

Judgment 200900317/1/H3

Date of judgment: 4 November 2009

## ADMINISTRATIVE JURISDICTION DIVISION

Judgment on the appeal of:

the Minister of Agriculture, Nature and Food Quality,  
appellant,

against the judgment of Arnhem District Court of 31 December 2008 in case no. 07/1311 in  
the action between:

the Municipal Executive of West Maas en Waal

and

the Minister of Agriculture, Nature and Food Quality.

### **1. Course of proceedings**

By decision of 14 November 2006 the Minister of Agriculture, Nature and Food Quality (referred to below as the Minister) refused an application by the Municipal Executive of West Maas en Waal (referred to below as the Municipal Executive) for disclosure of data concerning the establishment operated by [the interested party] at [location] in [place] (referred to below as the establishment).

By decision of 13 February 2007 the Minister ruled that an objection that had been lodged by the Municipal Executive to the decision was well founded but, after amending the grounds on which the decision had been given, upheld it.

By judgment of 31 December 2008, which was sent on the same day, Arnhem District Court (referred to below as the District Court) held that an application by the Municipal Executive for judicial review of the decision was well founded and quashed the decision in so far as it upheld the refusal to disclose the dates on which pigs had been delivered to and from the establishment in the period from 10 April 2000 to 21 April 2004, the numbers of pigs concerned and the date of the last delivery before and the first after that period. The District Court also held that the objection that had been lodged by the Municipal Executive was to this extent well founded, revoked the decision of 14 November 2006 in so far as it refused disclosure of the above-mentioned dates and numbers of pigs, ruled that the Minister should disclose the relevant dates and numbers of pigs within four weeks of the date of this judgment, and directed that this judgment should take the place of the decision that had been quashed. This judgment is attached.

The Minister appealed against the judgment by letter received by the Council of State on 13 January 2009. The grounds of appeal were supplemented by letter of 6 February 2009.

The Municipal Executive and [the interested party] granted consent as referred to in section 8:29, subsection 5 of the General Administrative Law Act by letters of 21 and 26 January 2009.

The Municipal Executive lodged a defence to the appeal.

The Division heard the case on 21 September 2009, when an appearance was entered by the Minister, represented by P.M. Bakker Schut, civil servant in the employ of the Ministry, and by the Municipal Executive, represented by M.H.P. Claassen, attorney-at-law in Rotterdam. Moreover, [the interested party], who attended the hearing in person and was represented by C.J. Driessen, attorney-at-law in Beers, municipality of Cuijk, was heard as a party to the proceedings.

## **2. Considerations**

2.1. Under section 1, opening words and (g) of the Government Information (Public Access) Act (referred to below by its Dutch acronym WOB), the definition of environmental information for the purposes of the Act and the provisions based on it is the same as in section 19.1a of the Environmental Management Act (referred to below by its Dutch acronym WM).

Under section 3, subsection 1 of the WOB, anyone may apply to an administrative authority, or to an agency, service or company carrying out work for which it is accountable to an administrative authority, for information contained in documents concerning an administrative matter.

Under subsection 5, an application for information must be granted with due regard for the provisions of sections 10 and 11.

Under section 10, subsection 1, opening words and (c), information must not be disclosed under the Act in so far as it relates to companies and manufacturing processes and was furnished to the government in confidence by natural or legal persons.

Under subsection 2, opening words and (g), information must also not be disclosed under the Act in so far as the importance of such disclosure does not outweigh the importance of preventing disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

Under subsection 4, second sentence, the only circumstance in which environmental information must not be disclosed, notwithstanding subsection 1, opening words and (c), is if the interests of disclosure do not outweigh the interests stated there.

Under subsection 6, the provisions of subsection 2, opening words and (g) do not apply to the disclosure of environmental information.

Under section 19.1a, subsection 1 of the WM, in so far as relevant here, environmental information is defined for the purposes of chapter 19 of the Act and provisions based on it as all information set down in documents on:

- a. the state of the various elements of the environment, such as air and atmosphere, water, soil, land, countryside and nature areas including wet biotopes, coastal and marine areas, biodiversity and its components, including genetically modified organisms, and the interactions between these elements;
- b. factors such as substances, energy, noise, radiation and waste, including radioactive waste, emissions, discharges and other releases of substances into the environment which harm or probably harm the elements of the environment referred to in point a;
- c. measures, including administrative measures such as policy measures, legislation, plans, programmes, environmental agreements and activities which affect or may affect the elements and factors of the environment referred to in points a and b, and measures or activities to protect these elements;

d-f. (...).

