Judgment

NORTH NETHERLANDS DISTRICT COURT

Administrative Law Division

Location: Groningen

Case number: AWB 12/796

Judgment of the Full-Bench Chamber of 18 July 2013 in the case between

Stichting Greenpeace Nederland, a foundation having its seat in Amsterdam, claimant

(counsel: B. Kloostra),

and

the Provincial Executive of Groningen, defendant

(counsel: M.L. Batting)

Course of proceedings

By decision of 19 July 2011 (the principal decision) the defendant partially refused an application from the claimant for disclosure of documents and data under the Government Information (Public Access) Act (WOB).

An objection to this decision was lodged by the claimant and by RWE Eemshaven Holding B.V. (RWE) and Nuon Power Projects I B.V.

By letter of 13 August 2012 the claimant applied to the District Court for judicial review of the failure to decide on its objection to this decision.

A decision on the objections of RWE and Nuon was made by the defendant on 15 August 2012. The defendant also decided on the claimant's objection by decisions/subdecisions of 6 November 2012, 4 December 2012 and 15 January 2013. The defendant forwarded these further decisions to the District Court and requested, pursuant to section 6:19 of the General Administrative Law Act (AWB), that the claimant's application for judicial review be deemed to be directed against these decisions as well.

The defendant lodged a statement of defence.

The claimant lodged further documents.

The court hearing took place on 18 March 2013.

The claimant, represented by A. ten Kate, assisted by its counsel B. Kloostra, entered an appearance. Those appearing on behalf of the defendant were N.J. Lobbezoo and R.J. Groenveld, assisted by its counsel M.L. Batting. RWE, as interested third party, was represented by H. Krinkels, assisted by its counsel J.J. Peelen. Nuon, as interested third party, did not enter an appearance. The District Court adjourned the hearing of 18 March 2013.

On 21 March 2013 and 26 March 2013 the defendant furnished documents to the District Court and requested it to apply the provisions of section 8:29 of the AWB. By decision of 11 April 2013 the District Court held that the restriction on disclosure of these documents was justified. By letter of 12 April 2013 the claimant gave the consent required under section 8:29 of the AWB.

The defendant made a supplementary decision on 28 May 2013.

The District Court resumed the hearing of the case on 10 June 2013.

The claimant, represented by A. ten Kate, assisted by its counsel B. Kloostra, entered an appearance. Those appearing on behalf of the defendant were N.J. Lobbezoo, R.J. Groenveld and D.C. Tans, assisted by its counsel M.L. Batting.

RWE, as interested third party, was represented by H. Krinkels, assisted by its counsel J.J. Peelen. Groningen Seaports entered an appearance as interested third party and was represented by C. Vierenhalm and R. van Essen. Nuon gave notice by letter of 17 May 2013 that it would not be present.

The Judicial Map (Revision) Act entered into force on 1 January 2013.

The District Courts of Assen, Groningen and Leeuwarden have together formed the new North Netherlands District Court since that date. The area in which this court has jurisdiction covers the provinces of Drenthe, Friesland and Groningen. From now on, the case will therefore be heard and decided by the North Netherlands District Court.

Considerations

Facts and course of the case

1.

RWE and Nuon applied for various permits for the construction, commissioning, operation and routine maintenance of a coal-fired or multi-fuel power plant on the Eemshaven industrial estate in the municipality of Eemsmond.

By decisions of 14 August 2008 RWE was granted a permit for this purpose both by the Minister of Agriculture, Nature and Food Quality (now the State Secretary for Economic Affairs, Agriculture and Innovation) and by the Provincial Executive of Friesland, pursuant to section 19d of the Nature Conservancy Act 1998.

The Minister and the Provincial Executives of Groningen and Friesland ruled on the claimant's objections to the permits by decisions of 5 December 2008 and 13 March 2009, respectively. The claimant and others then applied to the Administrative Jurisdiction Division of the Council of State (hereinafter: the Division) for judicial review of these decisions. At the Division's request, the Advisory Foundation for Administrative Law on the Environment and Spatial Planning (STAB) issued an expert opinion. In its judgment of 24 August 2011 in case numbers 200900425/1/R2 and 200902744/1/R2 (JB 2011/215; www.raadvanstate.nl), the Division held that the claimant's application was well founded, quashed the decisions on the objections and, arrogating the decision-making power to itself, refused the requested permits.

Following this judgment, RWE lodged a new application on 23 March 2012, after which a permit was granted anew by (principal) decision of 19 June 2012. The claimant and others lodged an objection to this decision and applied for judicial review.

