NORWAY

Avosetta Annual Meeting on 29/30 May 2015 in Bremen

Free Access to environmental information

1) *Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?*

The Norwegian constitution contains the following provision in article 112:

> Every person has the right to an environment that is conducive tohealth and to a natural environment whose productivity and diversityare maintained. Natural resources shall be managed on the basis ofcomprehensive long-term considerations which will safeguard thisright for future generations as well.
>
> In order to safeguard their right in accordance with the foregoingparagraph, citizens are entitled to information on the state of thenatural environment and on the effects of any encroachment on naturethat is planned or carried out.
>
> The authorities of the state shall take measures for theimplementation of these principles.

2) *Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information*

There are two main acts on access to information from public authorities: the Freedom of Information Act (2006) and the Environmental Information Act (2003). The former transposes Dir. 2003/98 in sections 2, 6, 7 and 8.

3) *National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?*

Before Dir. 90/313, environmental information was regulated through the former Freedom of Information Act (1970). Together with the constitutional provision, which was adopted in 1992, and the Aarhus Convention, the Directive was a reason, although not a major reason, for the adoption of the Environmental Information Act in 2003.

4) *Statistical information about the use of the access-right including types of users if known (eg NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.*

Norway established Electronic Public Records in May 2010 in order to make public documents more easily available. The use of the service in 2011was evaluated in a report published in 2012. The service received an annual amount of 156000 requests for access to information. Most users were male (76%), the service was used for professional purposes by 61% (of which more than half were journalists, only 2.9% were researchers), for private purposes by 28% and on behalf of NGOs by 7%. A very significant part of the users are repeat users (80%). As many as 76% of respondents found the follow-up of their requests to be satisfactory or better, but comments also included criticism of unnecessary secrecy and significant differences in the practice of public authorities. The Ministry of Climate and the Environment has had 18815 requests since start-up in 2010, and environmental directorates have had 32609 requests. The Ministry has listed 103669 documents, and the directorates have listed 245652 documents in the Records.

5) *Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC*

Environmental information is defined as follows in section 2 of the Environmental Information Act:

> Environmental information means factual information about and assessments of:
> a) the environment,
> b) factors that affect or may affect the environment, including
> - projects and activities that are being planned or have been implemented in the environment
> - the properties and contents of products
> - factors related to the operation of undertakings, and
> - administrative decisions and measures, including individual decisions, agreements, legislation, plans, strategies and programmes, as well as related analyses, calculations and other assumptions used in environmental decision-making,
>
> c) human health, safety and living conditions to the extent that they are or may be affected by the state of the environment or factors such as are mentioned in litra b).
>
> The environment means the external environment, including archeological and architectural monuments and sites and cultural environments.

In a case before the Supreme Court, an environmental NGO was successful in getting access to information regarding old-growth forest from a forest owning company. Such information was not regarded as exempted due to commercial secrets. (Rt. 2010 p. 385). Several cases have been decided by the Ombudsman for Public Administration. One case found that a report on legal issues that was part of the preparatory work of an environmental act was environmental information (case 2011/197).

6) Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Art. 3 para 1 Dir 2003/4/EC)

There is no explicit rule in the relevant legislation, but it would be against the unconditional rights of access to information under the Acts to require the statement of an interest before providing access to the information. I am not aware of relevant case law or that this has been a significant issue in practice. However, cases before the Ombudsman involve situations where requesters for access to information who are perceived by public authorities to be over-using their rights, and where the authorities take this perspective into account when handling their requests (cases 2012/1807and 2012/2243). The Ombudsman criticized authorities for indicating that lack of significant interest in the case might be a reason for not giving priority to requests.

7) Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c 4/EC. (see ECJ 279/11 (Fish Legal)

Section 2 of the Freedom of Information Act extends the rights under the act to:

> (c) any independent legal person in which the state, county authority or municipal authority directly or indirectly has an equity share that gives it more than half of the votes in the highest body of that legal person, and
>
> (d) any independent legal person in which the state, county authority or municipal authority directly or indirectly has the right to elect more than half of the voting members in the highest body of that legal person.
>
> Subparagraphs (c) and (d) above do not apply to legal persons which mainly carry on business in direct competition with and on the same conditions as private legal persons.

