/coat of arms of Norway/
THE ROYAL MINISTRY
OF THE ENVIRONMENT

The Parliamentary Ombudsman for Public Administration Norway/
The Parliamentary Ombudsman
P.O. Box 3 Sentrum
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Your ref.	Our ref.	Date
2011/97	201100225-/HEH	12 April 2011

Submission − matter regarding access to information

Reference is made to the letter of 1 March 2011 regarding Ole Christian Fauchald's disclosure request, in which the Parliamentary Ombudsman requested a more detailed explanation of the Ministry of the Environment's grounds for exempting the documents from public disclosure. Our comments on the Ombudsman's questions are listed below.

1. Legal authority for exempting the documents from public disclosure

The Parliamentary Ombudsman made reference to the fact that the Ministry's refusal appears to be of a general nature, and was not specifically linked to the individual documents. The Ombudsman requested an explanation as to whether section 14 of the Freedom of Information Act allows an exemption to be made based on general grounds, and whether the Ministry is of the view that all the documents that have been sent can be exempted based on this provision.

We are aware that section 15 of the Freedom of Information Act is the correct legal authority for exemption for some of the documents. This applies specifically to documents 1 to 5, which comprise correspondence between the Ministry of the Environment and the Ministry of Foreign Affairs, and documents 20-25 which are documents exchanged in connection with the internal ministry submission of the draft proposition [legislative bill]. For further details on this assessment, please see below.

In section 1.1 we have considered each of the documents and what legal authority can be used for exemption. For documents that can be exempted under section 15, it is a condition that exemption from public disclosure "is necessary in order to ensure proper internal decision processes". This condition is discussed in section 1.2.

The question of enhanced access to information pursuant to section 11 of the Freedom of Information Act is considered in section 2.

1.1 Legal authority for the exemption of the individual documents

Documents 1–5

Document 1 is a cover memorandum from the Minister of the Environment to the Minister of Foreign Affairs. This document was accompanied by another memorandum, Document 2, which the Ministry

of the Environment wanted the Ministry of Foreign Affairs to review. We assume that both Document 1 and Document 2 can be exempted based on section 15, third paragraph, of the Freedom of Information Act, since they are documents concerning the acquisition of a document mentioned in section 15, first paragraph.

Document 3 is a memorandum from the Ministry of Foreign Affairs, which we assume can be exempted based on section 15, first paragraph, of the Freedom of Information Act because it is a document obtained from another ministry for use in the Ministry of the Environment's internal preparation of a case.

Document 4 is a memorandum prepared by the Ministry of the Environment and sent to the Ministry of Foreign Affairs for review. We assume the document can be exempted based on section 15, third paragraph, because it is a document concerning the acquisition of a document mentioned in section 15, first paragraph.

Document 5 is a fax/report from the Ministry of Foreign Affairs, which we assume can be exempted based on section 15, first paragraph, of the Freedom of Information Act because it is a document obtained from another ministry for use in the Ministry of the Environment's internal preparation of a case.

Documents 6–15

Documents 6–15 are documents exchanged in connection with the consideration of the case by a state secretary committee. They are therefore covered by section 14, first paragraph; see also section 7.2.2.1, second paragraph, of the Ministry of Justice's guidelines. This states that documents exchanged in connection with the consideration of cases by state secretary committees and other internal government committees are deemed internal documents and can be exempted based on section 14, first paragraph.

Documents 16–17

Document 16 is an email from the Ministry of the Environment to the Ministry of Justice concerning the wording of the statutory text. Document 17 is the Ministry of Justice's reply.

We assume that Documents 16 and 17 can be exempted based on section 15, third paragraph, see also the first paragraph, and section 15, first paragraph, respectively.

Document 18

Document 18 is a memorandum from the Ministry of the Environment to the Ministry of Fisheries and Coastal Affairs, sent according to agreement, containing feedback on a suggestion concerning the statutory text received from the Ministry of Fisheries and Coastal Affairs. We assume that the document was sent to the Ministry of Fisheries and Coastal Affairs for use in its internal preparation of the case. The document can therefore be exempted from public disclosure by the Ministry of Fisheries and Coastal Affairs under section 15, first paragraph, second sentence, provided that the condition in the first sentence is met. According to of the Ministry of Justice's guidelines on the Freedom of Information Act, p. 98, the power of exemption then applies to both the sender and the recipient.