On 1 June 2011 the claimant requested the defendant, under the WOB, to furnish it with all documents relating to '*the granting of a permit for the construction of power plants by Nuon/Vattenfall and Essent/RWE in Eemshaven and the changes in and around Eemshaven to the port and fairway for colliers*'.

2.

The defendant's decision on the WOB application was made on 19 July 2011. An Excel spreadsheet belonging with that decision lists 1,724 documents and classifies each of them as

'*public*', '*partially public*' or '*not public*'.

Many of the documents not disclosed or only partially disclosed (including emails) had been exchanged in preparation for the hearings by the Division in cases 200900425/1/R2 and 200902744/1/R2, or concerned correspondence between the defendant and the permit holder in relation to the questions asked in those proceedings by the STAB (including emails, spreadsheets and 'question-and-answer drafts').

Objections to the decision of 19 July 2011 were lodged by the claimant and by RWE and Nuon.

2.1.

By decision of 15 August 2012 the defendant ruled on the objections of RWE and Nuon. By decisions/subdecisions of 6 November 2012, 4 December 2012 and 15 January 2013 the defendant decided on the claimant's objection, ruling on the disclosure of 604 documents (according to part 2.4 of the statement of defence of 14 February 2013). 304 documents were fully disclosed and 87 partially disclosed. Disclosure was refused in the case of 213 documents. The defendant made a supplementary decision on 28 May 2013.

2.2.

At the hearing of 18 March 2013, the claimant's counsel stated, when asked, that in relation to the application of 13 August 2012 for judicial review of the failure to make a decision in time the District Court could confine itself to making a substantive assessment of the decisions that postdated the lodging of the application.

2.3.

The District Court will deal below with the decisions referred to at 2.1 above. In doing so, it will take account of the following. The District Court has received documents 363, 375, 444, 604, 638 and 692 from the defendant pursuant to section 8:29 of the AWB. The Excel spreadsheets belonging with the disputed decisions/subdecisions indicate that these documents have been fully disclosed, but this is not the case according to the associated explanatory notes. The District Court assumes that these documents have not been made public and will rule on this basis.

By contrast, the District Court expresses no opinion on documents 611 and 616, which have been supplied to it pursuant to section 8:29 of the AWB. The District Court assumes that these documents have already been made public, since the Excel spreadsheets indicate that this has already occurred and there is no explanatory note stating otherwise.

Finally, the District Court notes that it follows from the Excel spreadsheets that it has been decided not to disclose certain documents (or not to do so fully), but there is no explanatory note to this effect. The documents in question are numbered 224, 231, 392, 534, 599, 607, 631, 656, 730, 731, 744, 754, 755, 756, 1129, 1155 and 1187. The District Court will assess documents 392, 534, 607, 631 and 1129 lodged by the defendant pursuant to section 8:29 of the AWB and assumes in this connection that the defendant has refused to make these documents public by reference to the same assessment framework applied by it to the other documents. Documents 224, 231, 599, 656, 730, 731, 744, 754, 755, 756, 1155 and 1187 have not been lodged. As the disputed decision will be quashed in view of the findings set out below, the District Court will direct the defendant, for reasons of procedural economy, to make a fresh decision on these documents by reference to the assessment framework described in this judgment.

The closed hearing

3.

In the grounds for judicial review, the claimant has alleged that the defendant, in preparing its decision, wrongly held a hearing which the claimant was not allowed to attend. This hearing

was held at the request of RWE and Nuon on 2 December 2011. By letter of 28 September 2012 the claimant gave the consent referred to in section 8:29 of the AWB to take cognisance of the record of the hearing.

3.1.

The claimant has submitted that convening a closed hearing and redacting passages from the record of the hearing are contrary to due process of law and a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and of section 7:6, subsections 2 and 4 of the AWB. The claimant argues that it should still be supplied with the record of the closed hearing.

3.2.

The defendant maintains that it acted in accordance with section 7:6 of the AWB and that the claimant's submission cannot succeed.

3.3.

Under section 7:6, subsection 2 of the AWB, interested parties may be heard separately if it is reasonable to assume that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons. Under section 7:6, subsection 3 of the AWB, interested parties must be informed of the matters dealt with during a hearing when they were not present. Under section 7:6, subsection 4 of the AWB (added in the second memorandum of amendment), the administrative authority may decide not to apply subsection 3 if there are compelling reasons for secrecy.

3.3.1.

