



ROYAL NORWEGIAN  
MINISTRY OF FOREIGN AFFAIRS

Savoie Arbitration  
Mr. Pierre-Olivier Savoie  
15 bis, rue de Marignan Poststed  
75008 Paris  
FRANCE

Your ref.:

Our ref.:

Date: 03.09.2020

**ICSID Arbitration Case ARB/20/11 – Confidentiality and Access to Information**

Dear Mr. Savoie,

Reference is made to your letter dated 28 August, in which you raise a number of issues related to confidentiality, transparency and access to information under Act of 19 May 2006 No. 16 pertaining to the right of access to documents held by public authorities and public undertakings (the Freedom of Information Act - FOIA). Let me take this opportunity to answer your questions and hopefully address your concerns.

**1.) Disclosure of Documents as a Result of 3<sup>rd</sup> party Requests under Norway's Freedom of Information Act**

As you are aware, the Norwegian public administration operates according to, and is bound by, the FOIA. The main rule of the FOIA follows from section 3, which states that case documents, journals and similar registers of an administrative agency are public except as otherwise provided by statute or by regulations pursuant thereto. As has also been explained in previous contacts<sup>1</sup>, this means that government agencies have a legal obligation to release documents requested under the act, unless a positive exception can be identified in statutory law or regulations adopted according to law.

Furthermore, the FOIA does not provide the originator of the document in question with a veto on disclosure and there is no obligation under the law to hear the views of the originator regarding a request for disclosure of a specific document. To the contrary, the law states in section 29 that the agency receiving the request shall consider it on an independent basis. If

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<sup>1</sup> Cf. e.g. e-mail of 27 August 2019 from Ms. Margrethe Norum to Mr. Pierre-Olivier Savoie

the originator's opinion on disclosure is known to the agency receiving the request, such opinion may be taken into account only to the extent permissible by the law. An agency that receives an access to information request under the law is required to handle the request without undue delay, cf. section 29.

Nevertheless, in the spirit of cooperation the Norwegian side has regularly invited the Claimants to make their points of view known whenever requests for disclosure have been made for documents related to the arbitration case<sup>2</sup> and we have taken such views into consideration to the extent permissible by the law.

## **2.) The deadline set for comments on the request for disclosure**

The FOIA section 29 requires that requests for public disclosure are dealt with without undue delay. How much time is actually available for an agency to respond to a specific request will depend on the volume and complexity of the request. These timelines, however, do not take into account any time needed for hearing the opinion of the originator of the document, as the law does not provide for such a mechanism. For that reason, a short deadline was set for the claimants to express their views on disclosure of the documents covered by the request at hand<sup>3</sup>. However, we do understand that assessing some 50 individual documents in three working days may pose a challenge, and in the spirit of flexibility and cooperation we will withhold the documents and decide on the request for disclosure only after receiving the Claimant's opinion, provided this is received by Friday 4 September as indicated in your letter dated 28 August. As stated in your 28 August letter, there is agreement between the Parties that there is no general duty of confidentiality in ICSID proceedings.

## **3.) Request for Disclosure of an Access to Information Request**

In your letter dated 28 August, you question why access to information requests are themselves subject to access to information requests. Furthermore, you object to the disclosure of your access to information request addressed to the Ministry for Oil and Energy.

The answer to your question is very simple: an access to information request is a document of an administrative agency similar to any other document received by the agency. Documents of an agency are public except as otherwise provided by statute or by regulations pursuant thereto, cf. FOIA, main rule, section 3. There is no exception in the law for access to information requests; they simply follow the main rule as any other document. Requests for public disclosure of access to information requests are received from time to time and dealt with in a regular manner, according to law. The situation with requests for disclosure of an

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<sup>2</sup> Cf. e.g. e-mail from Ms. Margrethe Norum to Mr. Pierre Olivier Savoie dated 27 August 2019, 19 November 2019, 17 December 2019, 23 January 2020 and 11 February 2020.

<sup>3</sup> Cf. e-mail from Mr. Olav Myklebust to Pierre Olivier Savoie dated 25 August 2020. The request for disclosure covered all correspondence between the Ministry of Foreign Affairs and Mr. Savoie. Correspondence between the Claimants and ICSID as well as correspondence between the Respondent and ICSID was considered to fall outside of the request. The list of approximately 50 documents that was communicated for comments in the above mentioned e-mail captured the correspondence between Mr. Savoie and the Ministry of Foreign Affairs on file with the ministry.



access to information request is not very common but it is in no way unique for the present case.

We have taken note of your objections to the release of your access to information request, and your points of view on such release have been communicated to the Ministry of Oil and Energy, which pursuant to FOIA section 29 is responsible for deciding on the matter. You should be aware, however, that the exceptions from the right to access to documents are exhaustively listed in chapter 3 of the FOIA. It is not clear to us which of these exceptions your objection is based on.

