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PUBLIC PARTICIPATION IN ENVIRONMENTAL PROTECTION

BUSINESS ENTERPRISES AND THE ENVIRONMENTAL INFORMATION ACT IN NORWAY

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Abstract Making market operators responsible for having and giving access to information about their impact on the environment is an important part of changing the way the economy operates in relation to environmental sustainability. To this end, the Norwegian access to environmental information act has established a right for the public to access to environmental information from private entities such as business enterprises. In this point, the Norwegian Act goes further than international rules, such as the Aarhus Convention, and also further than any other national legislation. This article presents the rules on access to information from business enterprises, and presents and discusses examples from the implementation of these rules.

Keywords Aarhus Convention, access to information, corporate social responsibility, environmental information, responsible business

INTRODUCTION

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INTRODUCTION

Increasing the public awareness and knowledge of the environment, as well as of factors affecting or likely to affect it, will lead to a better environment. Access to information will also lead to a better and more informed public debate, and contribute to democracy and public participation in decision-making affecting the environment. In order to give information, one must have it, and knowledge is the key to better performance. Being under an obligation to systematize and disclose environmental information helps organizations improve their efficiency in their management of resources, obtain a better understanding of the environmental risks they are facing, and through this enhance their reputation. For such reasons both international and national legal rules give rights to access to environmental information.

In Norway, the 2003 Environmental Information Act provides access to environmental information. The Act is unique in an international context in that it gives a right to environmental information not only from public authorities, but also from private enterprises. According to the Act, any person is entitled to receive environmental information from undertakings. In this context, undertakings are all public and private enterprises, including commercial businesses and other organized activities. The purpose of this article is to present the rules on the right to environmental information from undertakings, with a special emphasis on the right to access to environmental information from business enterprises.

Business enterprises, such as industrial plants, operators within agriculture, forestry and resource extraction hold information that is vital to those who want to assess the state of the environment. Information on the way the operations are performed, and the plans that such enterprises have for their future operations is crucial to anyone concerned about the environment. The goods and service sector of the economy also holds vital information on the composition of products put on the market, on the use of energy, and on waste that is produced. In most jurisdictions, public authorities collect information on business operations through their role as regulators. Many businesses are required to report on the environmental impact of their activities. This means that public authorities are holders of relevant information, and a right to access to information from public authorities may provide information on business enterprises. However, in many cases it is more efficient to obtain information directly from individual enterprises, and this may, in some cases, be necessary to assess the environmental impact of an individual enterprise.
In its proposal of the Act, the Norwegian government pointed to the fact that there is an increasing demand from the public for information about the activities and products of undertakings. Consumers need information about products in order to make informed choices in the market. There is a rising awareness of the way the economy functions as a main cause of environmental problems, and growing claim to hold market operators responsible for their conduct. Many businesses realize this and give information to the public, but this does not include all, and the information given is not always complete, and not always the information that the public wants.

Another reason is the need for information in order for citizens to protect themselves from harm and to prevent causing harm, by ignorant conduct or use of products or processes that may harm the environment. The cautious consumer wants relevant information, and should have a right to obtain this by request to the extent that it is not provided. The government also mentions those who have business relationships with the undertaking, who may need information before taking decisions on investment or other dealings with the undertaking.

Finally, information is an important part of the possibility of private enforcement of environmental regulations. In practice, this is perhaps the most important background for most requests for information, at least requests made by non-governmental organizations (NGOs) on behalf of civil society.

Making market operators responsible for having and giving access to information about their impact on the environment is an important part of changing the way the economy operates in relation to environmental sustainability. In its Seventh Environmental Action Programme to 2020, the EU has as a goal for 2020 to put “in place incentives and methodologies that stimulate companies to measure the environmental costs of their business and profits derived from using environmental services and to disclose environmental information as part of their annual reporting.” Chinese legislation already has some incentives to encourage more disclosure from enterprises. The Norwegian legislation uses legal obligations to ensure that undertakings collect such information about their activities, and is to my knowledge the only example of an application of the right to access to environmental information also to private companies and business enterprises.

The impact of the Environmental Information Act and the right to information from business enterprises is hard to measure. The public authorities in Norway do not keep records of the number of requests for information that relate to environmental information. The department of environment received a total of 1,088 requests for information in

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2 See EU Seventh Environmental Action Programme to 2020, at 70.
Since most of the work of the ministry is related to the environment, one can assume that most of these requests concerned environmental information. Of the 1,088 requests, 13.4% were refused. No systematic registration is undertaken on the requests for environmental information of business enterprises and other undertakings. The Environmental Information Appeals Board, which receives complaints from the public when a request for information has been refused by an undertaking, receives about fifteen complaints annually.