The explanatory note to the second memorandum of amendment (House of Representatives, 1990-1991, 21 221, no. 9, pp. 2-3) contains the following passage on this addition:

'The amendments to sections 6.3.11 (2) and 6.4.11 (2) mean that the court may hear interested parties separately, either of its own motion or on request, if it is reasonable to assume that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons. This exception to the obligation to hear interested parties in each other's presence may occur, for example, if disclosure of medical or psychological data about an interested party or of commercially sensitive company or manufacturing data is to be expected during the hearing. (…)

If the interested parties are not heard in each other's presence, each of them must be informed of the matters dealt with during the hearing pursuant to subsection 3 of sections 6.3.11 and 6.4.11. The addition of a fourth subsection to sections 6.3.11 and 6.4.11 as now proposed establishes beyond doubt that this obligation does not apply to sensitive or confidential information revealed by interested parties during the hearing. (…)

It should also be noted that the new subsection 4 implies that the information in question should also not be included in the record of the hearing that has to be prepared pursuant to section 6.3.12 or 6.4.12.'

3.4.

The District Court considers that the defendant acted in accordance with section 7:6 of the AWB. In view of the parliamentary history set out above, the District Court considers that it was reasonable for the defendant to decide to hold a closed hearing as it could be expected that confidential or sensitive information would be heard. The defendant also acted in accordance with the spirit of section 7:6, subsection 4 of the AWB by not supplying the claimant with the record of the confidential part of the hearing. The District Court does not agree with the claimant that this was contrary to due process of law.

3.5.

Nor does the claimant's submission that there has been a breach of article 6 of the ECHR succeed. The objection procedure cannot be regarded as a procedure to which the fair trial principle of article 6 of the ECHR applies since it is not conducted before an independent tribunal. For this reason alone there cannot have been a breach of article 6 of the ECHR during the objection procedure, as alleged by the claimant. The submission therefore fails (see also the Division's judgment of 1 June 2011 in case no. 201010013/1/H3).

The completeness of the disputed decisions

4.

In the grounds for judicial review submitted on 20 November 2012, the claimant argued that it had called attention in the objection procedure to the fact that documents were missing and that the defendant had wrongly failed to address this point in the disputed decision. In a document lodged by it on 6 March 2013, the claimant explained what attachments and annexes (to emails and reports that had been made public) it considered had not been taken into account in the decision.

4.1.

At the hearing of the District Court of 18 March 2013, it was agreed with the parties that before 1 April 2013 the claimant would lodge a list of the attachments and annexes it still wished to receive and that the defendant would lodge its reaction to this before 1 May 2013 and would, in so far as necessary, make a decision on disclosure of the requested documents.

4.2.

By letter of 29 March 2013 the claimant provided a list of the documents it considered had been wrongly withheld. These were documents whose existence the claimant inferred from the documents that had been made public by the defendant. The claimant substantiated its claim in each case by referring to one of the 1,724 documents considered by the defendant in reaching its decision.

4.3.

The defendant gave its response by letter of 26 April 2013. It determined whether each of the documents was in its possession and, if so, whether the document had already been made public or whether disclosure had been refused. The defendant noted that it had been unable to trace a number of documents.

4.4.

By letter of 21 May 2013 the defendant informed the District Court that it had managed to trace 11 of the missing documents, but that some of the other documents had not been found and that inquiries made of Nuon, RWE and Groningen Seaports had also failed to reveal their whereabouts. Enclosed was a letter from RWE of 13 May 2013 and an email from Nuon of 16 May 2013 stating that they would not cooperate in the search.

4.5.

By decision of 28 May 2013 the defendant decided to make public the 11 documents that had been traced. Copies of the letter of 21 May 2013 and of the decision of 28 May 2013 have been sent to the parties' counsels. The District Court assumes that the defendant has properly informed all interested parties. Nor has the disclosure as such been disputed by the parties to these proceedings. The District Court will therefore not express an opinion on this.

In its decision of 28 May 2013 the defendant took the position that it had done everything that could reasonably be expected of it to trace the missing the documents.

4.6.

Under section 6:19 of the AWB, the application for judicial review also applies by operation of law to a decision to retract, amend or replace the disputed decision, unless the parties do not have a sufficient interest in this. As the claimant alleges that the defendant, by taking the above-mentioned position in its decision of 28 May 2013, had not fully satisfied the claimant's application for judicial review, the District Court will consider whether the decision of 28 May 2013 can be upheld in law.

4.7.

By letter of 28 May 2013 the claimant lodged the report entitled 'expert opinion in case 070209-001' with the District Court. In this opinion, W. Verloop of Digital Investigation BV answers a number of questions raised by the claimant. The claimant submits that the efforts made by the defendant to locate all the documents referred to in the claimant's letter of 29 March 2013 were insufficient.

