

Statement

/logo of the Parliamentary Ombudsman/

MATTER: 2011/197

DISCLOSURE OF INFORMATION AND DOCUMENTS FROM THE PREPARATION OF THE ACT

This statement concerns the Ministry of the Environment's refusal to grant disclosure of legal assessments made during the preparation of the Nature Diversity Act.

The Ministry of the Environment has acknowledged that it gave inadequate information on the right to lodge a complaint when it refused the disclosure request. I therefore see no reason to pursue this matter any further. I have no comments regarding the material assessment of the question of disclosure of information under rules in the *Freedom of Information Act*. However, I have concluded that there is reason to question the position adopted by the Ministry on the request for *environmental information*, and I therefore request that this issue be re-assessed.

The background of the matter

On 12 January 2011, Ole Kristian Fauchald contacted the Ministry of the Environment by email letter. In the letter, reference was made to Proposition to the Odelsting [draft bill], No. 52 (2008-2009) regarding the Act relating to the management of natural diversity (the Nature Diversity Act), section 7.2.4.3, which states that "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."

Fauchald requested "disclosure of this assessment", with reference to section 11 of the Environmental Information Act of 5 September 2003 No. 31. He also stated that he would be using the information in an article on jurisprudence, and then stated that "The information was decisive for the wording of the act, although no detailed account was provided in the preparatory works."

In an email letter of 19 January 2011, the Ministry refused the disclosure request. In its refusal, the Ministry indicated that the assessments in question did not fall under the term "environmental information" in

section 2 of the Environmental Information Act. The request was therefore considered exclusively under the Freedom of Information Act of 19 May 2006 No. 16, and in this connection it was stated that the requested documents were “internal documents that can be exempted from public disclosure based on section 14, first paragraph, of the Freedom of Information Act.” It was also stated that enhanced access to information had been considered, but that the Ministry had concluded that the “need to shield internal decision processes in the government” outweighed other issues. Fauchald’s request was refused in full.

The complaint to the Parliamentary Ombudsman and inquiries conducted by this office

The question of disclosure was then submitted to the Ombudsman in an email letter of 20 January 2011. Among other things, the complainant referred to section 2(1)(b) of the Environmental Information Act and claimed that the Ministry had committed an error by assuming that the information of which he had requested disclosure did not fall under this Act. Furthermore, the complainant stated that the decision not to practise enhanced access to information was wrong. In this regard, it was stated, for example, that the arguments in favour of disclosure were weighty because the information was to be used in a jurisprudential article, and because the assessments in question and the decisions made on the basis of these assessments had been much criticised by environmental organisations. It was also stated that the arguments against disclosing the documents were weak, among other things because the documents related to legal assessments and not information on the “public administration’s internal political decisions and deliberations.”

Following a review of the documents in the matter, a decision was made to pursue this matter and conduct further inquiries. In a letter of 1 March 2011, the Ministry was asked, among other things, to explain its view on the extent to which section 14, first paragraph, of the Freedom of Information Act allowed the refusal of a disclosure request without citing the grounds for each individual document. The Ministry was also asked whether it was of the view that all of the sent documents could be exempted based on section 14 of the Freedom of Information Act. In addition, the Ministry was asked whether it believed that the information in question was not covered by the term “environmental information” in section 2 of the Environmental Information Act. Furthermore, the Ministry was asked to supply a detailed and concrete explanation of how it had assessed the question of enhanced access to information. This included asking the Ministry what arguments spoke for and against full or partial disclosure of the documents, and whether the Ministry had considered partial disclosure of some of the documents. The Ministry was also asked how the fact that the Nature Diversity Act of 19 June 2009 No. 100 had now been adopted and entered into force had affected its assessment of enhanced access to information. Finally, it was pointed out that the Ministry’s refusal did not include information on the right to lodge an appeal or the procedural rules on complaints, and inquired as to the reason for this.

The Ministry replied by letter dated 12 April 2011. In its reply, the Ministry stated that it regarded section 15 of the Freedom of Information Act as the correct legal authority for exempting several of the documents from public disclosure. A review was then conducted of the legal authority for the individual documents. With the exception of Document 19, the refusal to disclose was upheld.

Regarding the general condition in section 15, first paragraph, of the Freedom of Information Act, which indicates that information may be exempted from disclosure when this is “necessary in order to ensure proper internal decision processes”, the Ministry stated that a matter need not be subject to processing in order to exempt

documents. There is no need to establish that the internal decision process in the specific case is threatened. The consideration of ensuring proper decision processes in the long term is also a relevant concern.

