



Human Environment and Transport
Inspectorate
*Ministry of Infrastructure and the
Environment*

A new ILT vision on public access



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I Reason and key question

Government information can be requested by anyone relying on the Government Information (Public Access) Act [*Wet openbaarheid van bestuur*, WOB]. The government is generally passive in this respect. This means that another party must request the information from the government.

So far, the Human Environment and Transport Inspectorate (ILT) has been passive when it comes to the disclosure of inspection data.

In general, the ILT only discloses information if it receives a request under the WOB for this purpose. In some cases, the ILT proactively uses disclosure as an intervention. This is also called 'naming and shaming'. And finally, the ILT discloses general or abstracted information and inspection data about which businesses or institutions have been consulted in advance.

However, the ILT wants to promote compliance in a transparent manner and ensure that the public and businesses know what they can do with the inspectorate's information. With an emphasis on public access, the ILT expects to be able to achieve these objectives in a more efficient manner. In doing so, the ILT will also meet a number of important developments:

- the Open Government draft act regulating active disclosure of government information. The basic principle here is 'public, unless';
- the commitment made by the Minister for Housing and the Central Government to the House of Representatives to disclose enforceability and feasibility tests carried out by the Netherlands Authority for Housing Associations (which is a part of the ILT);
- other state inspectorates disclosing supervisory information;
- various executive organisations within the Ministry of Infrastructure and the Environment, such as the Directorate-General for Public Works and Water Management (RWS), the Royal Netherlands Meteorological Institute (KNMI), the Netherlands Environmental Assessment Agency (PBL) and the National Vehicle and Driving Licence Registration Authority (RDW), make electronic data available as 'open data'.

These developments require a new vision of the ILT on public access of information. This memo sets out this vision.

The key question for the ILT here is whether more information can be disclosed, taking into account the interests of other parties and the requirements which public access sets on the quality of the internal organization.

II Results: “all information public, unless”

The basic principle is that the ILT makes a change from a reactive and reticent approach to a proactive and open approach towards public access. The adage is ‘public, unless...’ whereby a reversed burden of proof applies: If there are no considerations for not making information available, this information will be published.

This memo does not focus on the implementation of this vision. In view of the broad scope that is chosen and the experience of other supervisory authorities, it is estimated that full implementation will not be completed before 2020. In implementing the vision, the ILT needs to take account of any differences per inspection domain with the level of support from, for example, the policy core.

III Basic principles

The ILT chooses to make as much information available as possible, in line with the development of an open government. The basic principles include:

- Public access is an instrument for promoting compliance, as it offers perspective for action to both businesses and citizens.
- The choice as to what information should be open to the public focuses on establishing a balance between offering perspective for action and the right of citizens to privacy and the right of businesses to protection of their business data. The right to privacy and protection of business data may limit public access both in terms of time and in terms of scope;
- Transparency does not only include public access to the results of the work performed by the ILT, but also to the choices made in order to arrive at those results. This means that not only inspection results will be disclosed, but also tests against enforceability, feasibility and fraud resistance (so-called 'HUF tests'), risk assessments, process organisation and choices with respect to the deployment of people and resources.

IV Perspective

In view of the broad scope, the goal of 'all information public, unless' will have been achieved throughout the ILT no sooner than in 2020. This is based on the experience of other organisations.

A first step towards implementation will be a proposal for the time schedule and milestones towards the goal. Questions to be addressed in this proposal include:

- In what order and with what priority will the ILT deal with public access to various categories of information?
- What does public access mean for existing process designs, information systems and suchlike?
- How and when will we communicate about this?

V Background

1 General principles

The government laid down its vision on an open government in the Open Government Vision (*Visie Open Overheid*, September 2013). The vision is based on three pillars:

- A transparent government
- An accessible government
- The facilitating / cooperative government

A *transparent* government will ensure that information is publicly accessible. Information about activities, decision-making (including policy and legislative processes) and finances (budgets and expenditure) will be made available in a better and more active way and the reuse of information will be promoted. The adage is 'public, unless'. If there are no considerations for not making information available, the information will be published.