4.8.

The District Court notes that the defendant has been able to provide clarity about the majority of the documents listed by the claimant in its letter of 29 March 2013. What remains is that the defendant was unable to locate some of the documents. For example, it was not able to trace every draft of a report or statement of defence attached to an email. What is in dispute is whether the defendant made sufficient efforts to trace the documents listed by the claimant.

4.9.

By letter of 28 May 2013 the defendant gave the following account of its search:

'We have checked our own records and computer files. On 25 April 2013 we also asked RWE, Nuon, GSP and the Ministry of Economic Affairs to search for the documents and to send us any they could find. The response from all these parties was negative, either because they felt under no obligation to comply with it or because they had not found the requested documents.'

4.10.

The District Court considers that the defendant did everything that was reasonably possible to trace the documents.

In its judgment of 6 March 2013 in case no. 201111046/1/A3 the Division held that when an administrative authority, after making inquiries, finds that a document is not in its possession and such a statement is not implausible, it is in principle up to the person requesting information to prove the opposite. The claimant has failed to show by means of W. Verloop's report that the defendant's statement that the requested documents were no longer in its possession is implausible. For example, its reply to question 3 was that it was likely that the digital email messages and/or their attachments on previously used backup media were no longer available. The District Court also considers that, contrary to what W. Verloop suggests, the defendant has no obligation under the WOB to try to reconstruct, partially or otherwise, the untraced documents using modern forensic techniques. It considers that the defendant's efforts were sufficient.

4.11.

In view of the above, the District Court finds that the claimant's submission disputing the defendant's position that it did everything which could reasonably be expected of it to trace the documents requested by the claimant fails. The claimant's application for judicial review of the decision of 28 May 2013 is therefore unfounded.

Internal exchange of documents

6.

With reference to what it has held above at 5, the District Court will first consider the documents that have been exchanged among administrative authorities and the advisers consulted by them as only these documents can be classified as being used for internal consultation as defined by it above.

The District Court assumes that a document has been shared with third parties if this is apparent:

- from the document itself (in view of the address of the recipient or sender);
- from one of the disputed decisions, for example if a third party is mentioned under the heading '*from (organisation)*' or '*to (organisation(s))*' or if the statement of the grounds for the decision indicates disclosure to or consultation with third parties.

6.1.

The question of exactly what documents were covered by the claimant's application for judicial review was discussed with the claimant at the hearings of 18 March 2013 and 10 June 2013. It is the District Court's understanding that the claimant wishes, above all, to inspect the documents exchanged with permit holders RWE and Nuon rather than the documents exchanged in the course of internal consultation in the customary sense.

In so far as the documents in question pertained to internal consultation in the customary sense, it is the District Court's understanding that the claimant does not wish to inspect the documents involving correspondence between an administrative authority and the state advocate and that, as regards the other documents exchanged internally (between administrative authorities and the advisers consulted by them), it only wishes to inspect them if they include environmental information.

The District Court notes that documents 217, 221, 291, 357, 358, 359, 361, 362, 363, 444, 518, 519, 523, 524, 526, 530, 533, 535, 542, 602, 604, 605, 606, 644, 662, 663, 664, 667, 986, 992, 1033, 1129, 1131, 1132, 1145, 1412 and 1692 (including the email attachments) were only

exchanged between the state advocate, the administrative authorities and the advisers consulted by them. The decision does not state by and with whom documents 903, 904 and 1677 (a draft memorandum of oral pleading and draft statement of defence drawn up by the state advocate) were shared. As the District Court has not found any evidence that these three documents were shared with parties other than the state advocate and administrative authorities, it includes them among the documents listed above.

As the District Court assumes from the above that the application for judicial review is not directed against the refusal to disclose these documents, it will not express an opinion on this.

6.2.

The District Court notes by reference to the assessment framework described in 6 that the following documents (including the email attachments), which have not been made public, have not been shared with parties other than the administrative authorities and the advisers consulted by them: 365, 374, 377, 379-387, 392 (in so far as not made public), 396, 398, 401, 559, 571, 572, 574, 575, 576, 580-588, 610, 637, 665, 676 (in so far as not made public), 701, 726, 729, 734, 743, 750, 751, 763, 767-773, 824, 868, 1036, 1037, 1138, 1144, 1171, 1172, 1181-1184, 1190, 1393, 1489 and 1723.

The District Court would make two observations about the classification of these documents. First, emails shared with the state advocate (and marked cc) have been included under 6.2 if they were not for the sole purpose of exchanging views with the state advocate.