Furthermore, the Ministry stated that the work done on the Nature Diversity Act was comprehensive, complex and demanding. The Act touches on the responsibilities of many different sectors and their sectoral regulations. This necessitates very close co-operation between the Ministry of the Environment and the ministries responsible for the various sectors, at both administrative and political level. The Ministry of the Environment also stated more generally that it works closely with the sectoral ministries in numerous contexts, and emphasised the necessity of open exchanges regarding technical and legal points of difference in a safe environment.

Fauchald submitted comments in his letter of 3 May 2011. Among other things, he stated that the Ministry did not appear to have given the Environmental Information Act due consideration as an independent basis for disclosure. He also pointed out that the Ministry had not assessed the matter pursuant to section 11(3) of the Environmental Information Act. He also made reference, among other things, to Norway's reporting on implementation of the Aarhus Convention in December 2010, and commented on the Ministry's practise in the light of statements from the report.

My view of the matter:

1. Processing of the matter

The refusal of the complainant's disclosure request did not include any details on the right to lodge a complaint or the time limit for such a complaint. Section 31, first paragraph, fifth sentence, of the Freedom of Information Act establishes that an applicant must be informed of the right of appeal and the time limit for lodging an appeal when a refusal notice is sent. Section 32, first paragraph, sixth sentence, of the Act says that where an appeal is lodged against a decision made by a ministry, the ministry shall inform the appellant that the right to appeal to the Parliamentary Ombudsman does not apply to decisions made by the King in Council. Section 13, fourth paragraph, of the Environmental Information Act states that if a request for environmental information is refused, the applicant must be informed of a number of things, including the right of appeal and the time limit for lodging an appeal.

The Ministry has acknowledged that an error was made in this regard, and stated that it will 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." As I assume that this matter will be acted on, this aspect of the matter does not require any further action by me at this moment in time.

2. The Freedom of Information Act

Following the Ministry's review based on the submission from this office, I no longer have any general objections to the legal starting points that have now been adopted with respect to sections 14 and 15 of the Freedom of Information Act. However, I note that it is questionable whether the Ministry's assessment of need is as concrete as it should be in relation to some of the documents. Document 3, for instance, has been exempted from public disclosure,

citing the fact that “proper decision processes require that the ministries and ministers can prepare and plan processes without having to make allowances for the fact that the public will be given access to the documents exchanged as part of these processes.” While this may be an important consideration, it is not in and of itself sufficient reason automatically to exempt from disclosure every single document containing an invitation to enter into a dialogue, to attend a meeting or to engage in future co-operation in general. Moreover, as the distance in time from the process in question increases, this argument may become less powerful. However, the complainant has not requested disclosure of, nor expressed any interest in, documents of this type, which contain no information on the legal assessments that were made during the preparation of the Act. As the case stands, I therefore find no reason to consider each individual document.

Based on the above and my own view on the question of environmental information, I have also decided to let the matter of the assessment of enhanced access to information rest in view of the Ministry’s explanation.

3. Environmental Information Act

The Ministry has assumed that the information whose disclosure was requested does not constitute “environmental information” under section 2 of the Environmental Information Act. My request to elaborate on this conclusion has been answered with the statement that “the matter [does not] require such an account, as there is in any event a genuine and objective need to exempt the documents from disclosure under section 11 of the Environmental Information Act.”

Section 2(1) of the Environmental Information Act contains a broad and complex legal definition of the term “environmental information”. This includes “factual information about and assessments of”, among other things, “administrative decisions and measures, including individual decisions, agreements, legislation, plans, strategies and programmes” that “affect or may affect the environment”. This type of environmental information also includes “related analyses, calculations and assumptions.”

I find it difficult to see that “assessments of”, for instance, “legislation” that “affects or may affect the environment” are unlikely to contain assessments of legal issues, although this does not in and of itself entail that such information is not intrinsically environmental information. As regards “related analyses, calculations and assumptions” it is possible that the wording primarily brings to mind cost/benefit analyses or other analyses that are more directly related to the external environment. The examples mentioned in Proposition to the Odelsting [draft bill] No. 116 (2201-2202), p. 145, are also of this type. On page 144 of the proposition, however, it also says that the wording is to “establish clearly that environmental information includes both factual information and assessments. Assessments include analyses and calculations, as well as other technical and political assessments.”

