

**Response of the Netherlands with regard to the Communication to the Aarhus Convention
Compliance Committee concerning compliance by the Netherlands with the provisions of
the Convention on access to information in connection with two power plants
(ACCC/C/2014/124)**

1. Please provide the text of article 2, paragraph 3 of the Protected Animal and Plant Species (Exemption Decree), as well as an English translation thereof.

Please refer to the attached Annex A for the original and the translated text of the requested article, as well as the original and the translated text of section 75 of the Flora and Fauna Act, to which article 2 paragraph 3 refers.

Please note that the Protected Animal and Plant Species (Exemption) Decree has been repealed following the entry into force of the new Nature Conservation Act. This subject matter is now dealt with in division 3.2 of the Nature Conservation Act, in particular section 3.8.

Please note furthermore that article 2 paragraph 3 of the Exemption Decree erroneously refers to subsection 5 instead of subsection 6 of section 75 of the Flora and Fauna Act. Any reference to subsection 5 in article 2 paragraph 3 of the Exemption Decree should therefore be read as a reference to subsection 6.

2. Please provide the Province of Groningen's reply of 19 July 2011 setting out the reasons for refusing to disclose those documents withheld, together with an English translation thereof.

Please refer to the attached Annexes B1 and B2 for the original and the translated text of the letter of the Province of Groningen of 19 July 2011.

3. Please provide English translations of the complete text of the District Court's judgment of 18 July 2012 and the Council of State's judgment of 16 July 2014.

Please refer to the attached Annex C for the translated text of the Council of State's judgment. The translated text of the District Court's judgment is forthcoming.

4. Please provide the judgment of the Council of State, 4 November 2009, ECLI:NL:RVS:2009:BK1977 (referred to in paragraph 23 of the Party's response to the communication), together with an English translation thereof.

Please refer to the attached Annexes D1 and D2 for the original and the translated text of the requested judgment.

5. In its letter to the Committee of 3 June 2016, the Party concerned refers to the exception in article 4, paragraph 3(c) of the Convention for "materials in the course of completion" which it states is incorporated in section 11, paragraph 1 of the Government Information (Public Access) Act. Did any institutions of the Party concerned (Province of Groningen the District Court or Council of State) rely on the "materials in the course of completion" exemption as a basis for refusing the information requested by the communicant?

The 'materials in the course of completion' exception is not expressly invoked either in the documents of the Province of Groningen or in the judgments of the District Court or the Council of State since this exception is not recognised in these words in Dutch law. However, all these institutions attach importance to the fact that many of the documents were drafts, in other words materials in the course of completion. This is relevant to the question of whether there was internal consultation and, if so, whether there were personal opinions on policy (for more details, see points 30 to 47 of the Written Statement of 26 November 2015) for the purposes of section 11 of the Government Information (Public Access) Act (WOB).

Section 11, subsection 1 of the WOB provides that, unlike other types of information, information on personal opinions on policy, contained in documents drawn up for the purpose of internal consultation within administrative authorities, must not be disclosed. Amendments to or comments in draft documents (as opposed to the final document) are considered to be personal opinions on policy. If the

environmental information in the document contains personal opinions on policy or is so closely linked to personal opinions on policy that this information cannot be separated, the public interest served by disclosure shall be weighed on a case-by-case basis against the interests of the protection of the personal opinions on policy.

6. Please provide the relevant caselaw, together with English translations thereof, that establishes that the “materials in course of completion” has been incorporated into section 11, paragraph 1 of the Government Information (Public Access) Act.

The Explanatory Memorandum to the WOB gives the following examples of documents drawn up for internal consultation within the meaning of section 11, subsection 1 of the WOB: ‘papers drawn up by civil servants for politicians and higher-ranking officials, correspondence between the different parts of a ministry and between different ministries, drafts of documents, diaries, minutes of meetings, summaries and conclusions of internal discussions and reports of civil service advisory committees’ (Explanatory Memorandum, Parliamentary Papers, House of Representatives, 1986/1987, 19 859, no. 3, pp. 13-14).

As the disclosure of draft documents had already been regulated in the WOB, it was decided when implementing the Convention that the exception for ‘materials in the course of completion’ did not require further implementation.

It follows from section 11, subsection 1 of the WOB that personal opinions on policy in documents drawn up for the purpose of internal consultation are not made public as those taking part in internal consultations might otherwise feel inhibited from speaking freely. In its judgment of 1 September 2010 (ECLI:NL:RVS:2010:BN5701), the Council of State held as follows:

‘It is apparent from the legislative history of section 11, subsection 1 of the WOB that the protection it affords for personal opinions on policy is designed to promote freedom of expression and ensure that brainstorming is possible in confidence without fear of loss of face and that those involved in the primary formulation of policy can express their ideas and views in complete freedom (Parliamentary Papers, House of Representatives, 19 859, no. 3, pp. 14 and 38). For this purpose, personal opinion on policy is taken to mean a view, proposal, recommendation or conclusion of one or more persons about an administrative matter and the arguments put forward by them in support. In view of the above, the Division considers that in so far as the draft answers differ from the definitive answers and are therefore not already public they contain personal opinions on policy. The District Court failed to recognise this. Where the draft answers differ from the definitive answers, disclosure could be refused under section 11 of the WOB. In so far as the draft answers correspond with the definitive answers, they have already been made public and the WOB does not therefore apply.’

In the letter of 3 June 2016 the Government wished to make clear that although the exception for ‘materials in the course of completion’ was not expressly invoked, the documents in question were drafts. The nature of the documents and the question of whether they are drafts are – as explained above – relevant in assessing whether they involved internal consultations and personal opinions on policy. This case concerns drafts of documents of which final versions are also available. That is important because it is through these that the environmental information has become public.

7. At paragraphs 52-54 of its response to the communication dated 27 November 2015, the Party concerned states that some of the documents not disclosed “refer to”, but do not “contain”, environmental information. In order to assist the Committee to have a clear picture of what “refer to” means in this context, please provide examples of sentences that, in the Party concerned’s view do not contain environmental information, but which:

- (a) “Refer to studies on the question whether the power plants in the Eemshaven serve an imperative reason of overriding public interest”;**
- (b) “Refer to imperative reasons of overriding public interest” regarding the power plants in the Eemshaven.**

What is important to the Dutch government is that the Committee’s request for information does not result in previously refused information becoming public after all in the context of these proceedings

before the Aarhus Convention Compliance Committee, when it has not been established that the refusal was unlawful.

To assist the Committee to understand what is meant by 'refer to', we can provide some general examples of documents that do not contain environmental information but do refer to it. Examples are documents such as email messages which do not themselves contain environmental information but refer to another document containing it, such as an environmental impact statement. Another example is an internal legal analysis which refers to environmental information described elsewhere in another document.