3.6 Relationship with the Environmental Information Act

The Act of 9 May 2003 No. 31 relating to the right to environmental information and public participation in decision-making processes relating to the environment (the Environmental Information Act) grants a right to the disclosure of environmental information. Under section 5, the Environmental Information Act covers a greater number of administrative agencies than the Freedom of Information Act, although the scope of disclosable information is far narrower because the Environmental Information Act only grants a right to disclosure of materials falling within the Act's definition of environmental information as found in section 2 of the Environmental Information Act.

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. First, administrative agencies have a duty to hold certain types of environmental information, see sections 8 and 9 of the Act; second, the actual right of disclosure under the Environmental Information Act is stronger than that under the Freedom of Information Act. Any exception from the disclosure of environmental information is conditional upon, first, the environmental information in question being exemptable under the Freedom of Information Act and, second, that the interests served by refusing disclosure outweigh the environmental and public interests served by disclosure; see section 11, second paragraph, of the Environmental Information Act. Further, under section 12 of the Environmental Information Act, certain types of environmental information are always disclosable. Moreover, the administrative and appeals procedures in the Environmental Information Act (sections 13 to 15), also differ somewhat from the corresponding rules in the Freedom of Information Act.

There are extensive overlaps between the areas of application of the Freedom of Information Act and Environmental Information Act. Since the Environmental Information Act grants stronger rights to persons requesting disclosure than the Freedom of Information Act, administrative agencies subject to both acts may not simply assess a disclosure request concerning environmental information under the rules in the Freedom of Information Act, but must also conduct an assessment under the rules in the Environmental Information Act. This will of course not be necessary if it is concluded that disclosure must or should be granted under the Freedom of Information Act; however, if the conclusion is that the request must or can and should be refused under the Freedom of Information Act, consideration must also be given to whether this outcome is consistent with the Environmental Information Act. This applies irrespective of whether the person requesting disclosure has only referred to the Freedom of Information Act or has not referred to any regulatory provisions whatsoever. The administrative agency that has received the disclosure request is required to ensure that this assessment is conducted in accordance with the rules granting the strongest right of disclosure.

These guidelines cover only the rules in the Freedom of Information Act and related regulations, and not potential differences between the Freedom of Information Act and the Environmental Information Act relating to the individual points discussed in these guidelines on the Freedom of Information Act.

5.4 At what point in time should an assessment be conducted of whether there is a duty to exempt or a power to exempt? Pre-classification.

Given how the exemption criteria in many of the Act's exemption provisions are formulated, the time factor will often influence whether the conditions for an exemption are met. Depending on the circumstances, the time factor will also influence the enhanced access to information assessment under section 11; see section 4.9.2. Not least for this reason, the administrative agency must conduct a concrete, independent assessment of all received disclosure requests based on the situation at the time each request is considered; see section 29, second paragraph, first sentence, of the Freedom of Information Act (see section 9.2). The fact that disclosure has previously been refused is therefore not decisive. The decisive factor is whether the exemption criteria are still met and, in relevant cases, whether there is still no reason to practise enhanced access to information.

So-called "pre-classification" involves concluding that a document must or can and should be exempted from disclosure entirely or in part, without any disclosure request having been received. For example, this may take the form of stamping sent or received documents to indicate that they have been exempted from disclosure under some provision of the Act. The clear general rule is that this should not be done. This is because such classification may restrict the assessments of the administrative agency when a disclosure request is subsequently received, or the assessments of other administrative agencies who receive classified documents. Pre-classification may thus undermine the rule that an administrative agency which receives a disclosure request must conduct a concrete, independent assessment of the request and that the question of disclosure must be decided based on the situation at the time a decision is made on the disclosure request.

Pre-classification should only occur with respect to documents or information when it is clear that a duty of confidentiality applies or when it is clear that an exemption may be made and that enhanced access to information is inapplicable. Pre-classification should not occur when it is likely that the circumstances will change within a reasonable period of time and the need for exemption is thus reduced.

7.5 Enhanced access to information in the case of internal documents

The exemptions in sections 14 and 15 of the Freedom of Information Act grant the public administration a right, but not a duty, to exempt if the statutory conditions are met. Accordingly, where disclosure of documents or parts thereof may be refused under these statutory provisions, consideration must be given to practising full or partial enhanced access to information; see section 11 of the Freedom of Information Act. The comments in section 4.9 on the enhanced access to information assessment will also apply to documents or parts thereof which may be exempted from disclosure under sections 14 and 15. Nevertheless, this section contains some additional comments on the enhanced access to information assessment when there is a power to exempt under section 14 or section 15.

The enhanced access to information rule will be particularly applicable where disclosure of a document may be refused under section 15, first paragraph, of the Freedom of Information Act but only clearly delimited parts of the document contain information which has to be exempted from disclosure in the interests of ensuring proper internal decision processes. In such situations, enhanced access to information should often be practised with respect to the other parts of the document. The situation may differ if this would be work-intensive, for example if the document is large and the parts in question are spread throughout the document, or if the pieces of information which should perhaps be made subject to enhanced access to information are interwoven with information which should be exempted from disclosure.

The enhanced access to information assessment is the same for documents concerning the obtaining of documents covered by section 15, first paragraph, and for notices of and minutes from meetings between administrative agencies as mentioned in the first paragraph; see section 15, first paragraph.