In my view, the preparatory works support a broad interpretation of the Act’s term “environmental information”, see also p. 43 of the Proposition. I therefore believe that exempting legal assessments generally from the Environmental Information Act is too narrow and does not accord well with the wording of the Act and its preparatory works. As a rule, legal assessments do not

appear in isolation, but are linked to actual circumstances. It is not uncommon for the law and the facts of the matter to be so interwoven that it is difficult to separate the two without losing some of the meaning. Depending on the circumstances, information on legal assessments may be key to achieving the purpose of the Act, which includes making it easier for the public to influence decision-makers in environmental questions, see section 1 of the Act. Which assessments may fall within the scope of the Act must be considered specifically, and needless to say there will probably be marginal cases. Further, it may not always be clear which of the Act's alternatives – "assessments of" regulations or "related analyses" – is the most appropriate. However, these considerations are not decisive for the right to information.

As regards the request for information in the present case, the determinative factor is thus the content of the documents themselves, and whether there is a "genuine and objective" need to refuse disclosure in this specific case, see section 11, first paragraph, of the Environmental Information Act.

The Ministry has largely referred to its assessments under the Freedom of Information Act, in addition to pointing out that the information of which disclosure has been requested, "[is] not of the type that is covered by the primary focus area of the right to access to information pursuant to the Environmental Information Act, see section 12." Furthermore, the Ministry does not consider "the environmental and public interests served by disclosing the documents to Fauchald and thus enabling him to write an article in jurisprudence to outweigh the need to shield from public disclosure internal decision processes in this case."

The general considerations that can justify refusal of disclosure requests relating to internal documents pursuant to the Freedom of Information Act are usually the ordinary need for free and confidential co-operation among the ministries, as well as with the specialist directorates. Inevitably, this also has ramifications beyond the individual instance. In general terms, there is therefore nothing wrong with substantiating a refusal to grant disclosure of documents obtained from, for example, a subordinate administrative agency in connection with preparation of a matter with the need for similar co-operation in the future pursuant to the *Freedom of Information Act*. The decisive question is whether this consideration makes such a refusal "necessary in order to ensure proper internal decision processes", see section 15 of the Freedom of Information Act. As I see it, however, such considerations will, depending on the circumstances, be less weighty if the question is assessed under the Environmental Information Act. Unlike the Freedom of Information Act, the Environmental Information Act is purely concerned with the regulation of information, whereas the Freedom of Information Act specifically regulates the right of access to documents. The Environmental Information Act safeguards somewhat different considerations, and its wording, which specifies that there shall be a genuine and objective need "in the specific case", imposes special assessment requirements regarding the – as the Ministry has in fact acknowledged. Any divergent interpretation would necessarily curtail the significance of the Environmental Information Act compared to the Freedom of Information Act.

In support of its assessment, the Ministry has referred to the special motives in Proposition to the Odelsting [draft bill] No. 116 (2001-2002), p. 160. The proposition states that section 11 of the Environmental Information Act was intended to "emphasise what currently follows from good administrative practice". I would remind the Ministry of the sentence immediately following the sentence it has quoted, which indicates that the Environmental Information Act is "somewhat stricter. "

Based on the above, the Ministry's assessment of the conditions for refusing the request for environmental information appears rather general and rather loosely linked to the present matter. This impression is reinforced by the fact that the Ministry, as noted above, has not answered my question regarding how it interprets the Act's term "environmental information". The failure to answer this question has the potential to sow doubt as to whether the Ministry has adopted a sufficiently wide definition of the term; this may, in turn, impact on the assessment made pursuant to section 11 of the Act. Given that the Ministry has cited little apart from the general need for co-operation between specialist directorates and ministries, and among the ministries themselves, it does not appear that the Ministry has exercised the type of "particular care (...)" indicated on page 160 of the proposition. Given that the question of the scope of the Nature Diversity Act is to be considered further, it might be appropriate, for example, to refer to the purpose of the Environmental Information Act, which is to facilitate the public's influence on decision-making, see section 1 of the Act.

As the Ministry has pointed out, the documents whose disclosure has been requested do not contain any actual overall analysis of legal questions. No final report or other document of this kind exists. The legal assessments that were made regarding the scope of the Nature Diversity Act largely appear in ongoing correspondence in connection with the forwarding of various memorandums, comments, etc. Nor do the circulated memorandums, including the inserted comments and questions that form part of the case documents, give any clear impression of what final assessments were made regarding the legal questions to be interpreted. This impression is further reinforced by the fact that the correspondence contains occasional references to discussions that apparently took place in meetings, although these exchanges of views and any conclusions that may have been drawn are not described in the case documents. Nevertheless, I find it difficult to agree that this by and of itself presents a genuine and objective basis for refusing all requests for information. At the very least, the Ministry should explicitly consider section 11(3) of the Environmental Information Act. I therefore do not regard this as a decisive reason not to ask the Ministry to re-assess the request.

4. Conclusion

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.

Oslo, 17 November 2011

/signature/
Arne Fliflet