The government Regulation on Freedom of Information contains more specific rules exempting certain entities from the scope of the act, including undertakings controlled by the government in the fields of petroleum, emission trading, energy production, and investment in developing countries.

More targeted at the environment, section 5 of the Environmental Information Act extends its scope to:

b) legal persons that perform public functions or offer services to the public, and that are subject to the control of an administrative agency that comes within the scope of litra a). Nevertheless, this does not apply to any of their services that are operated in competition with the private sector. A legal person is subject to the control of an administrative agency if an agency that comes within the scope of litra a) appoints more than half of the members of the governing bodies of the legal person, or otherwise has a decisive influence on the legal person,
c) legal persons that are either responsible pursuant to acts or regulations for performing public functions or offering services to the public relating to the environment, or commissioned to do so by an authority to which litra a) or b) applies. This only applies to environmental information related to these functions or services.

I have not been able to identify case law or practice clarifying the meaning of these provisions.It is noteworthy in this context that chapter 4 of the Environmental Information Act prescribes a right of access to environmental information directly from "all other public and private undertakings, including commercial enterprises and other organised activities" than those mentioned in section 5 (a) to (c). Disputes concerning access to information under chapter 4 can be brought to the Appeals Board for Environmental Information (section 19). This provision means that the scope of section 5 is less important in a Norwegian context than elsewhere.

8) *National law and jurisprudence on the public authorities to be addressed ("information held by or forthem") (Art. 3 para 1 Dir 2003/4/EC)*

Section 4 of the Freedom of Information Act defines the documents to which the right of access applies:

> The case documents of an administrative agency are documents which have been received by or submitted to an administrative agency, or which the administrative agency itself has drawn up, and which relate to that agency's area of responsibility or activities.

Section 10 of the Environmental Information Act includes an obligation for public authorities when receiving a request for information that they do not hold:

> If a request for access to information is not directed to the appropriate authority, the authority that received the request shall as promptly as possible transfer the request to the correct public authority, or inform the applicant of the public authorities that are assumed to hold the information requested.

Given the opportunities of searching for documents in the Electronic Public Records, I assume that there are few requests that are directed to authorities that do not hold the relevant documents. The main controversy of relevance to these provisions seems to be failure of public authorities to register documents in the agency's journal, which is part of the Electronic Public Records.I have not been able identify relevant case law under the provisions.

9) *Significant national law andjurisprudence on practices on access conditions (terms, "practical arrangements" (see Art.3paras 3 – 5 Dir 2003/4/EC)*

The Freedom of Information Act does not contain any clear deadline for decisions on access to information. Section 29 states that a request "shall be decided without undue delay." Section 5 includes a provision allowing agencies to defer access "provided there is reason to believe that the documents available give a directly misleading impression of the case and that access to them could therefore be detrimental to obvious public or private interests." The Environmental Information Act, on the other hand, contains much more detailed rules on deadlines in section 13:

> The recipient of a request for environmental information shall make a decision on the request and make the information available as soon as possible and no later than 15 working days after the request was received. If, given the volume or type of

> information requested, it would involve a disproportionate amount of work to provide the information within 15 working days, the applicant shall receive the information within two months. The applicant shall be informed of any extension of the time limit, of the reasons justifying this and when a decision may be expected, as soon as possible and at the latest 15 working days after the request was received. A provisional reply may be omitted if it is considered obviously unnecessary.

Although it is not clearly stated in the legislation, the practice of Norwegian authorities is generally not to classify documents as exempted from public access. It can, however, be argued that this follows implicitly from section 29 of the Freedom of Information Act: "An administrative agency that receives a request for access shall consider the request on a concrete and independent basis." But there are still important examples in practice where agencies do classify documents as exempted from public access.

Section 6 of the Freedom of Information Act contains a rule prohibiting discrimination among those seeking access to information. Section 9 provides right of access to collations of information that is electronically stored "insofar as the collation can be done using simple procedures."