Document 19

This document contains the Ministry of Foreign Affairs' consultation comments from the open hearing on Official Norwegian Report (NOU) 2004:28, and is public. This will be sent to Ole Christian Fauchald together with a copy of this letter.

Documents 20–25

Documents 21–25 are statements sent to the Ministry of the Environment by other ministries in connection with the circulation of the draft proposition [legislative bill]. These fall under section 15, first paragraph, second sentence. Document 20 is the circulation cover letter from the Ministry of the Environment, and falls under section 15, third paragraph.

1.2 Assessment of the criterion in section 15, first paragraph – "necessary in order to ensure proper internal decision processes"

Introduction

Section 15, first paragraph, second sentence, of the Freedom of Information Act allows an exception to be made from the disclosure of a document which a ministry has obtained from another ministry when this is necessary to ensure proper internal decision processes. Section 15, third paragraph, states that the first paragraph applies correspondingly to a document concerning the acquisition of such a document.

This condition must be met in order for it to be permissible to exempt documents 1–5, 16–17, 18 and 20–25 on the basis of section 15.

The Nature Diversity Act was adopted in the summer of 2009, and the internal decision process has been completed. However, there is no requirement that a case must be ongoing in order to exempt documents based on section 15. Reference is made to the Ministry of Justice's guidelines on the Freedom of Information Act, p. 104. It is submitted that there is no requirement that a risk to the internal decision process must be demonstrated in the specific case. It is also relevant to emphasise the consideration of ensuring proper decision processes in the longer term. The Ministry of Justice also wrote:

The key factor in the assessment of whether an exception is necessary will often be whether the document has a content or is of a type that more long-term damage may arise if such documents are made public generally or fairly often.

The deciding factor in the assessment of whether an exception is necessary will thus often be whether the document has a particular kind of content or is of a particular type or has been sent in a particular type of cooperation situation.

The requirement that an exception must be necessary may thus be met where there is close cooperation between the sending administrative agency and the recipient administrative agency. For example, where bodies exchange drafts of a final decision or a final draft for comment and feedback, it will often be permissible to make an exception. If a party writes comments and feedback directly into such a draft, this will apply fairly generally.

… In situations where a subordinate administrative agency contributes to a ministry's case preparations in cases that are to be submitted to the Storting [the Norwegian parliament] or considered at government level by the King in Council, or otherwise at political level, it will generally be permissible to make an exception in respect of advice and assessments from the subordinate administrative agency."

Page 106 states that the considerations relating to documents sent from a subordinate to a superior administrative agency also apply to documents exchanged by ministries. The following is also emphasised:

As regards the condition that an exception must be necessary to ensure proper internal decision processes, the condition will nevertheless in practice more often be met in the case of correspondence between ministries than in the case of documents sent from a subordinate to a superior administrative agency. This is because the ministries cooperate very closely on many cases, and largely deal with cases as part of political processes.

The work done on the Nature Diversity Act constituted a comprehensive, complex and demanding legislative process. The Act touches on the responsibilities of many different sectors and their sectoral regulations. This necessitated very close cooperation between the Ministry of the Environment and the sectoral ministries, at both administrative and political level.

The Ministry of the Environment cooperates closely with the sectoral ministries in many contexts, and there needs to be room for open exchanges regarding technical and legal points of difference, as well as a confidential, safe cooperation environment. If the public were to be granted insight into the assessments and feedback passing between the ministries in such cases, this might damage the cooperation and contact between the Ministry of the Environment and the sectoral ministries. Reference is made to Proposition to the Odelsting [draft bill] No. 102 (2004-2005), section 6.4.1, which stated that "it should be permissible, as at present, to exempt from public disclosure internal assessments and exchanges of opinion forming part of the preparation of cases on the way to a standpoint."

In a large and demanding case like the present, where the ministries work very closely together, there is a particularly strong need to shield the internal decision processes in the government and between the ministries. In our view, this strongly indicates that that the documents should also be exempted from disclosure subsequently, since this will in practice establish a framework for cooperation in corresponding case in the future. Reference is made to the Ministry of Justice's guidelines, p. 65, which emphasise that a key consideration is the need to prevent other administrative agencies, or persons within the same administrative agency, from developing a more reticent approach to sharing "candid advice and appraisals". The Ministry of the Environment cooperates extensively with other ministries with sector-specific responsibilities, and relies on relations with these being based on openness, confidentiality and confidence.