Before the adoption of the Environmental Information Act, certain information could be requested from public authorities through the general access to public documents act. The access to public documents act only applies to public authorities. Furthermore, the right to information only applies to information that is held in a document or a database, and therefore does not include physical information on the state of the environment that has not yet been registered by an authority. Moreover, the act does not impose any obligation on the public authorities to register or obtain environmental information.

The Environmental Information Act was passed to fulfill Norway’s obligations under international law to give access to information from public authorities. But the Act goes further than this, gives rights to access to information also against business enterprises and other undertakings. The Act therefore sets obligations not only on public authorities, but also on private parties. The Act is therefore not only an important piece of environmental legislation, but also forms a hard-law part of the corporate social responsibility of enterprises established in Norway.

I. LEGAL BACKGROUND

Environmental degradation interferes with the enjoyment of fundamental rights. At the same time, freedom of information and the right to participate in public decision-making are in themselves fundamental rights. Access to environmental information is therefore not just part of environmental law, but also belongs to the domain of constitutional law and fundamental rights. The right to access to environmental information is enshrined in Article 112 of the Norwegian Constitution. This article reads as follows:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

\[4\] See Draft Country report 2016 on the implementation of the Aarhus Convention, at 12, available at https://www.regjeringen.no/contentassets/b1d46284d244f41108a89a1c81e03b2d2/ren_-version.pdf (last visited Sep. 26, 2016).
In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.

The article was enacted as a constitutional amendment in 1992. Originally, it was perceived in practice as a directive to the legislative authority but not as a sufficient legal basis for individual legal claims, and therefore non-justiciable. After the revision of the Constitution of 2014 there are grounds to claim that the provision is justiciable, particularly when it comes to the right to information. The article underlines the importance that access to information has under Norwegian law, and supplements the general provision on freedom of speech and information and access to public documents in Article 100 of the Norwegian Constitution.

There are also important connections between human rights and the protection of the environment in an international context. The Aarhus Convention was drafted in terms of human rights, declaring the right to a healthy environment a universal basic right. The right to freedom and availability of information, especially those held by public authorities, is in itself one of the basic human rights. The UN Special Rapporteur on human rights and the environment, John Knox, said in his 2016 implementation report that, “human rights bodies have stated that Governments have: (a) procedural obligations, including to make environmental information publicly available, to facilitate public participation in environmental decision-making and to provide access to legal remedies.”

Presently there are no global rules on access to environmental information. The rules on access to environmental information that cover the largest geographical area are the ones entailed in the Aarhus Convention. The Convention has virtually all European states as participants, as well as several states in Central Asia, in total forty-seven adhering states. Both high and middle-income countries are represented.


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7 Id. at 16.


legislation of all EU member states, as well as in many other states.

Many countries outside the reach of the Aarhus Convention and EU Directive have national rules on access to environmental information. For instance, in China there are rules on the duty of the government and enterprises to disclose environmental information, on the right to access to environmental information held by public authorities, and on the encouragement of voluntary disclosure of environmental information by enterprises.10

The Aarhus Convention on access to information, public participation in decision-making, and access to justice in environmental matters has three pillars. The first is the right of everyone to receive environmental information that is held by public authorities. The second is the right to participate in environmental decision-making. The third is the right to review procedures to challenge public decisions that have been made without respect of the two aforementioned rights. The Convention has a compliance mechanism which gives the right to bring complaints before a committee of experts. The three pillars mirror the procedural entitlements to information, public participation, and access to justice expressed in Principle 10 of the Rio Declaration.11 The Special Rapporteur acknowledges the “leading example” of the Aarhus Convention, and recommends that the ASEAN countries consider the adoption of a similar convention.

The EU Directive 2003/4/EC on public access to environmental information prescribes in Article 3(1) that public authorities shall make available environmental information held by or for them to any applicant at his request and without his having to state an interest. Article 6 states that the Member States shall provide for procedures “in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law.” The Directive thereby gives the right to information and access to justice.

II. A CLOSER PRESENTATION OF THE ACT

Securing the right to access to information and participation in public decision-making in matters affecting the environment is thus of high value both under national and international law. The Norwegian Act must be seen on this background. The Act was adopted in order to fulfill the Norway’s obligations according to the Aarhus Convention and the EU Directive. The stated aim of the Act is:

To ensure public access to environmental information and thus make it easier for individuals to contribute to the protection of the environment, to protect themselves against injury to health and environmental damage, and to influence public and private decision-makers in environmental matters. The Act is also intended to promote public participation in decision-making processes of significance relating to the environment.

10 See ZHU, fn. 3 at 109–119.
11 See Mason, fn. 6 at 16.
As we can see, the purpose is three-fold. In addition to enabling the members of the public to participate in public decision-making, it is of importance to empower them to contribute directly to the protection of the environment, and to protect themselves against injury and harm. Therefore, the citizens will, for the good of themselves and society, supplement the work of public authorities in protecting and improving the environment. All these aims require knowledge and thereby access to information.