2.2. The Municipal Executive requested disclosure of data supplied by [the interested party] to the Minister in accordance with article 32 of the Identification and Registration of Animals Order (referred to below as the Order). Under this provision, pig farmers must notify the Minister immediately of the delivery of pigs to and from their establishment. Such disclosure involves various data about the suppliers and customers concerned, the type of pigs and the means of transport. Application for judicial review of the decision refusing disclosure of such information, which had been upheld in the objection procedure, was made by the Municipal Executive solely in respect of the dates on which pigs were delivered to and from the establishment and the numbers of pigs involved. The application by the Municipal Executive was also confined to deliveries of pigs in the period from 10 April 2000 to 21 April 2004 and the last delivery before and first after that period.

2.3. By the decision of 14 November 2006, as amended by the decision of 13 February 2007, the Minister refused disclosure of the requested information on the grounds that it related to companies and manufacturing processes as referred to in section 10, subsection 1, opening words and (c) of the WOB and had been furnished in confidence. In so far as the information could not be treated as relating to companies and manufacturing processes, the Minister maintained that under section 10, subsection 2, opening words and (g) of the WOB there should be no disclosure in order to ensure that the business concerned did not suffer disproportionate disadvantage.

2.4. The District Court held that the information should be treated as environmental information within the meaning of section 19.1a, subsection 1, opening words and (b) of the WM. As section 10, subsection 2, opening words and (g) of the WOB does not apply to the furnishing of environmental information, the Minister had been wrong to base the disputed decision on that provision. The Minister had also been wrong to treat the importance of protecting the confidentiality of data relating to companies and manufacturing processes, as referred in section 10, subsection 1, opening words and (c) of the WOB, as an absolute ground for refusal since the disclosure of environmental information could be refused on that ground only if it outweighed the importance of disclosure. On these grounds the District Court quashed the decision contested before it.

The District Court also held that the information did not constitute data relating to companies and manufacturing processes within the meaning of section 10, subsection 1, opening words and (c) of the WOB and that its disclosure could therefore not be refused on the grounds of that provision. As the District Court did not find any basis for applying a different statutory ground for refusal, it disposed of the matter itself by declaring that the Municipal Executive's objection to the refusal of the request to disclose the information was well founded and by revoking the decision to refuse that request and ordering disclosure of the information.

2.5. The Minister has submitted that the District Court was wrong to hold that the information should be treated as environmental information within the meaning of section 19.1a, subsection 1 of the WM. He based this submission on the argument that data on the delivery of pigs to and from an establishment are not covered by the list of data treated as environmental information given in that subsection. He also submits that the District Court failed to recognise that this information constitutes confidentially supplied data relating to companies and manufacturing processes within the meaning of section 10, subsection 1, opening words and (c) of the WOB since the information was supplied in compliance with a statutory obligation and sheds light on the customers and suppliers of [the interested party]. As the data do not constitute environmental information, section 10, subsection 1, opening words and (c) of the WOB is applicable to it and provides an absolute ground for refusal. In so far as the information is held not to constitute data relating to companies and manufacturing processes, the Minister has argued that its disclosure is still barred by section

10, subsection 2, opening words and (g) of the WOB since [the interested party] would be disproportionately disadvantaged by the publication of these commercially sensitive data.

If the data should nonetheless be treated as environmental information, the Minister considers that the District Court was wrong to dispose of the matter itself. The logical course of action in that case would have been to direct the Minister to make a fresh decision on the objection, thereby making it possible to assess to what extent partial disclosure of the information was possible.