One interesting case before the Ombudsman for Public Administration (case 2012/1807) concerned a person that repeatedly asked the municipality for access to documents regarding building cases. It appears from the case that the person insisted on getting paper copies although many documents were electronically available on the web site of the municipality. The Ombudsman criticized the municipality and stated that it had a duty to organize its administration so that requests for information were handled in a timely manner, and that procedures should be adhered to regardless of who asked for access. A somewhat similar case with a similar result concerned a person who complained that he felt that the municipality boycotted his requests (case 2012/2243).

10) *Law and practices/jurisprudence on charges for access (copying? administrative time?)*

The Freedom of Information Act states that requiring payment for access can only be done "insofar as it is authorised to do so by regulations". The Government Regulation contains detailed rules on charges for access in section 4, including a right to charge where a request exceeds 100 pages, as well as a right of requiring payment where an agency shall run its activities on a commercial basis, such as certain databases on registration of property, the production of geodata, etc. The latter is a significant issue and creates situations that can be challenging from an environmental perspective.

According to section 6 of the Environmental Information Act, the Government Regulation on Freedom of Information applies also to environmental information.There is no significant jurisprudence regarding these provisions.

11) *Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?*

The general rule in section 7 of the Freedom of Information Act states that:

> Information to which access is given pursuant to this Act or to other legislation that gives the public right of access to documents in the public administration may be used for any purpose unless this is prevented by other legislation or the rights of a third party.

Issues of interest may come up where the information requested has been collected and made available by an undertaking or agency that is required to be self-funded. There are an increasing number of examples where this is the case, including access to court decisions through a pay service (lovdata). The establishment of such portals for information that originally is produced by public authorities in the process of exercising their administrative

powers seems to be an increasing challenge due to the fact that the public authorities fail to take initiatives that would facilitate access to information directly as held by them.

12) *National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)*

Third party interests are protected through duties of confidentiality according to section 13 of the Freedom of Information Act which refers to corresponding provisions of the Public Administration Act (sections 13-13f). These provisions do to some extent provide private parties the right to make exemptions in respect of documents and information they submit to public authorities. Section 13 of the Freedom of Information Act states in this regard:

> Where a request for access concerns a document containing information that is subject to a duty of confidentiality, and this duty of confidentiality ceases when the consent of the person entitled to confidentiality has been obtained, the request for access together with any reasons given shall on request be submitted to the person concerned allowing a suitable period for reply. Failure by the person concerned to reply shall be considered a denial of consent.

One case of interest from an environmental perspective concerned information regarding fishers who were compensated for loss suffered during seismic surveys for petroleum exploration in the vicinity of important fishing grounds. The Ombudsman for Public Administration (cases 2009/1977 and 2009/2220) criticized the Ministry of Petroleum and Energy and asked that the requests be reconsidered. After the reconsideration, access was given to information regarding who were compensated and the level of compensation.

13) *Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)*

More specifically:

a. Confidentiality of commercial or industrial information

The exemption regarding commercial information in the Freedom of Information Act (see section 13) is related to the duties of secrecy in the Public Administration Act. Section 13 of the latter Act states:

> It is the duty of any person rendering services to, or working for, anadministrative agency, to prevent others from gaining access to, or obtainingknowledge of, any matter disclosed to him in the course of his duties concerning: ... technical devices and procedures, as well as operational or business matterswhich for competition reasons it is important to keep secret in the interests ofthe person whom the information concerns.

There are limitations on the duty of secrecy in sections 13a and 13b of the Act. None of these exemptions provides for weighting the interests of secrecy against the public interest in access to the information. However, section 11 of the Freedom of Information Act does include such a rule of general applicability:

> Where there is occasion to exempt information from access, an administrative agency shall nonetheless consider allowing full or partial access. The administrative agency should allow access if the interest of public access outweighs the need for exemption.

Section 11 of the Environmental Information Act refers to the rules of the Freedom of Information Act in these regards, but it also requires that there be “a genuine and objective need” to refuse access to the information. Moreover, the rule on providing access to the information despite the duty of secrecy includes stricter conditions than does the corresponding provision of the Freedom of Information Act. Hence, section 11 sub-sections 2 and 3 of the Environmental Information Act state:

> When considering whether there is a genuine and objective need pursuant to sub-section 1, the environmental and public interests served by disclosure shall be weighed against the interests served by the refusal. If the environmental and public interests outweigh the interests served by refusal, the information shall be disclosed.