Documents 20–25

As regards the individual documents, reference is made first to Documents 20–25 from the ministerial circulation of the draft proposition. The Ministry of the Environment assumes that these documents can be considered together. Their content is identical in nature, and they were created during the final phase of a legislative process during which views are exchange on drafts of final texts and the cooperation between the different ministries is particularly close before the case is considered at the political level. If this type of document is made public, the result may be a deterioration in the framework conditions for transparency, frankness and exchanges of opinion between the Ministry of the Environment and the sectoral ministries. The Ministry of the Environment intervenes in many cases involving the sectoral ministries, and is dependent on interaction occurring in a framework of confidentiality and confidence. In the Ministry of the

Environment's view, the documents need to be exempted from disclosure to ensure proper decision processes in future; see section 15, first paragraph, of the Freedom of Information Act.

Reference is also made to the fact that the question of the Nature Diversity Act's geographical scope has not been finally settled. The proposition states that, "The government will therefore conduct a thorough evaluation of whether, and if so in what form, other provisions should apply beyond 12 nm." This work has not yet started, but the documentation and assessments in question will also form part of the work done in future. In the interests of the further process, the various ministries' feedback should therefore remain internal.

Documents 1–5

As regards Documents 1–5, these concern the actual process and the consideration of the case by the government. All of the documents refer to and quote from a government memorandum.

Document 1 is a memorandum from the Minister of the Environment to the Minister of Foreign Affairs. In principle, the memorandum is a cover memorandum, but draws up frameworks for the process relating to work on the Nature Diversity Act and the assessment of its relationship with international law. It was sent for the purpose of securing comments and feedback on an enclosed memorandum. In the Ministry of the Environment's view, it is necessary in order to ensure proper decision processes that the ministries and cabinet ministers can organise and plan processes without having to consider that the public will be granted disclosure of documents exchanged in this connection.

Document 2 is an enclosure to Document 1. The memorandum was authored by the Ministry of the Environment. The memorandum was sent to the Ministry of Foreign Affairs in its capacity as an expert on international law, for quality assurance and other feedback. The memorandum was written at an early stage, as a starting point for subsequent clarifications. It was not written with publication in mind. It does not represent the type of "assessment" to which Fauchald has referred in his application for disclosure. The consideration that there must be room for communicating input and internal assessments and facilitating exchanges of opinion on the way to a standpoint indicates that disclosure of this document should not be granted. In the Ministry of the Environment's view, it would be harmful to subsequent decision processes if preliminary assessments and input cannot be communicated without being subject to disclosure to external parties.

Document 3 is a brief memorandum from the Minister of Foreign Affairs to the Minister of the Environment regarding the memorandum that was sent. We refer to our conclusions regarding Document 1, which also apply to Document 3.

Document 4 is a memorandum from the Ministry of the Environment to the Ministry of Foreign Affairs. The memorandum refers to meetings and other contact following the sending of documentation on previous occasions. The memorandum is very much an internal document, being an exchange between two ministries co-operating closely on a topical issue. In the view of the Ministry of the Environment, it is essential to proper decision processes that preliminary outlines, memorandums, etc. can be exchanged confidentially among ministries without disclosure to the public, whether at the time or subsequently, especially in difficult clarification processes like the present.

Document 5 is a memorandum containing the Ministry of Foreign Affairs' reply to documentation received from the Ministry of the Environment. Reference is made to our assessment of Document 1, which also applies to Document 5.

In summary, we are of the view that documents 1, 2, 3, 4 and 5 may be exempted from public disclosure, see section 15, first paragraph, of the Freedom of Information Act, because this is necessary to ensure proper decision processes.

2. Consideration of the question of enhanced access to information, see section 11 of the Freedom of Information Act

In cases where a document may be fully or partially exempted from disclosure, the assessment regarding enhanced access to information must weigh the arguments in favour of disclosure against the arguments for permitting an exemption.

The arguments in favour of allowing access, which must also form the basis for considering enhanced access to information, are, in particular, the wish to promote open and transparent public administration, freedom of information, democratic participation, legal safeguards for the individual, confidence in the public authorities and control by the public; see the preamble in section 1 of the Freedom of Information Act.

