Avosetta Annual Meeting on 29/30 May 2015 in Bremen

Free Access to environmental information

Report on Denmark

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

The Danish Constitution doesn't include any guarantee of right of access to information.

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*

Public access to information held by public authorities was introduced in 1970 by the Act no. 1970/280 on public access (lov om offentlighediforvaltningen) which covered general access of the public to documents held by public authorities and special access of the parties involved in an administrative act (forvaltningsakt). In 1985 the 1970 Act was replaced by two Acts – the Act no 1985/572 on public access (Offentlighedsloven) which extended the general access to information held by public authorities, and the Act no. 1985/571 on administrative acts (Forvaltningsloven) which in section 11 gives the parties of an administrative act access to information held by the competent authority. After a comprehensive preparatory work (Report 2009/1510 from en expert committee headed by the former Ombudsmann) and 4 more years of political discussion, the 1985 Act on public access was in 2014 replaced by Act no. 2013/606 on public access to information held by public authorities. The new Act extended the scope of the obliged "authorities" to include the Association of Municipalities and private companies if the State or local public authorities owns more than 75 % but the Act did also restrict access to documents prepared for the Minister. Compared to the Directive 2003/4 on access to environmental information, the new 2013 Act on public access as well as the former Act from 1985 includes more derogations from access to information which are applied without balancing the interest of given access to information with the reasons for derogations. Moreover, the Act on public access to information doesn't include a timetable to comply with requests for access to information held by public authorities. This very important matter was however not addressed by the long preparation process of the new 2013 Act.

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?*

The Directive 90/313 was formally implemented into Danish legislation by Parliament by Act no. 1994/292 on Access to Environmental Information. This 1994-Act was revised by Parliament with Act no. 2000/447 intended to implement the Aarhus Convention provision regarding access to environmental information. Despite the formal implementation in 1994 of the Directive 90/313 and the later implementation of the Aarhus Convention, the legislative Act on Access to Environmental Information was almost unknown by the environmental authorities including most divisions of the Ministry of Environment, the public in general and even among journalist until 2010. First time the Act on Access to

environmental Information was applied by the Nature and Environmental Appeal Board was in 2005 (one case on biogas installation), next time was in three cases in 2007 and 2008 regarding access to information held on statistics on the use of antibiotic in pig farms held by the Technical University (claim rejected by the Nature and Environmental Appeal Boardbecause of lack of competence– in 2011 the Ombudsman concluded that the information in the University Database regarding use of veterinarian medicine, growth promotors and food additives should be considered as environmental information – FOB 2011.14.5 – see below). With those few exceptions, the Act on Access to Environmental Information was not used in any appeal cases before 2009.
This ignorance is reflected in the Expert Committee report 2009/1510 which on 1-2 pages of the 1000 pages report observes without any considerations or reflections the existence of the Directive 90/313 (and later Directive 2003/4) and the Aarhus Convention. From a practical point of view it is fair to claim, that the Directive on Access to Environmental Information and the Aarhus Convention obligations regarding public access to environmental information were almost ignored until 2010, despite the Directive and the Convention in several cases would have given the public information that was rejected under the Danish Act on Public Access.

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.*

I am not aware of statistics regarding request for information neither under the general Act on Public Access nor under the Act on Access to Environmental Information.

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

Since the Act on Access to Environmental Information was almost unknown (or ignored) by public authorities as well as the public and even lawyers until 2010, the significant Danish case law on the interpretation of 'environmental information' is restricted to the last 4-5 years.

The first significant case was a decision of the Ombudsman regarding proposal by the secretariat of the Nature and Environmental Appeal Board to the Appeal Board on how to decide in a concrete case. While the Nature and Environmental Appeal Board rejected access to the proposal of the secretariat, the Ombudsman concluded that such information is included in the term, 'environmental information" and suggested that the Appeal Board released this information (published in MAD 2009.2727). Despite the conclusion, the Appeal Board has constantly rejected to release this information – see MAD 2013.1466.

The second significant case on the interpretation of 'environmental information' was FOB 2011.14.5 in which the Ombudsman found that information in the Technical University Database regarding use of veterinarian medicine, growth promotors and food additives in animal farming shall be considered as environmental information within the scope of the Act on Access to Environmental Information overruling the Ministry of food and agriculture which rejected that these information falls within the scope of the Act on Access to Environmental Information.

