

email (L) (407599).TXT

From: Ole Kristian Fauchald (mailto: o.k.fauchald@jus.uio.no)
Sent: 20 January 2011 15:51
To: postmottak@sivilombudsmannen.no
Cc: Post room, Ministry of the Environment
Subject: Complaint to the Parliamentary Ombudsman concerning the Ministry of the Environment's refusal of a disclosure request

To the Parliamentary Ombudsman

I refer to the Ministry of the Environment's refusal of a disclosure request regarding a legal assessment made during the preparation of the Nature Diversity Act. An account of the application and the refusal is provided in the correspondence listed below.

I regard this as a matter of great general interest, and as an important question of principle.

My reasons for filing this complaint concerning the refusal are the following:

1) Basis in law. The Ministry is wrong in asserting that the information whose disclosure has been requested is not covered by the Environmental Information Act. Pursuant to section 2(1)(b) of the Act, the following information falls under the Act:

"assessments of ... b) factors that affect or may affect the environment, including administrative decisions ... including legislation ... as well as related analyses". The information whose disclosure has been requested concerns an analysis forming part of administrative decisions concerning legislation. There is no doubt that the legislation in question is of great importance to the environment. There is nothing in the preparatory works that calls for a narrow or restrictive interpretation of this provision.

2) Assessment of enhanced access to information: There is a greater obligation to consider enhanced access to information and to grant access on this ground under the Environmental Information Act than under Freedom of Information Act. Regardless of the basis in law, I believe that the Ministry is wrong to refuse this disclosure application, for the following reasons:

a) There are strong arguments for disclosure: As submitted in the application: "the information in the assessment will be used in an article on jurisprudence and is assumed to be of great public interest. The information was decisive for the wording of the act, although no detailed account is provided in the preparatory works." A further argument is that the assessment, and the decisions based on it, triggered much criticism by environmental organisations and considerable public debate. However, in the public debate that took place in connection with adoption of the Act, no concrete information was provided on the nature of the assessments that were made.

b) The arguments against disclosure are weak. The Ministry asserts that "the need to shield from public disclosure the internal decision processes of government outweighs other considerations." In this regard, I would note that the assessments in question constitute "an assessment of the relationship between international law and these provisions that has identified a need for amendments and adjustments if these provisions are to be enforced beyond 12 nm," see Proposition to the Odelsting [draft bill], No. 52 (2008-2009) regarding the Act relating to the management of natural diversity (Nature Diversity Act), section 7.2.4.3. In other words, these are legal assessments. Such assessments are traditionally disclosed, see the practice of the Ministry of Justice's legal department relating to its submissions. I note that the grounds given by the Ministry only cite internal decision processes. Legal assessments should be more "objective" in the sense that they must be based on legal grounds and methodology. This entails that it should not be permissible to exempt a legal assessment on the basis of the public administration's internal political decisions and deliberations. Furthermore, I submit that subjecting legal assessments to specialist discussion and examination is of great value. This is all the more important as legal assessments are, in general, considered to clearly delineate the scope of action for political processes. Inadequate or incorrect legal assessments therefore have the potential to cause significant damage in a democracy. A critical examination of such assessments is therefore very important to avoid decisions that are actually politically founded being given the appearance of having been taken out of obligation. This argument may

be even more powerful in relation to decisions based on the claimed existence of obligations under international law, in part because international obligations are often diffuse and open to widely differing interpretation, and in part because the boundaries of international law may acquire significance for legislation, as in this case. In this case, great importance must also be attached to the fact that the assessment played a concrete role in the wording of the Act, although the assessment was not presented to the Storting [the Norwegian parliament] (in any event, there is no indication that the assessment was presented). A further crucial issue is the fact that this Act can be described as being fundamental in the environmental conservation field, and that the Ministry required no less than five years from completion of the official report on the Act (2004) until the Proposition to the Odelsting containing a draft bill was presented (2009), indicating that the legal assessments which were presumably done at an early point during this period should now bear close scrutiny.

Accordingly, it is my view that there is no doubt that the Ministry should have concluded in favour of enhanced public access and permitted disclosure of this information, regardless of whether the request was made under the Environmental Information Act or under the Freedom of Information Act.

Yours sincerely
Ole Kristian Fauchald

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----- Original Message -----

Subject: Application for disclosure of information
Date: Wed, 19 Jan 2011 13:08:12 +0000
From: Post room Ministry of the Environment <Postmottak.Postmottak@md.dep.no>
To: 'o.k.fauchald@jus.uio.no' <o.k.fauchald@jus.uio.no>

Reference is made to the request from Ole Christian Fauchald regarding disclosure of the assessment referred to in Proposition to the Odelsting [draft bill], No. 52 (2008-2009), section 7.2.4.3, under the Environmental Information Act.

The assessments in question concern the international legal framework related to the question of the geographical scope of the Nature Diversity Act beyond 12 nautical miles. In the view of the Ministry of the Environment, such assessments do not fall under the term "environmental information" as defined in section 2 of the Environmental Information Act.

The disclosure request has therefore been considered under the rules in the Freedom of Information Act. The documents which were prepared as part of the government's assessments of these questions were prepared in the course of the government's internal case processing. They are thus internal documents which can be exempted from public disclosure under section 14, first paragraph, of the Freedom of Information Act.

The Ministry has considered the question of enhanced access to information, see section 11 of the Freedom of Information Act, but has concluded that the need to shield internal decision processes in the government outweighs other considerations. Disclosure of the documents is therefore refused pursuant to section 14, first paragraph, of the Freedom of Information Act.

Yours sincerely

Helga Hjorth
Senior Adviser
Ministry of the Environment

----- Original Message -----

From: Ole Kristian Fauchald [mailto:o.k.fauchald@jus.uio.no]
Sent: 12 January 2011 19:40
To: Post room, Ministry of the Environment
Subject: Application for disclosure of information

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Proposition to the Odelsting [draft bill], No. 52 (2008-2009) regarding the Act relating to the management of natural diversity (the Nature Diversity Act), in section 7.2.4.3, mentions the following assessment made in the work with the proposition: "An assessment has been made of the relationship between international law and these provisions that has identified a need for amendments and adjustments if these provisions are to be enforced beyond 12 nm."

I hereby apply for disclosure of this assessment. I ask that this disclosure request be considered under the rules in section 11(2) of the Environmental Information Act. The information in the assessment will be used in an article on jurisprudence and is assumed to be of great public interest. The information was decisive for the wording of the act, although no detailed account was provided in the preparatory works.

Yours sincerely
Ole Kristian Fauchald

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