**Appendix 5B**
**Judgment of 16 July 2014 by the Council of State in case no. 201307984/1/A3**

6.1. The District Court rightly held that it follows from the legislative history of section 11 of the Government Information (Public Access) Act (WOB) (Parliamentary Papers, House of Representatives, 1986/87, 19 859, no. 3, p. 13) that the internal character of a document is determined by the purpose for which it has been drawn up. The person who drew up the document must have intended it for their own use or for the use of others within the government sector. The District Court also rightly held, with reference to the judgment of the [Administrative Jurisdiction] Division of 22 May 2013 in case no. 201108747/1/A3, that documents obtained from third parties who do not belong to the government sector may be designated as documents drawn up for the purpose of internal consultation if drawn up for that reason. However, the consultation ceases to be of an internal character if it must be deemed to have the character of advice or structured consultation.

6.2. Pursuant to section 8:29 of the WOB, the Division has taken note of the relevant confidential documents lodged by the Provincial Executive.

6.3. The documents referred to in paragraphs 8.4 and 9.2 of the appealed judgment are annexes to emails received from or sent to RWE, Nuon, Groningen Seaports and the advisers consulted by them, and documents with annexes concerning consultation with permit holders RWE and Nuon, which have been shared with parties other than the administrative authorities and their advisers. These are often drafts of documents lodged in the action, such as memorandums of oral pleading and statements of defence as well as ‘question and answer’ documents. The District Court wrongly held that the documents could not be deemed to have been drawn up for the purpose of internal consultation as referred to in section 11, subsection 1 of the WOB. It is important to note first of all that the documents were drawn up for the purpose of internal consultation since it had been agreed with the parties concerned that the deliberations would remain confidential. As the Provincial Executive and RWE have rightly argued, the District Court was therefore wrong to hold that the documents could nonetheless not be deemed to have been drawn up for the purpose of internal consultation if the external third parties who had taken part in the deliberations had represented their own interests and the legislator does not expressly provide for such third parties to have joint responsibility for decision-making intended to arrive at a position on an administrative matter. There is no basis in law for this finding. Moreover, it can be inferred from the Division’s judgment of 18 February 2009 (in case no. 200804345/1) that even if persons or institutions represent their own interests in consultations, the documents drawn

up for these consultations by the person or institution concerned can still be deemed to have been drawn up for the purpose of internal consultation. In so far as the parties have referred to the Division's judgment of 8 February 2006 (in case no. 200505098/1), the Division holds that the situation in that case is not comparable to the situation in the present case. That case concerned a request for disclosure of draft versions of an environmental impact assessment which had been submitted by Enci B.V., a private limited company, to the Provincial Executive of Limburg, and belonged with the permits it had applied for. Those documents had therefore been drawn up for the preliminary consultations on a document to be submitted by an interested party to the administrative authority for the purpose of applying for a permit. The documents referred to in paragraphs 8.4 and 9.2 of the appealed judgment do not relate to the preparation and submission of such a document, and instead concern the exchange of information with an administrative authority to enable it to determine its position on an administrative matter, namely defending the granting of the licences in a legal action.

6.4. In view of the above, the District Court was incorrect in holding that the Provincial Executive wrongly took the position that the documents which had been exchanged with RWE, Nuon, Groningen Seaports and their advisers must be deemed to have been drawn up for the purpose of internal consultation. Since there is also no ground for the finding that those documents did not contain personal opinions on policy, the Provincial Executive rightly refused to disclose them pursuant to section 11, subsection 1 of the WOB.

[…]

12.3. What is not disputed is that the documents concerned were drawn up for the purpose of internal consultation as referred to in section 11, subsection 1 of the WOB. If such documents contain environmental information, a different assessment criterion is applied pursuant to subsection 4 of that section. 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. That section was introduced by the Act of 30 September 2004 to amend the Environmental Management Act, the Government Information (Public Access) Act (WOB) and several other statutes (Bulletin of Acts and Decrees 2004, 519). The purpose of the Act was to introduce the measures needed to implement the Aarhus Convention. The definition of the term 'environmental information' in section 19.1a of the Environmental Management Act is derived from and virtually a literal translation of article 2, paragraph 3 of the Aarhus Convention. In so far as relevant here, environmental information has the following meaning. It follows from the text of point a of section 19.1a, subsection 1 that information relating to the state of elements of the environment can be deemed to be

environmental information within the meaning of this provision. Pursuant to point b, information about factors that harm or are likely to harm the elements of the environment referred to in point a also constitutes environmental information. It is important to note in this connection that only documents that actually contain that information are covered by the definition. Documents that merely refer to such information without actually containing it themselves do not come within this definition. The District Court rightly referred in this connection to the Division's judgment of 4 November 2009 (in case no. 200900317/1/H3). It follows from the text of points c and e of section 19.1a, subsection 1 that measures, including administrative measures such as policy measures, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors of the environment referred to in points a and b, as well as measures or activities designed to protect these elements must be classified as environmental information. The same is true of cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in section 19.1a, subsection 1, opening words and (c). Pursuant to section 19.1a, subsection 1, opening words and (d) of the Environmental Management Act, reports on the application of environmental legislation are also treated as environmental information.

After studying the relevant documents and having regard to the considerations set out above, the Division considers that the District Court rightly held that, in so far as the documents relate to 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, they do not contain environmental information, with the exception of the documents mentioned below. A factor taken into consideration here is that, contrary to what Greenpeace has argued, these documents do not contain information relating to the state of elements of the environment or to factors that harm or are likely to harm elements of the environment. The documents concerned refer only to the study instituted to ascertain whether there is an imperative reason of overriding public importance for the coal-fired power stations in Eemshaven. The environmental information on which that study is based has not been included in these documents. Nor do the documents contain environmental information as referred to in section 19.1a, subsection 1, opening words and (c) to (e) of the Environmental Management Act. The District Court therefore rightly held that those documents do not require further assessment under section 11, subsection 4 of the WOB.