In his complaint, Fauchald asserts that the information may be assumed to be of great public interest, and that he will use it to write an article in jurisprudence. He is also of the view that the arguments against disclosure are weak. Among other things, he refers to the fact that the matter concerns legal assessments, which are traditionally made public. Legal assessments shall be "objective", and specialist discussion and examination would be of great value. As considerable time has passed, these assessments should now bear scrutiny.

In the view of the Ministry of the Environment, none of the documents answers to Fauchald's description.

To the extent that the assessment in question builds on documents, these documents have been prepared by the Ministry of the Environment in its capacity as the specialist ministry, and have been commented on and assessed by the Ministry of Foreign Affairs and other ministries. Some of the assessments that led to the wording of the Proposition to the Odelsting [draft bill] took the form of discussions in meetings, including state secretary committees. These legal assessments were part of a comprehensive process ongoing in connection with preparation of the Act, where parallel assessments of both political and sectoral interests continued at the same time. In our experience, the ministries do not publish this type of document.

Fauchald makes reference to the fact that a long time has passed since the Act was prepared. As regards the question of the Act's geographical scope, reference is made to the fact that, in the proposition, the government said it would return to this matter at a later date. Accordingly, we are of the view that the amount of time that has passed is not particularly significant in this instance.

This matter concerns a number of different types of document. All of these can be exempted from public disclosure. The legal authority relating to some of the documents is section 15, and in these cases the Ministry has explained that these need to be exempted from public disclosure because it considers this "necessary in order to ensure proper internal decision processes". In respect of the

internal documents that can be exempted from public disclosure under section 14, similar arguments apply, namely the need to ensure an internal sphere where information remains confidential. In our view, this applies especially to cases subject to political consideration, including matters considered by the state secretary committees.

Among other responsibilities, the Ministry of the Environment must ensure that the sectors meet their environmental responsibilities. This requires close and varied co-operation with the sectoral ministries, including on both the development of regulations and individual matters. Differences of opinion among the ministries are not uncommon. We are of the view that facilitating such exchanges is important, and that discussions should be as open and free as possible. Public disclosure of internal exchanges of views in such matters may be detrimental to co-operation and contact between the Ministry of the Environment and the ministries responsible for other sectors. Like the other ministries, the Ministry of the Environment wishes to have a confidential relationship with the other ministries.

As noted above, work on the Nature Diversity Act was a comprehensive, complex and demanding process, involving close co-operation among the ministries. In these circumstances, the need to shield the content of internal government and inter-ministerial processes from public disclosure becomes even greater. In our view, this provides equally strongly support to the case for also exempting these documents from public disclosure in the future, as doing so will in practice define the framework for future co-operation on similar matters. Reference is made to the Ministry of Justice's guidelines, p. 65, which emphasise that a key consideration is the need to prevent other administrative agencies, or persons within the same administrative agency, from developing a more reticent approach to sharing candid advice and appraisals.

The Ministry of the Environment is engaged in continuous and ongoing co-operation with other ministries with sector-specific responsibilities, and relies on relations with these being based on openness, confidentiality and confidence.

Reference is also made to the fact that Proposition to the Odelsting [draft bill] No. 52 (2008-2009) provides for further clarification of questions related to a possible expansion of the act's geographical

scope. In so far as this issue plays a role, it must be that the situation is largely deemed unchanged since the time of preparing the draft bill. The Ministry of the Environment is aware that several of the arguments in favour of enhanced access to information, see section 1 of the Freedom of Information Act, can be used to argue for public disclosure of the documents in this case, including the objective of democratic participation and control by the public.

These arguments are counterbalanced by the need to ensure proper decision processes in the future. Reference is made to the fact that the assessments relating to the geographical scope of the Nature Diversity Act have not yet been conclusively settled.

In weighing the various arguments, the Ministry of the Environment has concluded that the interest of ensuring proper decision processes outweighs the other arguments, and that this means that public disclosure, whether full or partial, should be refused for all of the documents which were considered with a view to granting disclosure.

3. Relationship to the Environmental Information Act

In his letter, the Parliamentary Ombudsman makes reference to the fact that the Ministry of the Environment has stated that the information does not fall under the term "environmental information" in section 2 of the Environmental Information Act, and requests a more detailed explanation for this.

The Ministry of the Environment cannot see that such an account is required, as there is in any case a genuine and objective need to exempt the documents from public disclosure under section 11 of the Environmental Information Act.