Governmental supervisory authorities ensure that tasks are carried out properly and laws and regulations are complied with. They do so on the basis of six general principles, one of which is transparency¹. For the ILT, this means that based on our mission, we aim at *promoting compliance*, and that we also try to do this by being transparent in how we do this and how we arrive at our opinions, so as to allow the parties involved (citizens and businesses) to base their choices on this (*offering perspective for action*).

The ILT has various considerations for opting for more public access. A more fundamental consideration is that government information should, from the point of view of transparency, be publicly accessible as much as possible and may contribute to the ILT's mission. A more practical consideration is that the ILT receives a large number of requests under the WOB every year (between 350 and 400 in 2015). Public access could contribute to reducing this number, and the amount of work related to the handling of such requests. Therefore, public access does not only contribute to a transparent, but also to an *efficient government*. Active disclosure could be a juridical act to which parties involved may object. That is why it should be carefully assessed in this respect what information can be disclosed without any negative consequences. New policy or regulations may have to ensure that the possibilities for lodging an objection will become subordinate to the higher purpose of information being available to the general public.

All four goals against which the ILT wants to check the questions on public access have now been mentioned:

- Transparency
- Promoting compliance
- Offering perspective to act
- Promoting efficiency or cost reduction

2 Statutory framework

The Government Information (Public Access) Act [*Wet openbaarheid van bestuur*, WOB] currently forms the basis for making government information available. The

¹ The six principles of sound supervision have been laid down in the framework vision on supervision titled 'Less of a burden. More impact. Six principles of sound supervision', Ministry of the Interior and Kingdom Relations, 2005. Annetje Ottow, a Utrecht professor, recently gave a new definition of the principles of sound supervision, to wit LITER: legality (L), independence (I), transparency (T), effectiveness (E), and responsibility (R). Transparency also plays a role in this definition.

WOB proceeds from the submission of a request for availability, followed by a decision-making process. This process is provided with the necessary safeguards for interested parties.

The WOB does not sufficiently create a situation in which the government itself actively discloses information. This poses a problem if the information (as with supervisory authorities) concerns details of third parties (interested parties). For this reason, an Open Government framework act is being drawn up, which proceeds from active disclosure of government information and which pays specific attention to inspection data. However, this act has not yet entered into force.

For some other supervisory authorities disclosure is incorporated into specific legislation because they did not want to wait for the general framework act. For instance, the Social Affairs and Employment Inspectorate (ISZW) publishes inspection data on the basis of the Foreign Nationals (Employment) Act, the Minimum Wage Act and the Placement of Personnel by Intermediaries Act, and the Netherlands Food and Consumer Product Safety Authority does so on the basis of the Health Act. The Ministry of Infrastructure and the Environment is also subject to a number of specific - mostly European - regulations providing for the aspect of disclosure. For instance, under EC Regulation No. 2111/2005, a list of air carriers is published that are subject to an operating ban, under Directive 2009/16/EC (port State control), an overview of inspections, detentions and refusals of access may be published and of managing companies whose performance, in view of determining the ship risk profile, has been considered as low and very low for a period of three months or more, and Directive 2003/4/EC provides for public access to environmental information (Aarhus Convention).

Under the Aarhus Convention, authorities are obliged to disclose environmental information. Environmental information sometimes outweighs privacy and company-sensitive information when the decision is made to disclose the information. The implementation of the Convention therefore goes further than in many other areas. In the Netherlands, the WOB was brought into line with the Convention at the time. The Convention is about:

- obtaining access to environmental information available to the government. In addition to providing information if so requested by a citizen or environmental organisation, the government must also actively provide information through, for example, the publication of reports on the state of the environment, publicly accessible databases or similar registers, etc.
- participating in decision-making on environmental issues. This pertains to specific activities as well as plans, programmes, policy and regulations with respect to the environment. The results of the participation should be taken into account when a decision is made and the decision itself will be published.
- obtaining access to justice in environmental matters, for example in order to obtain access to environmental information.