The Act gives the right to access to environmental information held by public authorities and by business enterprises and other undertakings. Its concept of environment is wide, and includes the external environment, including archaeological and architectural monuments and sites and cultural environments. In-door environments and the work environment are not included in the concept.

Under the Act, public authorities and undertakings have a duty to hold information irrespective of whether a request for information is made or not. The Act further gives a right for anyone to participation in decision-making processes related to the preparation of legislation, plans and programs relating to the environment. At the same time the Act was adopted, the Product Control Act received a new section 10 on the right to information about products from the producer, importer, processor, distributor or user of a product. Together these two Acts give a comprehensive right to environmental information from undertakings within the market.

The public authorities are the subjects of obligations to the Aarhus Convention and the EU Directive. It has been held that this is a consequence of a market liberal approach to regulation behind the Convention where disclosure by market actors is left to the field of soft law of corporate social responsibility. The Norwegian regulation goes further by giving a right to obtain environmental information also from business enterprises and other undertakings. This does not mean that the international rules do not provide any rights to information about the activities of commercial operators. Public authorities to a large extent hold information also on business enterprises, for example, as the result of environmental impact assessments that have been forwarded as part of applications for various types of licences, or as the result of monitoring and reporting by business entities on pollution or other impact on the environment. But in many cases information is not available through the authorities and must be obtained from the enterprises themselves. Typical for information with relevance to the environment held by business enterprises is information on products, operations, processes and plans for future development. Other examples are information on resource and waste management.

The Aarhus Convention in Article 5(6) encourages the Parties to extend the flow of information to the public also from business enterprises. The section includes the following wording:

12 Id. at 24.
Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

The Norwegian Act goes considerably further than this in that the public is given a direct right to information, with a corresponding legal duty on business enterprises to accommodate this.

**III. REQUIREMENTS OF DISCLOSURE IN OTHER LEGISLATION**

Undertakings are obligated to disclose many types of environmental information to public authorities under different sets of rules. The same obligations generally do not exist when it comes to informing the public. There are some issue-based information arrangements, such as the EU energy consumption labelling scheme.\(^{13}\) Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is also an important measure that entails disclosure rules. REACH is adopted to improve the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry. Companies have the responsibility of collecting information on the properties and uses of substances that they manufacture or import at or above one ton per year. They also have to make an assessment of the hazards and potential risks presented by the substance. Producers and importers have to notify the European Chemical Agency of substances listed on the list of “substances of very high concern” that are present in their articles.

At a more general level, certain larger enterprises are required to report on environmental, social and employee-related, human rights, anti-corruption and bribery matters under the EU Directive on disclosure of non-financial and diversity information by certain large undertakings and groups.\(^{14}\) The rules encompass companies with more than 500 employees, approximately 6,000 companies in the EU. The Directives are part of the wider EU’s initiative on corporate social responsibility, which includes plans for a consistent approach of reporting to support smart, sustainable and inclusive growth in pursuit of the Europe 2020 objectives. The legislation of some countries goes further. In


the UK, the Companies Act 2006 (Strategic Report and Directors’ Reports) Regulations 2013 requires quoted companies to report on greenhouse gas emissions for which they are responsible. Quoted companies, as defined by the Act, are also required to report on environmental matters in their Annual Report to the extent necessary for an understanding of the company’s business within. Also other countries, among them Denmark and Norway, have similar reporting requirements.

Reporting requirements are different from rules that give individual rights to information in that the information is provided in a standardized form at certain intervals. Although they ensure that important information is systematized and provided in the public domain, they cannot replace an individual right to have specific information on request.

For the remainder, most of the regulations on access to information set up voluntary regimes, such as Eco labelling and information requirements of environmental management systems.\(^\text{15}\) The access to information about business activities is therefore still for the most within the field of corporate social responsibility as instruments of soft-law.

**IV. DEFINING THE SCOPE OF THE ACT: THE CONCEPT OF ENVIRONMENTAL INFORMATION**

This is not the case in Norway. The Act gives a right to access to environmental information. Environmental information is defined in section 2 as:

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.

This definition is in line with the definitions of the Aarhus Convention and the EU Directive, albeit in a slightly simplified form. The definition is very broad, and should as

a minimum cover the same scope as the Aarhus Convention and the EU Directive. If there is doubt as to whether something can be regarded as environmental information, it should as a rule be included and not excluded from the scope. In a case concerning billboard advertising, the Environmental Information Appeals Board held that outdoor advertising was a factor that might affect the environment. The decision must be understood on the background that, in the Act, cultural environment is included in the concept of “environment.” In another case, the board refused a request to give information about the use of conflict minerals in mobile phones, with the reasoning that information on violence and breach of human rights is not in itself environmental information. In light of the fact that conflict minerals contribute to the financing of conflict and war, which also has considerable, negative effects on the environment, this decision may be disputed.