The third case was even more significant and concerned whether the existence of the penicillin resistant bacteria MRSA at certain specific pig farms falls within the definition of 'environmental information'. The Ombudsman concluded that the existence of MRSA falls within the concept of environmental information and further more concluded that in balancing the interest of public information with the interests of the individual pig farmers,

this information should be disclosure (see FOB 2012.21/MAD 2012.2822).In 2014 the Ministry of Agriculture decided to disclosure the information to a journalist, but thelegal validity of the decision was by the pig farmers brought before the Eastern High Court with request of suspensive effect. In February 2015 the Eastern High Court gave the legal action suspensive effect which has been appealed to the Supreme Court where the question of suspensive effect is pleading.

The last an less significant case on interpretation of 'environmental information is the Ombudsman case - FOB 2014-27 – regarding information on documents concerning the replacement of the Agency of Coat protection from the Ministry of Transport to the Ministry of Environment. The Ombudsman concluded these information to be environmental information within the scope of the Act on Access to Environmental Information.

Finally it can be mentioned that in MAD 2014.96, the Nature and Environmental Appeal Board concluded that information regarding application for a windmill farm is environmental information within the scope of the Act on Access to Environmental Information and by this overruled the decision of the municipality.

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)*

No case law – the matter has not been questioned.

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)*

No case lawor other interesting observations regarding the legislation.

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)*

In this respect, the most important case is the Ombudsman decision in MAD 2009.2727 regarding internal documents in preparing a decision of the Nature and Environmental Appeal Board. While the Nature and Environmental Appeal Board rejected access to the proposal of the secretariat, the Ombudsman concluded that such information is included in the term, 'environmental information" and suggested that the Appeal Board disclosure this information. Despite the conclusion, the Appeal Board has constantly rejected to disclosure this information.

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

No case law or other interesting observations regarding the legislation.

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

No case law or other interesting observations regarding the legislation.

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)?*

No case law or other interesting observations regarding the legislation.

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)*

Regarding trade secrets there has been on case before the Nature and Environmental Appeal Board, MAD 2012.3225. The case concerned information on analysis of waste water imported from Norway for further treatment at a Danish factory. Fishermen asked for information but this was rejected by the municipality based on trade secrets. The Nature and Environmental Appeal Board found the decision invalid since it was based on the Act on Public Access to information and no balance of interest has been taken.

Another case concerned request of information on public inspections of mink farms which was accepted but without disclosure of the name of the mink farms. This was upheld by the Nature and Environmental Appeal Board in MAD 2014.78 which concluded that a proper balance was made. Finally the problem of affected third parties was and is the main concern in the above (5) mentioned MRSA case.

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

More specifically:

a. *Confidentiality of commercial or industrial information*
b. *Confidentiality of the proceedings of public authorities / internal communications /*
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*
d. *"Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11*

The most interesting case is the above (5) mentioned MRSA case and the case on use of antibiotica.

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

Regarding public security there has in the last five years been a number of cases on request of information regarding SevesoInstalations. The first case, was an Ombudsman's decision in MAD 2010.2706 in which the Ministry of Environment has rejected the request of disclosure of information regarding several Seveso Installations arguing that the release of the information could be used by terrorists. The Ombudsman strongly criticized that the decision was taking without balancing the interest of the public of having these informationand that it took more than a year to make the decision.

In January 2008, the same journalist did ask all municipalities for information regarding Seveso installations. Access was denied and this was brought before the Nature and Environmental Appeal Board which in MAD 2010.3105 annulled the decision because of lack

of balancing of interest and returned the case. Same scenario was repeated in MAD 2011.1337 and in MAD 2012.2261, in MAD 2012.3357 and in MAD 2013.1152. The clear interpretation of the Appeal Board did change the practice and in the rulings of the Appeal Board in MAD 2013.1106 and in MAD 2013.1337 the partly disclosure of information regarding Seveso installations was upheld by the Appeal Board which found that a proper and reasoned balance has been found between the threat of terrorists and the public need for these information on risk from Seveso installations.

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

This has particular been a subject for disputes regarding release of information on Seveso Installations – see above 13.e.

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?

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

No special administrative appeal body has been established. TheNature and Environmental Appeal Board has the competence in all cases concerning matters which are subject to appeal to the Appeal Board but in other cases, legal action must be taken before an ordinary court.

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

By making information public available at websites.