The Convention does not say anything about actively providing supervisory information. Supervisory information is usually more critical than general policy information, as supervisory information also concerns information that can be traced back to individual businesses or citizens.

3 Public access and the ILT's mission

In the ILT's current vision, active disclosure of inspection results forms part of the intervention strategy. In this vision, inspection results are meant for the inspected party itself and not for the outside world. The disclosure of inspection results showing the names of individual businesses is considered to be an intervention, i.e. 'naming and shaming': consciously damaging the reputation of a business in case of a failure to comply. A recent judgment (29 December 2015) of the Trade and

Industry Appeals Tribunal provides a different interpretation of this: disclosure is an actual act arising from a governmental decision and does not constitute any additional punishment.

In line with a transparent government, transparency has been formulated as one of the pillars of action for supervisory authorities as well. Moreover, there seems to be a slight tendency in scientific literature towards the view that public access has a preventative effect². For these reasons, the ILT chooses to no longer consider disclosure to be a sanction, but an instrument that is used to promote compliance. Public access to inspection data is in line with a transparent government, and by offering insight into how the ILT carries out its supervision, we offer citizens and businesses the opportunity to base their choices on this (*offering perspective for action*).

If there are any signs that public access to supervisory information will *negatively* affect compliance, this could be a reason not to disclose the information. This is an interpretation of the 'unless' part, which may differ per subject or domain and will have to be substantiated.

4 Public access and third-party information

The data available to the ILT usually concern statements or opinions on other parties. Observations are not objectively measured facts, but findings that rules have been violated, along with the related opinions and possible interventions. Sometimes, these findings are based on inspection of company-sensitive information, such as information on the business operations of a party subject to supervision or information about a product or production process. This does not pose a problem in the current vision on disclosure, as the information is usually only shared with the inspected party. This is different with public access or active disclosure and a balance will have to be established between public interest (*offering perspective for action*) and the right of citizens to privacy and the right of businesses to protection of their business data.

The ILT implements this consideration as follows:

- Only objective findings, opinions and possible sanctions will be disclosed. The underlying information will not be disclosed, insofar as it does not concern environmental information and insofar as business operations do not form part of the supervision, for the purpose of protecting company-sensitive information;
- The ILT will only disclose current opinions. The disclosure of previous opinions will not serve any purpose with a view to offering perspective for action. At most, data sets containing data from the past may be made available as open data in order for comparisons to be made and developments to become visible.
- Not only negative, but also positive opinions will be disclosed. This is in line with transparency and offering perspective for action, but is also an aspect of legal equality: equal treatment of all parties subject to supervision. It is emphasised that disclosure should not be seen as a sanction, but as a consequence of a decision made.
- Businesses (but also government authorities, institutions and citizens) information is provided about should know this in advance and should have been given the opportunity to raise objections.

5 Public access and the internal organisation

Public access is not only about the question as to what information is disclosed and what not (and for what purpose), but also about the question whether the ILT dares

² See, for example, C.G. van Wingerde, 'De afschrikking voorbij'

to guarantee the quality of the information it discloses. In order to be transparent, the design and implementation of the processes to arrive at this information should be of a high quality.

In the current vision, part of the internal information of the ILT is already disclosed. The ILT's supervisory programme has been laid down in the long-term plan, which has been published for some time now. The same applies to the annual report. The State of Security [*Staat van de Veiligheid*] has been published for a number of years now. The HUF tests carried out by the Netherlands Authority for Housing Associations have been open to the public since 1 January 2016.

The ILT has the following ambition:

- Not only the results of the primary tasks of the ILT will be disclosed, but information about how these results were obtained will be provided as well. This means, for example, that in case of risk-based supervision, it is indicated that not everything is inspected by definition, but that this is done on the basis of internal choices that are published;
- Checks of new regulations against enforceability and feasibility are published and simultaneously offered to the minister and the policy core;
- Information about the ILT's operations is, in principle, open to the public. Only the grounds for exception under the WOB may offer arguments not to disclose information. This is particularly true in case of Article 10(2), opening words and under (e), of the WOB insofar as the interest of public access does not outweigh the importance of respect for privacy. This means that individual personal data of ILT staff members and of individuals with whom the ILT maintains contact (e.g. within the context of complaints procedures) will not be disclosed.
- Data resulting from formally established processes are disclosed as much as possible, both at file level (individual complaints) and at aggregated level (number of complaints). If the data pertain to internal operational processes, aggregated data will suffice (workforce composition, budgetary accountability, numbers of inspections scheduled and executed).
- Data resulting from non-process-related activities (e-mail traffic) will not be disclosed.