Notably, the definition includes both factual information and assessments. Environmental information is thus not limited to observations and records of hard facts. This is in line with the Aarhus Convention which includes “cost-benefit and other economic analyses and assumptions used in environmental decision-making” in the concept of “factors…affecting or likely to affect the environment,” see Article 3(2)b. The EU Directive includes cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities affecting or likely to affect the environment, Article 2(1)e.

Seemingly, the Norwegian Act has broader coverage since it mentions “assessments” in general, without any reference to cost-benefit analysis and other economic analysis and assumptions. For this reason, it has been argued that the concept also includes legal advice given in connection with policy-making or the making of decisions that may affect the environment. I doubt whether one can include legal advice in the concept of environmental information. The privilege of legal advice is an important part of the right to a fair trial, and thus of the rule of law. The right to a fair trial is recognized in section 95 of the Norwegian Constitution. The right to seek legal advice in confidence is important to secure all other rights. It is also difficult to argue that legal assumptions that are made directly affect the environment. A public authority or a business enterprise will have to defend the legality of its actions if challenged, and this defense must be judged on its merits irrespectively of whether it is in accordance with or contrary to advice that was given. What is of importance to the public is whether there are facts, assumptions or

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theories about the environment, or factors that affect the environment, that are not reflected in the decision, and not how the legal position has been assessed during the decision-making.

In order for assumptions to fall under the concept of environmental information, there must be some relation between the assumption and decisions affecting or potentially affecting the environment. It is evident that assumptions and hypothesis regarding the state of the environment and factors or activities likely to influence it fall under the definition. But a business enterprise makes many decisions on strategy and behavior in the market that in some way will affect the environment, but where the consequences are indirect and difficult to estimate. If no line is drawn, all evaluations and assumptions made within the enterprise, on pricing, entering new markets, acquisition of property and shares, investments etc. would be environmental information. This is obviously not the intention of the legislator, and is supported by the requirement mentioned in section 2b, last sentence, that the assumptions be “used in environmental decision-making.” For this reason, the majority of the Environmental Information Appeals Board refused access to information on differences in average profits on meat and other goods in retail chains. The majority held that information on pricing strategy and profits fall outside the scope of “environmental information.” The assumptions and considerations therefore have to be made as part of deliberations over issues pertaining to the environment or factors influencing it, such as the use of resources, in order for them to be considered “environmental information.”

A further notable point is that environmental information includes information on decisions and plans, as well as projects and activities. Plans and decisions are included in the right to information in the Constitution, as well as in the Aarhus Convention. When it comes to information from public authorities, the inclusion of plans and decisions, as well as the background material for such, must be seen in relation to the right of the public to participate in public decision-making regarding the environment. Even though no such right to participation exists in relation to private enterprises, a possibility for stakeholders to exert influence before decisions are taken can be of importance to the environment.

There is no requirement that the factors, activities or decisions have a manifest impact on the environment. The condition mentioned in the Act is that the factor affect or may affect the environment, without any threshold. The lack of a threshold is intended by the legislator. The way the Act is structured is that it gives a wide definition without many qualifications. The operative rules giving the access to information, however, have certain qualifications that limit the scope of the rights.

The right to information regarding products is further elaborated in the Product Control Act. But the definition of environmental information related to products is

included in the Environmental Information Act, and encompasses the properties and contents of products that affect or may affect the environment. This includes the effects products may have throughout their life cycle: production, distribution, use, and disposal. One might ask whether the volume of sales of a product from a distributor is included in the concept of environmental information. It is clear that the volume that is produced, imported and used may affect the environment. The relationship between the volume of sales of an individual distributor and the environment is less clear, particularly when the market share of the distributor is not substantial. This issue was reviewed by the Environmental Information Appeals Board in a case regarding the distribution of hydrogen peroxide and the drug “Paramove” used in sea-farming.\textsuperscript{21} The majority of the board held that the volume of sales of a distributor did not fall within the definition of environmental information. This decision is not easily reconcilable with the decision in \textit{Regnskogfondet v. Windy Boats AS} referred to below, where the fact that the company’s use of tropical timber in its leisure boats contributed only negligently to the deforestation of the rain forests, was not relevant to the assessment of whether the effects were “appreciable.” Account of the problem of deforestation had to be taken, not the individual contribution of the enterprise in question. When it comes to sales of substances that have appreciable effects on the environment, the enterprise should be under a duty to disclose its contribution through its volume of sales, even if these do not comprise a large share of the market.