In your letter of 28 August, you also reserve the right to further investigate how the existence of your clients' access to information request came to the attention of the person who made the request of disclosure to the Ministry of Oil and Energy.

Public agencies in Norway make their journal of documents received and submitted available on the Internet, searchable for the public at [einnsyn.no](http://einnsyn.no). For the ministries this practice was established already in 1993. For a number of agencies, including the ministries, such publication is a legal obligation under the FOIA regulation (Regulation on public access to information of 17 Oct. 2008 No. 1119) section 6. As an incoming document to the Ministry of Oil and Energy, your access to information request appears in the public journal, which is available on the Internet.

#### **4.) Claimants' Notification of Public Disclosure of Documents**

In your August 28 letter you notify Claimants' intention to make public both the Notice of Dispute of 8 March 2019 and the Request for Arbitration of 18 March 2020. The intention of making these documents public seems to contrast with the position previously taken by the Claimants, e.g. as expressed in your letter dated 3 September 2019, where the claimants took the express position that all communications between the parties, including the Notice of Dispute of 8 March 2019 were to be viewed as non-disclosable. We take note of the fact that the Claimants have changed their position on this point. We also note that the Claimants now want to actively make public information they previously have wanted to keep confidential, while at the same time expecting their own search for information using their rights under the FOIA to be kept confidential, see point 3 above.

As regards the proposed redactions in the Notice of Dispute and the Request for Arbitration, the proposed redactions are not necessary from our perspective, in particular we see no reason for withholding the size of the claim from public disclosure.

#### **5.) Access to information requests under FOIA made by Claimants**

The Claimants have themselves sent extensive access to information requests to a number of different Norwegian agencies including the Prime Minister's Office and various ministries. These were at the outset understood to be requests for information under the arbitration case, as you indicated the connection with the arbitration case in your e-mails ("on behalf of the

claimants in ICSID Arbitration Case ..." etc.). The Foreign Ministry's response on behalf of all addressees was based on the assumption that your request was made on the basis of the Claimants' status as such in the arbitration case. In that relation we found it pertinent to await the guidance of the Tribunal with respect to the regime for production of documents.

In your e-mail of 21 August however, you seem to suggest that your requests should not be considered under rules of the Tribunal of the Arbitration Case, but rather be considered under the FOIA.

Even though the Tribunal may agree on a separate legal regime for the production of documents in the arbitration case, we agree that any regime in the Procedural Order regarding the production of documents will not extinguish the Claimants' right to request the disclosure of documents under the FOIA. Following your clarification it should be expected that the various agencies will respond to your requests accordingly, in compliance with the FOIA. Although the requests certainly will be dealt with without undue delay as required by the FOIA section 29, comprehensive requests as the ones you sent require extensive search of archives and, if many documents are identified, a reasonable amount of time must be allowed for the different agencies to assess your request against the rules for exception for public disclosure in FOIA chapter 3 as well as duty of confidentiality that may follow from other laws and regulations. A way for the Claimants to speed up their search for relevant documents would be to narrow their request, for example by searching actively for individual relevant documents in the publicly available registry for in- and outgoing mail at [einnsyn.no](https://einnsyn.no) referred to above.

## **6.) Proposed Confidentiality Order**

We have taken note of the points of view on confidentiality expressed on behalf of the Claimants under point 1) in your August 28 letter. Any obligation with regard to confidentiality must be compatible with Norwegian authorities' obligation to grant public access to documents under the FOIA in the continued handling of the case, an obligation the Claimants also have taken advantage of, see point 4 above.

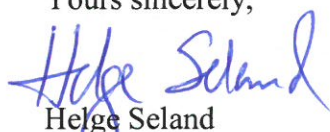
A government agency may not enter into an agreement with the originator or recipient of a document to the effect that all their communications that are exchanged shall be excluded from the FOIA. The FOIA provides no general exception for investor-State arbitration cases. You first suggested that we enter into a confidentiality agreement in your letter of 24 May 2019, and you have presented various iterations of such agreements in 2019 and 2020. We have remained somewhat puzzled by your insistence on a very broad confidentiality agreement being signed from the outset, covering any and all information incidental to the Claimant's case.

For reasons explained above, Norway is not in a position to enter into the suggested agreement(s) nor would it seem warranted from our perspective. Claimants did so far not substantiate the need for such an agreement.



Norway will, however, comment on the issue of confidentiality as a part of our comment on the Draft Procedural Order No. 1 submitted by the Tribunal. Our comments at that point will mainly address the need for a Confidentiality Order submitted in draft by the Claimants. Norway notes, however, a positive development in that the Claimants now seem to take the legal constraints imposed by Norwegian legislation better into account in their suggested order, and that the parties seem now to share a general desire for transparent proceedings.

Yours sincerely,

  
Helge Seland  
Director General

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