In so far as all or part of the information included in the documents listed in 6.2 was disclosed to third parties in other emails, the refusal to make them public via those emails is discussed. By way of example, the District Court mentions the information in (yet-to-be-assessed) document 375, some of which is taken from documents 374 and 763.

6.3.

The District Court notes that documents 210 and 446 (presumed to have been shared internally) have not been lodged. The defendant should check whether it has these documents in its possession. As the disputed decision will be quashed in view of the findings set out below, the District Court will direct the defendant, for reasons of procedural economy, to make a fresh decision on these documents by reference to the assessment framework described in this judgment.

6.4.

As the claimant's application for judicial review relates only to the documents listed at 6.2 in so far as they contain environmental information, the District Court will limit its ruling on the defendant's refusal to disclose the documents exchanged internally to those documents that contain environmental information.

Partly internal email correspondence

8.

The District Court notes that although some of the lodged email correspondence ends with a limited exchange among the administrative authorities and the advisers consulted by them, it does include underlying emails shared outside the circle of those deemed by the District Court to participate in the internal consultations.

8.1.

The District Court sets out below what emails were not shared outside the circle of those it regards as participating in the internal consultations:

- document 122 (internal as from email of 3 February 2010, 09.39)
- document 230 (internal as from email of 3 February 2010, 09.39)
- document 394 (internal as from email of 27 January 2011, 16.29)
- document 562 (internal as from email of 1 February 2011, 11.46)
- document 569 (internal as from email of 22 October 2010, 17.42)
- document 570 (internal as from email of 13 October 2010, 09.08)
- document 578 (internal as from email of 13 October 2010, 09.08)
- document 579 (internal as from email of 13 October 2010, 09.08)
- document 629 (internal as from email of 3 February 2011, 10.47, attachment 1685)
- document 630 (internal as from email of 1 February 2011, 11.46)
- document 732 (internal as from email of 1 February 2011, 11.46)
- document 733 (internal as from email of 3 February 2011, 10.47)

- document 735 (internal as from email of 14 March 2011, 13.42)
- document 753 (internal as from email of 5 February 2011, 10.11)
- document 764 (internal as from email of 13 October 2010, 09.08)
- document 765 (internal as from email of 13 October 2010, 09.08)
- document 766 (internal as from email of 14 March 2011, 13.42)
- document 874 (internal as from email of 3 February 2011, 10.47)
- document 963 (internal as from email of 4 February 2010, 12.07)
- document 1115 (internal as from email of 4 February 2010, 12.07, attachment 1114)
- document 1193 (internal as from email of 14 April 2011, 14.38)
- document 1406 (internal as from email of 1 February 2011, 11.46)
- document 1407 (internal as from email of 3 February 2011, 10.47)
- document 1629 (internal as from email of 25 January 2011, 10.57)
- document 1718 (internal as from email of 26 March 2009, 09.42).

8.2

The assessment framework described above in 6 to 7.2 applies to the email correspondence and accompanying attachments addressed solely to administrative authorities and the advisers consulted by them. On the basis of this assessment framework, the District Court concludes that the passages that remained internal do not require further discussion, either because they do not contain environmental information or because they concern correspondence addressed to the state advocate (and others) about the statement of defence to be lodged.

8.3

The District Court would, however, make a further observation about document 103, which has not been mentioned previously. An email dating from 2006, which is addressed to Nuon's adviser named in the statement of defence of 14 February 2013, is 'pasted' into page 1 of this document. Also 'pasted' is an email from an unspecified consultancy firm. The defendant should reassess this document by reference to the assessment framework described in this judgment.

8.4

The District Court considers that the defendant is not entitled to invoke section 11 of the WOB in relation to the passages in the 27 documents (25 emails and two attachments) mentioned in 8.1 and any accompanying attachments which were shared with parties other than the administrative authorities and the advisers consulted by them (sent by or to RWE, Nuon and the advisers consulted by them). These parts of the disputed decisions/subdecisions should be quashed.

Consultation with the permit holder(s)

9.

In view of what has been held in 5 to 5.8, the defendant is not entitled to invoke section 11 of the WOB if the documents were shared with parties other than the administrative authorities and the advisers consulted by them. The defendant was therefore wrong to base its refusal to make those documents public principally on section 11 of the WOB (internal consultation).

9.1.

The District Court has held in 6 above that it assumes that a document has been shared with third parties if this is apparent from the document itself owing to the identity of the addressee or from the reasons given for the contested decisions/subdecisions.