\textbf{V. THE DUTY TO HOLD INFORMATION}

A precondition to receive information from a public authority or company is that the information is actually available. In order to ensure this, the Act puts an obligation on public authorities and enterprises to possess the relevant information. Sections 8 and 9 of the Act state:

\begin{quote}
\textit{Administrative agencies such as are mentioned in section 5, sub-section 1, litra a), shall hold general environmental information relevant to their areas of responsibility and functions, and make this information accessible to the public.}
\end{quote}

\begin{quote}
\textit{Any undertaking to which chapter 3 or 4 applies shall hold information about factors relating to the undertaking’s operations, including factor inputs and products, which may have an appreciable effect on the environment.}
\end{quote}

The duty includes knowledge of the state of the environment within the operations of an undertaking, as well as knowledge of actual or planned factors that may influence the environment. Although the wording of the duty when it comes to undertakings is tied to “factors,” knowledge about the state of the environment is a precondition for the undertaking to know how this environment may be effected. In line with this, the

\footnote{\textit{Roald Dahl jr. v. Aqua Pharma AS} 2015/3. I was part of the majority in this case, but have later come to the conclusion that the majority opinion was wrong.}
Norwegian Supreme Court, in its only case regarding the act so far, held that the owner of a forest had a duty to hold knowledge about all parts of the forest, including the parts where he was not actively engaged in any current or planned operations.\(^{22}\)

When it comes to public authorities, the duty to hold information is an implementation of the Aarhus Convention Article 5, which states that the parties shall ensure that public authorities possess and update environmental information which is relevant to their functions, and that mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment.

There is no provision in the Convention for business enterprises. The duty to hold information is therefore an original construction of the Norwegian Act. On the other hand, enterprises were and are under the obligation to hold information on the environmental impact of their operations under many other rules. Accounting and reporting rules require enterprises retain certain information in order to be able to report them. Rules regarding potentially harmful or dangerous products and substances also have such requirements, in the EU through the REACH-framework\(^{23}\). Farmers are under the obligation under Norwegian law to have environmental plans for their operations. Industry with license to pollute is under the obligation to monitor and register their pollutions. This means that the general requirement of holding information in the Act did not so much introduce new duties on the enterprises as confirm already existing duties of knowledge. For the most part such duties already existed. The main effect of the duty in the Act is that it is expressed in a comprehensive way, and that it forms the basis for making a claim of access to this information. In applying the Act, it is not necessary to refer to other rules in order to establish the duty to hold information on factors which may have an appreciable effect on the environment relating to the undertaking’s operations.

**VI. THE RIGHT TO INFORMATION**

The right to information is stated in general terms. Access to information from undertakings is modelled on the right to information from public authorities, and thus has the same structure as the rules in the Aarhus Convention. According to the Act section 16, subsection 1,

> Any person is entitled to receive environmental information from undertakings such as are mentioned in section 5, sub-section 2, concerning factors related to the undertaking, including factor inputs and products, which may have an appreciable effect on the environment.

The undertakings subject to this duty are all public and private undertakings,

\(^{22}\) NRT (Norwegian Court Reports) 2010, at 385.

\(^{23}\) The regulation of the EU, adopted to improve the protection of human health and the environment from the risks that can be posed by chemicals.
commercial enterprises and other organized activities, as much as they do not fall under the definition of “public authority” under the Act. This means that all commercial entities, natural and legal persons, are included, but also non-commercial enterprises, such as schools, rest homes, NGOs, etc.

Sometimes the identification of a responsible subject may be difficult within a corporate group encompassing a company with subsidiaries. In a case with the Environmental Information Appeals Board regarding information from sea farming, the company argued that it was only a holding company, and that the request for information had to be directed towards the subsidiary companies where the activities were undertaken. The majority of the board argued that the activities of the subsidiary companies must be regarded as an activity of the holding company in the meaning of the Act. The holding company was therefore under an obligation to hold or to have accessible to it, environmental information about its subsidiary companies. Consequently, a request for information about the activities of all the subsidiary companies could be directed against the holding company.

The person requesting information is not under any obligation to state an interest. Both natural and legal persons can request information. Many of the complaints received by the Environmental Information Appeals Board are from NGOs. In other cases the requests are made by the media or interested private persons and local groups.

The request does not have to specify particular factors, activities or documents where the information sought is contained. It is possible to request information in a general way, such as the ecological footprint of the company, the use of harmful substances, emissions of CO₂ through transportation, etc. But the information sought must be identifiable for the company.