If there are grounds for refusing to disclose part of the requested information, the remaining information shall be disclosed provided that this does not give a clearly misleading impression of the contents.

Section 14 contains a special rule on information related to competition issues:

A public authority may require any person that provides the authority with information, or that is affected by a request for environmental information, to identify information which for competition reasons it is important to keep secret, and to give reasons for this.

Before the public authority takes a decision to disclose information that is subject to a statutory duty of secrecy, the person whom the information concerns shall be given the opportunity to express an opinion within an appropriate time limit.

If the public authority wishes to disclose information that is subject to a statutory duty of secrecy, the person whom the information concerns shall be notified. The decision to disclose the information may be appealed. The provisions of section 15 apply correspondingly. An appeal has a suspensive effect.

One case of interest before the Ombudsman for Public Administration concerned public tendering for projects that could qualify according to the Clean Development Mechanism of the Kyoto Protocol (case 2009/17). The Ombudsman criticized the Ministry of Finance for having included confidentiality provisions in the tendering documents and stated that it was unclear in the case whether secrecy was justified. The request was reconsidered by the Ministry and access was given to the majority of the documents. A problem in this case was the time the Ministry spent reconsidering the request (four months), which was commented on by the Ombudsman in light of the duty to deal with requests "without undue delay".

b. Confidentiality of the proceedings of public authorities / internal communications /

A broad exception regarding internal communications within an agency is set out in section 14 of the Freedom of Information Act: "An administrative agency may exempt from access any document which it has drawn up for its internal preparation of a case." Where documents are obtained from other agencies or entities, section 15 includes the following exemption:

Where it is necessary in order to ensure proper internal decision processes, an administrative agency may exempt from access any document that the agency has obtained from a subordinate agency for use in its internal preparation of a case. The same applies to documents which a ministry has obtained from another ministry for use in its internal preparation of a case.

Moreover, exemptions may be made in respect of parts of any document containing advice on and assessments of how an administrative agency should stand on a case, and which the agency has obtained for use in its internal preparation of the case, where this is required in the interest of satisfactory protection of the government's interests in that case.

The exemptions in this section apply correspondingly to documents concerning the acquisition of a document as mentioned in the first and second paragraphs, and to notices of and minutes from meetings between a superior and subordinate agency, between ministries and between an administrative agency and any person who gives advice or assessments as mentioned in the second paragraph.

As above, section 11 of the Freedom of Information Act includes a duty to provide access despite the exceptions, and section 11 of the Environmental Information Act applies in the same manner as mentioned above.

One case of interest concerns a legal assessment of the geographical scope of the Nature Diversity Act carried out between several ministries when preparing the act. The Ombudsman found that a denial of access to the assessments should be dealt with as environmental information and should be reconsidered (case 2011/197). Denial of access to

the information was upheld by the ministry. The case is currently pending before the Aarhus Compliance Committee (ACCC/C/2013/93 Norway).

c. Approach to the disclosure of:

- *"raw data' (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)*
- *"material in the course of completion" vs "unfinished documents" see AC Implementation Guide 2014 p 85*

The provisions on right of access to information do not specify access to raw data. However, the complexity and costs associated with handing out such data may be an issue. One case concerning access to information regarding old growth forests (2500 locations) from a forest owner is of interest (Rt 2010 p. 385). The Supreme Court concluded in the case that there was a duty for the property owner to provide the relevant maps on paper or as electronic files, and that access could not be given by allowing the applicant to access the maps in the offices of the property owner (para. 53). The court built its decision in this regard on section 18 of the Environmental Information Act:

> The recipient of a request for environmental information may provide the information in the form or format that is considered to be appropriate.
>
> The information shall be adequate and comprehensible in relation to the need for information expressed by the applicant. If the request for information can be answered satisfactorily by referring to generally available public registers, reports, product labelling, etc., the applicant may be referred to such sources of information.