The defendant has given the following reason for refusal in respect of a large number of documents (including documents 893, 894, 899, 1039, 1043, 1047, 1058, 1059, 1067, 1068, 1069, 1151 and 1679): *'The document contains questions and answers intended as preparation for the hearing before the Council of State on 11 April 2011. The document is one of those that contain questions and answers drawn up in preparation for the hearing by Nuon, RWE and the province (and their lawyers).'*

The District Court assumes that the lawyers representing Nuon and RWE have been able to acquaint themselves with the content of the documents in respect of which this reasoning was used.

9.2.

On the basis of the above, the District Court holds that the following (181) documents and the accompanying attachments were exchanged with parties other than the administrative authorities and the advisers consulted by them: 34, 40, 42, 45, 49, 84, 123, 138, 170, 172, 173, 174, 207, 220, 269, 279, 292, 294, 313, 319, 360, 375, 378, 469, 496, 510, 513, 522, 525, 527, 528, 534, 540, 548, 550, 557, 558, 560, 565, 566, 568, 577, 607, 617, 621, 623, 624, 625, 631, 635, 638, 645, 646, 647, 648, 651, 653 (= 510), 657 (= 496), 659 (= 968), 685, 692, 694, 696, 697, 699, 725, 727, 728, 736, 737, 738, 739, 740, 741, 745, 746, 748, 749, 752, 757, 758, 759, 760, 761, 762, 774, 823, 859, 893, 894, 899, 947, 954, 964, 968, 969, 973, 984, 1025, 1027, 1031, 1035, 1038, 1039, 1040, 1043, 1045, 1046, 1047, 1048, 1049, 1050, 1053, 1058, 1059, 1067, 1068, 1069, 1071, 1072, 1074, 1075, 1076, 1078, 1079, 1080, 1095, 1099, 1100, 1101, 1104, 1136, 1149, 1151, 1169, 1203 (= 496), 1209, 1319, 1320, 1321, 1331, 1332, 1340, 1341, 1342, 1343, 1344, 1350, 1351, 1352, 1395, 1401, 1405, 1411, 1413, 1429, 1436, 1457, 1461, 1508, 1510, 1513, 1524, 1563, 1618 (= 635), 1625, 1634 (= 496), 1635, 1636, 1661, 1679, 1681, 1682, 1683, 1684, 1686, 1687, 1690, 1693, 1699 and 1722.

10.

Although the defendant is not entitled to invoke section 11 of the WOB in relation to the documents referred to above in 8.4 and 9.2, this does not of itself mean that they should therefore be made public.

10.1.

If third parties are in consultation with an administrative authority, either they or the authority may prevent disclosure of the resulting documents by invoking the ground for refusal referred to in section 10 of the WOB (see, for example, the Division's judgments of 30 May 2012 in case no. 201105407/1/A3 on settlement negotiations, 3 October 2012 in case no. 201109085/1/A3 on a tendering procedure, 7 November 2012 in case no. 201109485/1/A3 on expert opinions, and 5 December 2012 in case no. 201110330/1/A3 on grant awards).

10.2.

Alternatively, the defendant has argued that it can invoke section 10, subsection 2, opening words and (g) of the WOB. In its response of 21 December 2012, RWE too argued that section 10, subsection 2, opening words and (g) of the WOB could be applied.

10.3.

Under section 10, subsection 2, opening words and (g) of the WOB, information must 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 section 10, subsection 6 of the WOB, the provisions of subsection 2, opening words and (g) do not apply to the disclosure of environmental information.

10.4.

By its principal decision of 19 July 2011, the defendant held as follows:

'In so far as the documents were sent to or received from the permit holders (exclusively or otherwise) and date from after the granting of the permits, they relate to consultation that took place between the administrative authorities and companies concerned in connection with preparation for the defence of the permit before the courts. (…) Alternatively, section 10, subsection 2 (g) of the WOB is invoked in respect of these documents.'

In its statement of defence of 14 February 2013 the defendant referred to 'disproportionate advantage or disadvantage'. In each case the same reasoning was applied and reference was often made to document 365. The defendant refused disclosure of the documents (in part) on the following ground:

'The other party would thus obtain more information than provided for under procedural law. As a new procedure has now been started for the issue of a permit under the Nature Conservancy Act, we share the committee's view that in this procedure the importance of not being disadvantaged must outweigh the public interest in disclosure.'

10.5.

The District Court considers that, in the reasons given for the decision, the defendant has not sufficiently demonstrated that disclosure of the documents would result in disproportionate advantage or disadvantage to the defendant and/or RWE and/or Nuon and/or Groningen Seaports. The application for judicial review is therefore held to be well founded in relation to this reasoning as well.