The information requested has to concern the undertaking from which the information is requested. This is basically information about the environment and how the environment is affected by the activities of the enterprise, such as its lands, resources and use of resources, energy consumption, pollution, transportation purchases, use and sales of products, etc. The condition that the information must concern the undertaking may give rise to doubt in some cases. As a starting point, this should be subject to extensive interpretation. In some cases the Appeals Board has received requests where several enterprises are involved, and where doubt can be raised as to which of them is the right subject to answer the claim for information. One area where this has arisen is in the context of extermination of diseases or parasites related to sea farming. Such activities are often performed with the use of products delivered or sold by one undertaking, dispensed by another, on the order and in the interests of a third undertaking, normally the plant operating a sea farm. In one case, the complainant wanted information from a plant

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operating a sea farm about where wastewater after a disease treatment was disposed.\textsuperscript{25} The plant argued that the disposal of wastewater was the responsibility of the undertaking that performed this service for the plant, and that the request had to be directed to this undertaking. The majority of the Board concluded that the disposal of wastewater “concerned” the plant itself, and that it therefore was under an obligation to secure this information and to disclose it to the complainant.

A request must concern factors that may have an “appreciable effect” on the environment in order for it to be sustained. There is therefore a threshold to be passed. The undertaking is not required to provide information on activities or plans with only an insignificant effect on the environment. To determine the significance of a factor it is not sufficient to look at the activities of the specific undertaking. Account must also be taken of the significance of the activity or problem as such. Small Norwegian enterprises may play an insignificant role in contribution to global warming, but greenhouse gas emissions are not insignificant, even on a small scale. Information on such emissions is therefore information about factors that have an appreciable effect on the environment within the meaning of the Act, even from a small company with low emissions. The Environmental Information Appeals Board regarding unsustainable logging and use of tropical timber held as such. In a case regarding information about the quantities of tropical timber used by a producer of leisure boats, the Board stated, “even if the quantities imported to Norway are low, and the fact that each importer only contributes to a small part this, the import in itself is part of the global problem. The imports must consequently be seen to have not an insignificant effect on the environment.”\textsuperscript{26}

Information about products is regulated in the Product Control Act. The composition and characteristics of a product fall under this Act, whereas the production and use falls under the Environmental Information Act. Requests for information about products may be directed to the producer, importer, retailer or user of a product.

The Product Control Act section 10 states that any person is entitled to information about

\begin{itemize}
  \item whether a product contains components or has characteristics that may result in effects such as are mentioned in section 1,\textsuperscript{27}
  \item the components or characteristics to which this applies,
  \item how the product must be handled to prevent effects such as are mentioned in section 1,
\end{itemize}

\textsuperscript{25} Helgelands blad v. Sinkaberg-Hansen AS and Bindalslaks AS 2014/11.

\textsuperscript{26} Regnskogfondet v. Windy Boats AS 2005/10.

\textsuperscript{27} Sec 1 states “The purpose of this Act is to: a. prevent products or consumer services from causing damage to health; this includes ensuring that consumer products and services are safe, b. prevent products from causing environmental disturbance, for example in the form of disturbance of ecosystems, pollution, waste, noise and the like, c. prevent environmental disturbance by promoting effective energy use in products.”
significant injury to health or environmental disturbance caused by production and distribution of the product, and who is the producer or importer of the product.

The Product Control Act is limited to products that may cause harm or disturbance. The right to information about the characteristics of a product as such is therefore limited to characteristics or traits that might cause harm or disturbance. The right to information according to the Environmental Information Act, on the other hand, is not limited to potentially harmful factors. Information about what product an enterprise produces or uses, and about their production and use is therefore not limited to potentially harmful products, but encompasses all products. However, more specific information about individual products must be requested under the Product Control Act, and is therefore limited to the products that fall under this Act.

The right to information also applies to information concerning the environmental impact of production or distribution of a product. In many cases much of this has taken part outside Norway’s borders. The right to information includes these parts of the life cycle of the product, insofar as such information is available to the undertaking. The Act requires that the undertaking shall request such information from the previous link in the supply chain, if this is necessary to enable it to answer the request for information. The enterprise must show that it has carried out a reasonable effort to obtain information about the production process abroad. But in contrast to what is the case regarding the characteristics and components of the product, the importer or commercial user of products is not under an obligation to actually have this knowledge.

VII. EXEMPTIONS

The right to information is not without limits, and is subject to certain exemptions. Section 16 subsection 3 states that a request for information may be summarily dismissed if it is formulated in too general a manner or does not provide an adequate basis for identifying what is meant by the request. This is in line with the Aarhus Convention, which in Article 4(3)b, states that a request may be refused if is “formulated in too general a manner.”

