsider its findings in paragraphs 90 and 91. In this context, I refer to p. 2 of the "Communicant's closing statement":

"I encourage the Committee to recommend that:

- Norway takes the measures needed to ensure that a procedure as required in art. 9.1 and 9.4 is made available to those who are denied access to environmental information from ministries."

23. Paras. 93-94: I encourage the Committee to reconsider its main findings in light of adjustments made elsewhere in the draft findings.

If the Committee has any questions regarding the above general and specific comments, I remain at the Committee's disposal.

Yours sincerely,

Ole Kristian Fauchald
(sign.)