The wording of the exemption criteria in this provision entails that a weighty, objective and real need for an exemption will generally exist where parts of a document, or entire documents, may be exempted from disclosure under section 15, second paragraph, of the Freedom of Information Act. It is correct that the enhanced access to information assessment must include the balancing of considerations indicating public disclosure with the need for an exemption. Nevertheless, it is difficult to imagine situations where enhanced access to information should be practised when a power to exempt applies under section 15, second paragraph. The same will apply when documents concerning the obtaining of advice and assessments under section 15, second paragraph, may be exempted under section 15, third paragraph, and to notices of and minutes from meetings between an administrative agency and a person providing advice or assessments as mentioned in section 15, second paragraph.

The Freedom of Information Act is based on the assumption that the power to exempt internal documents under section 14, first paragraph, of the Freedom of Information Act is thoroughly reasoned. Accordingly, full or partial enhanced access to information should generally not be practised with respect to the key content of documents covered by this exemption, i.e. for example advice and assessments, in a wide sense, regarding what decisions the administrative agency should make or what actions, etc. should be chosen in a specific case. Depending on the circumstances, the situation may differ for documents on the fringes of this exemption, such as documents which only set out general principles which are generally known or available.

Government memorandums, drafts of such memorandums and comments on such memorandums are covered by the power of exemption under section 14, first paragraph, of the Freedom of Information Act. Such memorandums, drafts and comments must always be exempted from disclosure. Enhanced access to information is thus irrelevant in the case of such documents.

Draft bills and white papers to be submitted to the Storting (the Norwegian parliament), as well as draft Royal Decrees to be considered by the government, will normally be submitted to other ministries. It is then permissible to make exemptions under section 15, third paragraph, of the Freedom of Information Act; see also the first paragraph, second sentence. The same applies to substantive comments on such drafts from other ministries; see section 15, first paragraph, second sentence, of the Freedom of Information Act. Enhanced access to information will generally be inappropriate in the case of such drafts and substantive comments.

Further, the time factor will be relevant in the assessment of whether enhanced access to information should be practised with respect to internal documents. Generally speaking, the need for an exemption from disclosure will be greater before a case is closed than after it has been closed. As emphasised in sections 4.9.2 and 7.3.2.7 above, the primary purpose of the exemptions relating to internal documents is to avert the potential long-term harm resulting from the disclosure of such documents. Consideration must of course also be given to this factor in the enhanced access to information assessment. Moreover, as regards documents at the heart of the exemption in section 14, first paragraph, of the Freedom of Information Act and documents covered by the exemptions in section 15, first paragraph, of the Freedom of Information Act and documents concerning the obtaining of such documents – including notices of and minutes from meetings between administrative agencies as mentioned in section 15, first paragraph, see also section 15, third paragraph – enhanced access to information should also generally not be practised with respect to documents concerning closed cases. As regards draft bills, etc. and substantive comments exchanged by ministries, this applies almost without exception. Nevertheless, when a very long time has passed since the matter was closed, the time factor may – depending on the circumstances – indicate that enhanced access to information should also be practised with respect to such documents.

The exemption in section 15, second paragraph, see also the third paragraph, will often apply in negotiation situations, dispute situations, etc. Once negotiations are concluded or a dispute is resolved, the condition that an exemption must be necessary in the interests of properly protecting the public's interest in the case will often no longer be met, meaning that disclosure can no longer be refused. The exemption criteria in this provision thus take the time factor into consideration, meaning that the enhanced access to information rule does not need to be employed to ensure that this factor is taken into account.

9.5.2 Requirement to provide detailed reasons

In principle, there is no requirement to provide reasons for a refusal, other than to include a reference to the provisions providing the grounds of exemption; see section 31, first paragraph, of the Freedom of Information Act.

Nevertheless, under section 31, second paragraph, first sentence, the person whose disclosure request has been refused is entitled to a detailed statement of the reasons for the refusal if the person in question requests one. There was no corresponding provision in the Freedom of Information Act 1970. A request for a detailed statement of reasons under section 31, second paragraph, first sentence, of the Freedom of Information Act must be submitted within three weeks of receipt of the refusal notice. If such a request is submitted by the deadline, the administrative agency has a duty to provide a detailed written statement of reasons for the refusal, which must mention the main considerations that were decisive for the refusal; see section 31, second paragraph, of the Freedom of Information Act. The statement must cover not only why the administrative agency considers there to be grounds for exemption, but also – in relevant cases – the factors to which weight has been given in the enhanced access to information assessment. There is no requirement for the statement of reasons to be exhaustive or comprehensive. Moreover, the requirements regarding the content of the statement are limited by the fact that the administrative agency is obviously not required to formulate the statement in such a manner that information which must or can and should be exempted from disclosure is revealed.

Under section 31, second paragraph, of the Freedom of Information Act, a detailed statement of reasons must be provided as soon as possible, and no later than 10 days after the request for a statement of reasons is received.

The duty to prepare a detailed statement of reasons lapses if the administrative agency, in connection with the receipt of a request for such a statement, concludes that – after all – there are no grounds for refusing disclosure or that enhanced access to information should be practised, and grants disclosure.

There is no requirement for the first refusal to contain information on the right to request a detailed statement of reasons. If such a detailed statement of reasons is requested, the rules on the appeal deadline should be interpreted to mean that the appeal notification period only begins to run on the date when the person requesting disclosure receives the detailed statement of reasons.