As stated above, there is no requirement that the person requesting information be specific about the information he or she wants. However, it must be possible to identify what is meant by the request. In addition, the request must not be so wide-ranging that the effort required to answer it is clearly unreasonable, see section 17b. What is unreasonable must be seen in relation to the size and resources of the company, but there are limits to what can be demanded even from a large and professional company. In a case against the largest Norwegian petroleum company, Statoil, the Environmental Information Appeals Board refused a request that, according to Statoil, comprised 40,000 to 50,000 documents
that it would take 32–39 man-weeks to identify and assemble. Additionally, the Aarhus Convention gives grounds to refuse a request that is “manifestly unreasonable.” Under certain conditions, a request for information may be refused even if it is identifiable and not unreasonable. Section 17a states that

A request may be refused if it needs to be exempted because public disclosure would facilitate the commission of acts that may harm parts of the environment that are particularly vulnerable or threatened with extinction.

The Aarhus Convention has a similar exemption, and allows for refusals in the interest of the “environment to which the information relates, such as the breeding sites of rare species.”

The most important exemption in practice is the right of the enterprise to protect commercial secrets. The wording of section 17c allows the company to refuse a request for information if

[T]he information requested concerns technical devices and procedures or operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns.

The right to protecting information that might harm or disadvantage the enterprise is not absolute. Information on harmful pollution and unlawful intervention or damage to the environment must always be disclosed, even if this entails revealing information that may harm the company in competition. Commercial secrets cannot be invoked as a defense in such cases. Furthermore, 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, see section 11, subsection 3 of the Act.

The protection of commercial secrets is also recognized in the Aarhus Convention. Under the Convention, national law may protect the confidentiality of commercial and industrial information in order to protect a legitimate economic interest.

Not all types of information that might harm the enterprise if revealed can be regarded as commercial secrets. The legitimate interest of the enterprise to keep the information secret has to be taken into account. For this reason, information about defamatory matters that might lead to disinvestments by investors following a policy of socially responsible investment (SRI) or to consumer boycotts, are not included. The enterprise has no legitimate interest in keeping secret, for example, the fact that they are trading with business partners who are acting irresponsibly, or that they have neglected to perform due diligence in such matters. Rats in the kitchen are not a commercial secret that can be protected by a well-reputed restaurant, even if it would lead to bankruptcy should the facts be revealed.

Typically, production methods, strategies and plans for developing the line of

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28 Norges Naturvernforbund v. Statoil ASA 2011/03.
products, factors determining the pricing of goods and services, customers and other business strategies, are regarded as commercial secrets by business enterprises. Since such matters may often affect the environment, there is high potential for conflict between the right to information on the one hand, and protection of commercial secrets on the other. In one case, the Environmental Information Appeals Board allowed a contractor for the municipality of Oslo to protect its information about investments that had been made, its pricing structure, and the agreed minimum volumes in the contract, since competitors in the next tendering round could utilize such information to the disadvantage of the company.\(^{29}\) In another case, a telecommunication company was allowed to protect information about planned expansions of its network of radio transmitters around the country.\(^{30}\) On the other hand, a company in another case had to disclose information on the location of already established radio transmitters, since this could not be regarded as “secret.”

When it comes to products, not all information on their composition can be considered as secret. Producers and importers are under obligation to provide much information on elements and component to users and customers, and this information cannot be regarded as secret. In addition, the requirement that there must be a “competition reason” to guard the information that cannot be used to copy the product, is not protected. That the information must be “secret” has the consequence that information about the product that can be easily determined by a not too costly examination, must be given on demand. It is only when the information reveals information that is unobtainable through other sources, on how to produce the product, that one can regard it as a commercial secret.

The burden to prove that a certain piece of information is a commercial secret is on the undertaking. It is not sufficient for the undertaking to just claim the information must be protected. In a case on access to information about a forest, the claimant wanted to know what parts of a large forest surrounding Oslo still had the characteristics of “natural” forest, untouched by modern forestry, and where these areas were located. The owner claimed that this information could be used by competitors to calculate the costs and grounds for the company’s setting of its prices, and thus be used by the competitors to their advantage in the competition. The Supreme Court rejoined these arguments as “theoretical” and “unsupported by economic facts” and denied protection of the information.\(^{31}\) Consequently, an enterprise wanting to invoke the defense of commercial secrets cannot rely on the fact that the information requested will typically fall under this category, but must show in the specific instance how revelation of the requested information will harm this individual company, given the actual circumstances of the case.

\(^{29}\) Kommunal Rapport v. JCDecaux Norge AS 2011/5.
\(^{30}\) Trond Martin Skjerpe v. Telenor ASA 2014/13.
\(^{31}\) See fn. 22.
The Act also has a general reference to the Norwegian Freedom of Information Act in section 11, and allows for a refusal of a request for information if “there is a genuine and objective need to do so in a specific case and the information, or the document containing the information, may be exempted from public disclosure” pursuant to this Act. According to this Act, access to information may be refused on among other grounds, to protect Norway’s foreign relations and national security. Refusal is not automatic, however. It must be shown in the individual case that the interests of protection are strong enough to override the interests of access to information. In some cases Norway is under an obligation under international law to protect certain information, for example, where information has been received from the authorities in another state under EU rules that require confidentiality. In such cases access cannot be given under the Environmental Information Act.