2.5.1. In view of section 19.1a, subsection 1, opening words and (b) and (c) of the WM, information about factors which harm or probably harm elements of the environment and information about activities which affect or may affect such factors should be treated as environmental information. As the Municipal Executive has pointed out, pig farming is accompanied by odour nuisance and ammonia emissions, which are factors that harm or probably harm elements of the environment. Contrary to what the District Court held, data on the delivery of pigs to and from an establishment do not in themselves constitute information about such factors. However, these data and numbers are about an activity which may affect the factors concerned. The District Court was therefore correct to hold, albeit on different grounds, that the requested information constituted environmental information within the meaning of section 19.1a, subsection 1 of the WM. The ground for refusal in section 10, subsection 2, opening words and (g) of the WOB does not apply to this information, and the ground for refusal in section 10, subsection 1, opening words and (c) of the WOB should be applied in accordance with section 10, subsection 4, second sentence of that Act. As the Minister wrongly based the disputed decision on the former provision and wrongly applied the latter provision as an absolute ground for refusal, the District Court was right to quash that decision.

2.5.2. However, the Minister rightly argues that the information constitutes data relating to companies and manufacturing processes within the meaning of section 10, subsection 1, opening words and (c) of the WOB. As the Division held previously (judgment of 17 July 2002 in case no. 200103014/1), this subsection should be interpreted restrictively. Data are treated as relating to companies and manufacturing processes only if and in so far as they describe or shed light on the technical operations of the business or the production process or the sale of the products or the identity of the customers and suppliers. Contrary to what the Minister has argued, the requested data furnish no information about the customers and suppliers of the establishment of [the interested party]. As held above at 2.2, the Municipal Executive does not wish to obtain data on the identity of customers and suppliers, but merely wishes to obtain disclosure of data on the delivery of pigs to and from the establishment and the numbers of pigs concerned. However, the latter data, which concern the purchase and sale of pigs, can yield information about the production process and turnover of the establishment operated by [the interested party]. These data must therefore be treated as data relating to companies and manufacturing processes. As these data were furnished by [the interested party] to the Minister in compliance with the obligation referred to in article 32 of the Order, it must be assumed that they were furnished in confidence.

As the data comprise not only environmental information but also data relating to companies and manufacturing processes and were furnished in confidence, within the meaning of section 10, subsection 1, opening words and (c) of the WOB, they need not be disclosed if the importance of disclosure does not outweigh the importance of protecting the confidentiality of the data. The Minister will now have to make this assessment himself in a fresh decision on the objection lodged by the Municipal Executive. The District Court was therefore wrong to dispose of the matter itself.

2.6. The appeal is well founded. The appealed judgment should be quashed in so far as it declared the objection lodged by the Municipal Executive to the decision of 14 November

2006 to be well founded and then revoked the decision, directed that the Minister disclose the data relating to the delivery of pigs to and from the establishment and provided that the judgment should take the place of the quashed decision on the objection of 13 February 2007. The Minister should make a fresh decision on the objection, taking into account the findings of this judgment. The Division will set a deadline for this purpose. The appealed judgment should be upheld in other respects, and the grounds on which it is based amended.

2.7. There is no reason to make an order for costs.

### **3. Decision**

The Administrative Jurisdiction Division of the Council of State

Giving judgment in the name of the Queen:

I. declares the appeal to be well founded;

II. quashes the judgment of Arnhem District Court of 31 December 2008 in case no. 07/1311 in so far as it held that the objection lodged by the Municipal Executive of West Maas en Waal to the decision of the Minister of Agriculture, Nature and Food Quality of 14 November 2006, reference TRCJZ/2006/3556, was well founded and then revoked the decision, ruled that the Minister should disclose the relevant information about the delivery of pigs to and from the establishment, and directed that this judgment should take the place of the quashed decision of the Minister of 13 February 2007, reference DRR&R/2007/606;

III. directs the Minister of Agriculture, Nature and Food Quality to make a fresh decision on the above-mentioned objection within four weeks of the communication of this judgment, taking into account its findings;

IV. upholds the appealed judgment in other respects.

Judgment given by M. Vlasblom, presiding judge, and C.W. Mouton and S.F.M. Wortmann, members of the Division, in the presence of A.M.E.A. Neuwahl, officer of the Council of State.

signed by Vlasblom  
Presiding Judge

signed by Neuwahl  
Officer of the Council of State

Pronounced in open court on 4 November 2009

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