The District Court has taken into account in this connection that the proceedings in the course of which the documents were drawn up have since ended with the Division's judgment referred to in 1. It is not clear what passages from the documents would or could result in disproportionate advantage or disadvantage to the defendant and/or RWE and/or Nuon and/or Groningen Seaports in the procedure for a fresh application and, in so far as such an advantage or disadvantage already exists, whether it is disproportionate.

The defendant has thus provided insufficient reasons as to why in this case there are interests which outweigh the public interest in disclosure.

Assessment framework for a fresh decision

11.

The following conclusion can be drawn from what has been held above in relation to the claimant's application for judicial review.

The District Court finds that some of the documents which the defendant has refused to disclose pursuant to section 11 of the WOB were not shared outside the circle of those regarded by the District Court as participating in the internal consultations. It follows from the explanatory notes on the claimant's application for judicial review that the District Court need not further assess whether the disclosure of these documents could be refused by the defendant, with the exception of five documents that contain environmental information. The defendant still needs to assess whether the importance of protecting personal opinions on policy expressed in those documents outweighs the

public interest in disclosure of the environmental information.

The District Court has also established in respect of the parts of the 27 documents listed in 8.1 that the documents can be classified as intended for internal consultation, over which it need not express an opinion.

The defendant cannot invoke section 11 of the WOB in respect of the 27 documents listed in 8.4 or the 181 documents (and accompanying attachments) listed in 9.2 in so far as the documents contain passages shared with parties other than the administrative authorities and the advisers consulted by them, or rather the permit holders and their advisers.

As the District Court has concluded that no other ground for refusal has been adequately invoked for the passages from the 208 documents mentioned above, the defendant should reassess the claimant's objections in respect of these documents. The District Court holds as follows with regard to the final resolution of the dispute.

11.1.

In so far as the defendant must make a fresh decision on the 208 documents mentioned above (and the documents that have not been lodged, as listed in 2.3) which originated, whether or not in the form of successive drafts, from a third party that cannot be regarded as participating in the internal consultations such as RWE, Nuon and Groningen Seaports, and which were furnished by such third party to the defendant in confidence, the defendant will have to contact the third party concerned to ask whether it objects to the complete or partial disclosure of the document originating with it and, if so, on what grounds.

11.2.

In so far as that third party considers that disclosure would cause it disproportionate disadvantage, as referred to in section 10, subsection 2, opening words and (g) of the WOB, it must provide a reasoned explanation of how its interests would be harmed and why that breach would be disproportionate. The defendant must then assess whether the third party's claim of disproportionate disadvantage is justified. The same applies to a claim by the third party concerned that disclosure would result in disproportionate advantage for another party.

11.3.

In so far as the defendant itself, by invoking section 10, subsection 2, opening words and (g) of the WOB, wishes to refuse disclosure of documents which it has shared with a third party, whether or not in the form of successive drafts, it must assess whether such disclosure would result in disproportionate disadvantage to itself or disproportionate advantage to a third party. As the objections committee has already noted, the risk that certain information may be used in legal proceedings against the province is not a sufficient argument for refusing disclosure of information under section 10, subsection 2, opening words and (g) of the WOB (see page 33 of the opinion).

The District Court would also point out that the mere submission that the documents in question are drafts and that the final version has already been made public is insufficient. The District Court refers in this connection to the Division's judgment of 12 March 2008 in case no. 200705164/1.

11.4.

After weighing the competing interests, the defendant should decide whether to make the documents public or to amplify the reasons for refusing their disclosure.

11.5.

If the defendant once again decides to refuse disclosure of the documents, it should determine whether they contain environmental information. For this purpose it should apply the criterion set out in 7.1. The District Court would note in advance that, contrary to what the defendant has

stated, many of the documents listed in 9.2 do contain environmental information. This is particularly true of the documents drawn up for STAB about the state of the various elements of the environment (air and atmosphere, water, soil, land, countryside and nature areas) and factors (such as substances and noise) which harm or may harm these elements of the environment, as well as measures and activities to protect these elements.

11.6.

If the defendant concludes that the documents do contain environmental information, it cannot invoke section 10, subsection 2, opening words and (g) of the WOB and should plainly consider, on the basis of the information furnished by third parties, whether there are other grounds for refusal as referred to in section 10. For example, RWE has already argued in the judicial review proceedings that disclosure of the documents should be refused on the ground specified in section 10, subsection 1, opening words and (c) of the WOB (data relating to companies or manufacturing processes furnished to the government in confidence by natural or legal persons).