VIII. ADMINISTRATIVE PROCEDURES

A request for information must be directed towards the undertaking in question. There are no formal requirements, and information may be requested in writing, electronically or orally. The undertaking may provide the information in the form or format that is considered to be appropriate, see section 18. This means that the undertaking may choose to invite the applicant to a site visit and show and explain the requested information orally. The right for the undertaking to choose the form in which to give the information is intended to make the duty as least strenuous as possible. The Act requires that the information be adequate and comprehensible in relation to the need for information expressed by the applicant. In some cases this will entail that the information is given in writing, particularly when it comes to information that is voluminous and complex.

If the request for information can be given a satisfactory answer by referring to generally available public registers, reports, product labelling, etc., the applicant may be referred to such sources of information. Such a reference can only be said to be a satisfactory answer if the information is readily and easily available from these sources.

According to the Act, the undertaking shall take a decision on the request and make the information available as soon as possible. This requires that the undertaking give the request prompt attention and deal with it accordingly. The request should be replied to no later than one month 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 one month, the information shall be provided within two months. In such cases the undertaking must inform the applicant about the extension of the time limit, of the reasons justifying this, and when a decision may be expected.

If a request for environmental information is refused, the undertaking shall indicate the provision pursuant to which the refusal is made. At the same time it should inform the applicant of the right to request further grounds for the refusal and the time limit for doing so, and of the right of appeal and the time limit for lodging an appeal. The applicant
may request a brief explanation of the refusal. The explanation shall be provided as soon as possible and at the latest ten working days after the request for an explanation was received. The explanation shall be provided in writing if the applicant so requests. The right to request reasons for a denial of access is of importance to the access to justice provided by the establishment of the Environmental Information Appeals Board.

The Appeals Board is established under section 19 of the Act. The Appeals Board consists of a chair, deputy chair, and six ordinary members, all appointed for terms of four years. The chair and deputy chair shall have law degrees. Three of the members shall come from the private sector, and the other three from an environmental organization, a consumer rights organization or a media organization. When dealing with specific cases, the Board shall consist of the chair or deputy chair and two ordinary members, one drawn from the private sector and one from an environmental, a media or a consumer rights organization. Decisions of the Appeals Board are taken by a simple majority, and decisions and the grounds for them are recorded in writing.

Refusals of requests for environmental information pursuant to both the Environmental Information Act and to section 10 of the Product Control Act may be appealed to the Appeals Board. The time limit for lodging an appeal is three weeks from the date when notification of the refusal reached the party concerned. In the case that the undertaking does not reply to the request at all, the request shall be considered as refused after the expiration of two months after the request has been made.

The Appeals Board receives on average 10–12 appeals each year, of which a little over half merit investigation in substance. Approximately half of the claims are rejected, and the other half are sustained. The main areas that have been brought to the Board are environmental effects of forestry and sea farming, the content of chemicals in consumer products and the use of tropical timber in products on the market in Norway.

**CONCLUSION**

The Norwegian law is the first to introduce a right for the public to have access to environmental information directly from business enterprises, and a corresponding duty for enterprises to give such information on demand. To date, it is still the only law to give the legal right to demand environmental information from business entities. The right to information supplements the general duties such enterprises have to give information to public authorities, and to inform the public as part of the reporting of non-financial information under certain rules. In contrast to such reporting rules, the obligations under the Environmental Information Act are comprehensive, and apply to all undertakings, regardless of their size. They give anyone the right to receive the information they request on demand, and the information is therefore not limited to the scope and form that is determined by the reporting rules. The Act has now been in force since 2004, and the more than ten years that have passed since the Act entered into force have proven the merits of the Act. There are few conflicts about its provisions and the duty to give
information on environmental information seems to have gained a wide acceptance, also among business enterprises.

To adopt such rules is an important step. However, having rules in the law-books is not sufficient. A survey performed among journalists in Norway showed that 96.6% of them had never filed a claim for information under the act.\(^{32}\) Over one third of these answered that this was due to lack of knowledge about the Act, whereas the remaining two-thirds replied that it was because the Act was irrelevant to their work. With more than a third of the journalists ignorant of the Act and the rights that it provides, there is still need for measures to increase knowledge about it. This may lead to increased pressure on enterprises to maintain and provide information on the environmental impact of their activities. Having such information and making it available to the public is a key to improving the environment to the benefit of all.

\(^{32}\) See fn. 4 at 4.