

Appendix 4B

Judgment of 18 July 2013 by the North Netherlands District Court in case no. 12/796

Internal consultation (section 11 of the Government Information (Public Access) Act)

5.

The defendant's principal submission at the hearing of 10 June 2013 was that under section 11 of the Government Information (Public Access) Act (WOB) the documents now before the District Court for assessment need not be disclosed. It also took this position on the documents in respect of which this is not (immediately) apparent from the explanatory notes accompanying the decisions.

5.1.

Under section 11, subsection 1 of the WOB, where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information must be disclosed concerning personal opinions on policy contained therein.

5.2.

In assessing the documents presented to it, the District Court distinguishes between documents that have been exchanged:

- among administrative authorities and the advisers consulted by them;
- between administrative authorities and other third parties.

5.3.

The District Court considers that section 11 of the WOB (internal consultation) is, in principle, intended to relate only to persons who form part of an administrative authority. This follows from section 1, subsection 1, opening words and (c) of the WOB, where internal consultation is defined as consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter. The District Court takes the view that, in so far as the defendant submitted the present documents to persons forming part of other

administrative authorities, the latter can be regarded as belonging to the internal consultation, given the scope and complexity of the decision-making concerned.

5.4.

The District Court also considers that third parties that are under the direction of administrative authorities and have been engaged for a project can also be described as participants in the internal consultation. This follows from the settled case law of the Administrative Jurisdiction Division (e.g. its judgment of 22 May 2013 in case no. 201108747/1/A3) and from the explanatory memorandum to the WOB, which explains this definition of internal consultation in the following terms:

‘Whether a document is of an internal nature is determined by the purpose for which it has been drawn up. Consultation may qualify as internal even where external persons or bodies are involved in collecting data, developing policy alternatives and/or completing the consultation within the administrative authority. However, the consultation ceases to qualify as internal if it must be deemed to be in the nature of advice or structured consultation (House of Representatives, 1986-1987 session, 19 859, no. 3, pp. 13-14).’

The District Court therefore regards ECN, the adviser consulted by the Ministry of Economic Affairs, and the state advocate consulted by the defendant as third parties covered by the concept of internal consultation.

5.5.

The District Court considers that, since this concerns an exception to the basic rule, not every consultation between an administrative authority and an arbitrary third party qualifies as ‘internal consultation’ simply because the latter has been admitted to the consultation by the authority.

The present dispute focuses on whether the defendant can invoke the protection of the ‘internal consultation’ provision in respect of consultations involving not only representatives of the administrative authorities and their advisers but also persons representing either of the permit holders.

5.6.

The District Court answers this question in the negative. If the administrative authority holds a consultation and uses external persons to collect data, develop policy alternatives and/or

complete such consultation, whether or not this results in the determination of a position on an administrative matter, the District Court believes that, in principle, this consultation qualifies as internal consultation only if the external persons contribute to that consultation without having an interest in the matter under consideration. Examples would be a lawyer who does not have an interest in the administrative matter under consideration and is asked to advise on the legal merits of the case, and an environmental adviser who advises on the environmental aspects of the case without having an interest in the administrative matter.

The participation of interested parties who are clearly representing their own interests in a consultation dealing with an administrative matter can, in the opinion of the District Court, qualify as 'internal consultation' within the meaning of section 11 of the WOB only if the legislator expressly provides that the third party concerned has joint responsibility for decision-making intended to arrive at a position on the administrative matter.

As the District Court is not aware of any statutory rule which could show that people working for the permit holders can participate in the decision-making process on account of their own interest or the interests represented by them, it considers that the defendant cannot invoke the 'internal consultation' exception in respect of disclosure.

The District Court considers that the situation is no different if the administrative matter, as in this case, relates not to the granting of a permit but to the defence of that permit where it is challenged in legal proceedings by a third party such as the plaintiff. In both cases the central issue is the correctness of the decision. The administrative authority is, after all, competent to retract or amend the decision, depending on the ground(s) for review.

5.7.

In view of the above considerations, the defendant has wrongly taken the position that the consultation with the persons participating in it on behalf of the permit holder qualifies as internal consultation. Although the permit holder makes constructive proposals to the defendant on the question of how a permit granted to it can be defended before the [Administrative Jurisdiction] Division, holds consultations about this with the defendant and advises the defendant, this does not, in the opinion of the District Court, mean that the permit holder therefore participates in the internal consultation. The District Court finds support for this opinion in the Division's judgment of 8 February 2006, in case no. 200505098/1 (ENCI), and its judgment of 30 November 2011 in case no. 201008458/1/H3 (La Vie en Rose). In both cases the Division held that the third parties could not be deemed to have participated in the internal consultation.

5.8.

In view of the above, the District Court does not agree with the defendant's argument that the permit-granting stage is separate from the defence stage before the courts. It follows, in the opinion of the District Court, that the defendant cannot invoke section 11 of the WOB in relation to the documents exchanged with RWE, Nuon and Groningen Seaports. This also applies in relation to the advisers consulted by RWE and Nuon. According to the statement of defence of 14 February 2013, the advisers consulted by RWE and Nuon include Arcadis, DNV Kema, Bureau Bakker, Royal Haskoning, Tauw, Stibbe and Norton Rose (pages 9-10).

[...]

7.

This brings the District Court to the question of which of the documents referred to in 6.2 contain environmental information. Pursuant to section 11, subsection 4 of the WOB, such documents are assessed by reference to different criteria.

7.1.

Pursuant to section 11, subsection 4 of the WOB and notwithstanding subsection 1, in the case of environmental information the interests of protecting personal opinions on policy must be weighed against the interests of disclosure.

Pursuant to section 1, opening words and (g) of the WOB, environmental information has the same meaning as in section 19.1a of the Environmental Management Act (WM).

Pursuant to section 19.1a, subsection 1 of the WM, environmental information means 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; (...).

7.2.

As the Division held previously (judgment of 4 November 2009 in case no. 200900317/1/H3) in view of section 19.1a, subsection 1, opening words and (b) of the WM, information about factors which harm or probably harm the elements of the environment or information about activities which affect or may affect such factors qualifies as environmental information.

The District Court will apply the concept of environmental information in the above-mentioned sense.

7.3.

In the decisions the defendant has twice assumed that the documents referred to in 6.2 contain environmental information. This concerns documents 1190 and 1393.

7.3.1.

Where an authority refuses to make these documents public, it must first decide whether personal opinions on policy are involved and, if so, whether the interests of protecting these personal opinions weigh more heavily than the interests of disclosure. The District Court considers that insufficient information has been provided about both these decisions and therefore sets aside the disputed decision, in so far as disclosure of the environmental information from documents 1190 and 1393 has been refused. The defendant should make these documents public or provide reasons for its refusal to disclose them.

7.4.

As regards the remaining documents referred to in 6.2, the defendant has assumed that they do not contain environmental information. In doing so it has made frequent reference to a judgment of The Hague District Court of 25 November 2009 (LJN: BL0767).

7.4.1. The District Court notes that the documents relating to the information exchanged internally (with ECN) about the imperative reason of overriding public importance referred to in article 2, paragraph 3, opening words and (e) of the Protected Animal and Plant Species (Exemption) Decree were not treated by the defendant as environmental information. After

reading the documents exchanged internally (and also with ECN) on the imperative reason of overriding public importance, the District Court considers that these documents were not of such a kind as to necessitate the application of a different criterion under section 11, subsection 4 of the WOB.