Under section 11, first paragraph, of the Environmental Information Act, a request for environmental information can be refused if there is a genuine and objective need to do so in the specific case, and the information or the document in which the information is found can be exempted from access under the Freedom of Information Act.

As has been explained, all the documents can be exempted from public disclosure under section 14 and section 15, respectively, of the Freedom of Information Act.

In considering whether there is a genuine and objective need to exempt the information from public disclosure pursuant to section 11, first paragraph, the environmental and public interests served by disclosure must be weighed against the interests served by refusal. If the environmental and public interests outweigh the interests served by refusal, the information must be disclosed.

The special motives underlying section 11 in Proposition to the Odelsting [draft bill] No. 116 (2001-2002) on the Environmental Information Act (p. 160 et seq.), indicate the basis for any assessment of whether a genuine and objective need exists to exempt information from public disclosure. The proposition states that the intention underlying the provision was to establish in law the practice that was recommended in connection with the Freedom of Information Act with a view to promoting greater openness in public administration and to "emphasise what currently follows from good administrative practice". Furthermore, in our view the provision can be regarded as expressing that

the Environmental Information Act requires the public administration's assessment of any disclosure request to be particularly thorough. It is evident that this criterion is especially relevant for internal documents. In weighing the various considerations, it is possible to base oneself on the purpose provision in the Environmental Information Act, which mentions environmental considerations, considerations relating to the individual and the need to allow public participation in decision processes. Furthermore, the proposition states that the provision in section 12 regarding environmental information that must always be disclosed indicates what types of information constitute the primary focus area of the Act, thus throwing light on how much weight such considerations must be given when weighing the various interests against one another. The types of information that must be disclosed regardless, see section 12, are information on pollution that is harmful to health or may cause serious environmental damage, information on measures to prevent such damage, and information on unlawful intervention in or damage to the environment.

Fauchald has observed that he will use the information in an article in jurisprudence, that the information may be assumed to be of great public interest, and that specialist discussion and examination of legal assessments is very important. He also makes reference to the fact that he believes the case for exempting the information from public disclosure to be weak.

In sections 1 and 2, above, we have explained what arguments support exempting the documents in question from access and weighed these against the arguments in favour of disclosing them to the public. These assessments are also relevant in assessing whether it is permissible to exempt documents from public disclosure with legal authority in section 11 of the Environmental Information Act.

The information requested by Fauchald is not of the type that is covered by the primary focus area of the right to access to information pursuant to section 12 of the Environmental Information Act. Nor do we consider the environmental and public interests served by disclosing the documents to Fauchald and thus enabling him to write an article in jurisprudence to be weightier than the need to shield the internal decision processes in this case from public disclosure.

Based on this, the Ministry of the Environment refuses the request for disclosure, even after considering section 11 of the Environmental Information Act.

4. Why did the Ministry of the Environment not mention the right to lodge an appeal and the possibility of submitting a complaint against the refusal to the Parliamentary Ombudsman?

The Ministry made a mistake in not informing Fauchald of the right to lodge an appeal and of the possibility of submitting a complaint against the refusal to the Parliamentary Ombudsman. However, we do not regard this as significant in the present case, as Fauchald may be assumed to be very well-informed of the right to lodge an appeal and of the possibility of submitting the matter to the Parliamentary Ombudsman. In the view of the Ministry of the Environment, this is confirmed by the fact that Fauchald submitted the case to the Parliamentary Ombudsman quite soon after the Ministry refused his disclosure request.

Nevertheless, efforts will be made to ensure that procedures are improved so that, in future, the Ministry provides information on the right to lodge an appeal and on the right to make a complaint to the Parliamentary Ombudsman.

In conclusion, we note that the Parliamentary Ombudsman has asked us to frame our reply in a manner that allows it to be presented to the complainant, but that the Ombudsman also understands that this may be difficult to comply with fully, given that the Ombudsman has "requested a concrete explanation of the Ministry's assessments regarding the content of the report." As stated in the letter, none of the documents contains a summary or conclusive legal assessment. Far less is there any report.

Ole Christian Fauchald has been sent a copy of this letter and a copy of the letter from the Ministry of Foreign Affairs of 31 August 2005 to the Ministry of the Environment containing consultation comments relating to Official Norwegian Report (NOU) 2004:28.

Yours sincerely

/signature/
Torbjørn Lange (by authority)
Deputy Director General

/signature/
Helga Hjorth
Senior Adviser

Cc: Ole Christian Fauchald