6 Types of information: inspection data and data of the inspectorate

The action plan to the Open Government vision document refers to 'designating categories of government information for active disclosure'. Various regulations refer to inspection data as a separate category of data. There is specific mention of 'information about a violation or information obtained through monitoring compliance'.

This information could involve a wide range of data, such as data collected during the inspection, the inspector's opinion, the inspection report but also any intervention imposed.

In addition to inspection data (supervisory data), the ILT has other categories of data at its disposal (data of the inspectorate). The data available to the ILT can be categorised as follows:

A Data that are the product/result of our primary tasks:

- Supervisory data: inspection results, interventions
- Data on permits (applications, permits granted), registers
- Reports and incidents
- Investigation results
- Investigative activities

B Data that are the result of or are related to choices in respect of our (internal) control and operations:

- Contacts with customers: questions, complaints, requests under the WOB
- Operational data (in a broad sense, so not only budgets/expenditure and personnel data but all data related to operations, such as data on planning and accountability, internal communications, consultation structures and suchlike, data on process organisation)

C Policy cycle information

- "HUF" tests (tests on enforceable, practicable and fraud)
- Policy rules
- Supervisory signals

7 Types of public access

A vision on public access does not only include the question as to which information will be published, but also the question as to how this information will be published.

These are questions such as:

- The form in which products are disclosed (raw data, enriched data or information products)³
- The time of disclosure: immediately or after a few weeks (the General Administrative Law Act is amended to this as we speak)
- Active or passive disclosure⁴

Open data are often mentioned as a category of data to be published. Open data are raw, non-enriched data which are provided by the government in electronic form and which can be used by others to offer to the public. The discussion on disclosure of data as open data is derived from the discussion on public access to information: if information is not open to the public, there will be no disclosure as open data either. If, however, information is open to the public, disclosure as open data will mainly be a technical question.

Data obtained from the granting of permits, supervision and enforcement are especially interesting as open data. Information about operations and the policy cycle are less interesting or unsuitable for this.

The combination of the specific purpose for which open data are disclosed (reuse) and the form in which these data are disclosed (raw data, electronic) does involve risks. Third parties could make connections between data and use these connections to ask questions about the quality of the work performed by the ILT. For this reason,

³ *Raw or source data* are the basic elements on which opinions and decisions are based. An example of source data is an observed (measured) fact: the uninterrupted driving time of a driver, the legionella value measured.

Enriched data are source data supplemented with/measured against statutory or other standards and assessment methodologies indicating whether the source data should be regarded as 'good' or 'bad' (or any other option). Enriched data therefore always contain an opinion of the inspector/advisor. Not only the number of hours driven by a driver, but also the finding that this exceeded the statutory maximum and the consequences to be attached to this in the opinion of the inspector.

Information products are digital or physical products comprised of source and/or enriched data and having a certain format/design that is tailored to the needs of a customer/user. Examples of information products include an inspection report (for the inspected party), an investigation report (for the minister), a HUF test (for a policy department) or an internal policy memo.

⁴ 'Public, unless...' does not necessarily result in the decision to *actively* disclose information. Passive disclosure (disclosure upon request) also meets the principle of 'public, unless...'

it was decided earlier not to publish any open data before the working process for the data is of sufficient quality. At the same time, it offers the ILT the opportunity to implement improvements in the quality of our information management with the help of third parties. This, too, constitutes transparency.

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P.O. Box 16191 | NL-2500 BD The Hague
T +31 88 489 00 00

www.ilent.nl

@inspectieLenT

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