Concerning material in the course of completion, section 5 of the Freedom of Information Act states:

> An administrative agency may determine in a particular case that access to documents shall not be given until a later stage in the preparation of the case than that stipulated in sections 3 and 4, provided there is reason to believe that the documents available give a directly misleading impression of the case and that access to them could therefore be detrimental to obvious public or private interests.

d. "Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11

Section 12 of the Environmental Information Act addresses this issue in relatively clear terms:

> Notwithstanding the provisions of section 11, the public shall always have access to information on
>
> a) pollution that is harmful to health or that may cause serious environmental damage,
>
> b) measures to prevent or reduce damage such as is mentioned in litra a), and
>
> c) unlawful intervention in or damage to the environment.

However, there seems to have been problems associated with the implementation of this provision. In cases concerning use of chemicals in the mining industry which have led to emissions in fjords, journalists have had problems of getting access to information regarding which chemicals have been used and the properties of the chemicals.

e. International relations, public security, national defence (see T-301/10 Sophie t' Veldt)

The Freedom of Information Act has broad exceptions out of regard for Norway's foreign policy interests (section 20), including information that "relates to Norwegian negotiating positions, negotiating strategies or the like and such negotiations have not been concluded. After conclusion of negotiations, exemptions may still be made in respect of such information where there is reason to believe that negotiations on the same matter will be resumed." Moreover, according to section 21 exceptions apply for information "when this is required by national security interests or the defence of the country."

One case of interest concerned a "letter of formal notice" from the EFTA Surveillance Authority to the Ministry of Petroleum and Energy concerning issues of discriminatory treatment of companies. The Ombudsman asked the ministry to reconsider, and the document was ultimately released (case 2011/531).

f. Weighing of interests in every particular case(Art. 4 para 2 subpara 2 Dir 2003/4/EC

This issue concerns the rules of section 11 of the Freedom of Information Act and section 11 of the Environmental Information Act, as discussed under litra a) above.

14) *Judicial control of access-decisions*

a. Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?

There is no special administrative appeal body for information sought from public authorities. Appeals are brought to the superior public authority or cases are brought to the Ombudsman for Public Administration.

There have been concerns about the time spent when reconsidering requests for access to information after a request for such reconsideration by the Ombudsman. One case that concerns this issue is currently pending before the Aarhus Convention Compliance Committee (ACCC/C/2013/93 Norway). In this case, public authorities and the Ombudsman spent two years and five months dealing with the request.

In cases concerning access to information from private parties an appeal body has been established; the Appeals Board for Environmental Information (section 19 of the Environmental Information Act). Its decisions are binding and enforceable, and can be appealed to the courts. This happened with the decision regarding access to information concerning old growth forests, which went all the way to the Supreme Court (Rt 2010 p. 385).

b. Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?

Formally speaking, parties affected by decisions regarding access to information have the right of access to courts. However, the real access to courts in such cases remains a significant challenge. There have hardly been any cases before Norwegian courts regarding access to information. There has been no case under the Environmental Information Act beyond the one that has been mentioned above. None of the 30+ cases that have been brought under the Freedom of Information Act concern access to environmental information.

15) *How do states fulfill the duty to make information actively available?*

There have been a number of initiatives to make environmental information available in recent years. Important initiatives include the following:

1. Naturbase, which is a map-based database that include a broad range of information relevant to the status of the environment and measures taken to protect the environment. This database combines 22 other databases (some are mentioned here), see http://www.miljodirektoratet.no/no/Tjenester-og-verktoy/Database/Naturbase/ (in Norwegian)
2. Environment.no is a web site that contains basic information regarding the state of the environment in Norway. The web-site is both in English and Norwegian.
3. A separate register on administrative decisions regarding biodiversity issues has been established, which provides access to the individual decisions of national, regional and municipal authorities, see http://www.miljodirektoratet.no/no/Tjenester-og-verktoy/Database/miljovedtak/ (in Norwegian)
4. A database on characteristics of products, including environmental effects, has been made available: http://www.pib.no/ (in Norwegian)

5. The Norwegian Nature Index is an initiative to map and predict the environmental status and trends on the level of ecosystems, see http://www.miljodirektoratet.no/no/Tema/Arter-og-naturtyper/Naturindeks-for-Norge/ (in Norwegian, a publication from 2010 is available in English)