11.7.

The District Court also notes that when applying section 10, subsections 1, 2 and 7 of the WOB it is necessary, under section 10, subsection 8 of the WOB, to consider whether the information concerns environmental emissions.

11.8.

It follows from the above that the District Court does not share the defendant's view that the huge quantity of documents justifies a less strict assessment. As the defendant should apply the assessment framework referred to above to 208 of the more than 1,700 documents, some of which are identical, there are no longer any practical objections to carrying out a full assessment. The District Court also considers that in this case the public interests to which the documents relate are of such importance as to justify the efforts that must be made by the defendant.

11.9.

The District Court sees no reason to give a final ruling on the dispute. First, it does not see any reason to apply an 'administrative loop' allowing rectification of the decision as this would make it impossible for the defendant to appeal against the District Court's definition of internal consultation.

Nor does the District Court see any reason to order the direct release of the documents since the defendant must be given an opportunity to reassess whether there is disproportionate advantage or disadvantage and decide whether another ground for refusal exists.

12.

The District Court believes that an order for costs should be made. It allocates 3 points for the applications for judicial review of the decisions/subdecisions of 15 August 2012, November 2012, 4 December 2012, 15 January 2013 and 28 May 2013. It also allocates 1.5 points for attendance at the hearings of 18 March 2013 and 10 June 2013. The District Court awards a sum of €472 per point. The defendant should also reimburse the court fee that has been paid.

Decision

The District Court:

- declares the claimant's applications for judicial review of the decisions of 15 August 2012, 6 November 2012, 4 December 2012 and 15 January 2013 to be well founded in so far as they related to disclosure of the documents numbered 34, 40, 42, 45, 49, 84, 103, 122, 123, 138, 170, 172, 173, 174, 207, 210, 220, 224, 230, 231, 269, 279, 292, 294, 313, 319, 360, 375, 378, 394, 446, 469, 496, 510, 513, 522, 525, 527, 528, 534, 540, 548, 550, 557, 558, 560,

562, 565, 566, 568, 569, 570, 577, 578, 579, 599, 607, 617, 621, 623, 624, 625, 629, 630, 631, 635, 638, 645, 646, 647, 648, 651, 653, 656, 657, 659, 665, 685, 692, 694, 696, 697, 699, 725, 727, 728, 730, 731, 732, 733, 735, 736, 737, 738, 739, 740, 741, 744, 745, 746, 748, 749, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 764, 765, 766, 774, 823, 859, 874, 893, 894, 899, 947, 954, 963, 964, 968, 969, 973, 984, 1025, 1027, 1031, 1035, 1038, 1039, 1040, 1043, 1045, 1046, 1047, 1048, 1049, 1050, 1053, 1058, 1059, 1067, 1068, 1069, 1071, 1072, 1074, 1075, 1076, 1078, 1079, 1080, 1095, 1099, 1100, 1101, 1104, 1114, 1115, 1136, 1149, 1151, 1155, 1169, 1171, 1181, 1187, 1190, 1193, 1203, 1209, 1319, 1320, 1321, 1331, 1332, 1340, 1341, 1342, 1343, 1344, 1350, 1351, 1352, 1393, 1395, 1401, 1405, 1406, 1407, 1411, 1413, 1429, 1436, 1457, 1461, 1508, 1510, 1513, 1524, 1563, 1618, 1625, 1629, 1634, 1635, 1636, 1661, 1679, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1690, 1693, 1699, 1718 and 1722;

- quashes to this extent the decisions of 15 August 2012, 6 November 2012, 4 December 2012 and 15 January 2013;

- directs that within eight weeks the defendant should decide anew on the disclosure of these documents, taking into account the provisions of this judgment;

- declares the application for judicial review of the decisions of 15 August 2012, 6 November 2012, 4 December 2012 and 15 January 2013 to be unfounded in all other respects;

- declares the application for judicial review of the decision of 28 May 2013 to be unfounded;

- orders the defendant to reimburse the claimant for its costs in the proceedings, up to a sum of €2,124 (i.e. 4.5 times €472);

- orders the defendant to reimburse the claimant for the court fee paid by it.

This judgment was given by A.W. Wassink, presiding judge, and R.L. Vucsán and S.B. Smit-Colenbrander, judges, in the presence of E.A. Ruiter, clerk of the court.

This decision was pronounced in open court on 18 July 2013.

Clerk of the Court Judge

Legal remedy

Appeal may be lodged against this judgment with the Administrative Jurisdiction Division of the Council of State within six weeks of the date of its dispatch.

Copy sent to the parties on: