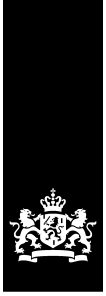

Statement of the Government of the Netherlands

concerning communication ACCC/C/2014/124

A. Introduction

1. On 22 December 2014, Stichting Greenpeace Netherlands (Greenpeace) submitted a communication to the Compliance Committee (Committee) under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Convention), which was forwarded to the Government of the Netherlands (Government) on 28 June 2015.

2. The issue before the Committee is whether Article 2, paragraph 3, and Article 4, paragraph 3 (c), of the Convention have been complied with in connection with access to documents relating to appeal proceedings in connection with the granting of permits for two power plants.

3. The Government is of the opinion that Article 2, paragraph 3, and Article 4, paragraph 3 (c), of the Convention were correctly applied in connection with access to information relating to appeal proceedings in connection with the granting of permits for the two power plants. In order to demonstrate this, the Government will make statements concerning the facts of the case, the implementation of the relevant provisions of the Convention in domestic law, and the application of those provisions in connection with access to information on the permit procedures for the two power plants.

B. Background

Granted permits

4. Over the past few years the energy companies Nuon has built a gas-fired power plant and RWE a coal-fired power plant in the *Eemshaven*, a port area in the province of *Groningen* at the edge of the *Waddenzee*. The *Waddenzee* is a Natura 2000 area protected by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [1] and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora[2].

5. By decisions of 14 August 2008, both the Minister for Agriculture, Nature and Food Quality and the Executive Councils of the Provinces (Provincial Executives) of *Groningen* and *Friesland* granted RWE and Nuon a permit for coal-fired and/or gas-fired power plants in accordance with Section 19d of the Nature Conservancy Act 1998 (*Natuurbeschermingswet 1998*)[3]. A permit pursuant to the same Act was granted to *Groningen Seaports (GSP)* for deepening the *Wilhelmina* Port in the *Eemshaven*.

6. On the basis of a formal procedure for filing a notice of objection, Greenpeace lodged objections to these decisions. These objections were rejected by decision of 5 December 2008

[1] Official Journal of the European Union, L 20, 26 January 2010, p. 7–25.
[2] Official Journal of the European Communities, L 206, 22 July 1992, p. 7–50.
[3] Appendix 1: English translation of relevant Sections of the Nature Conservancy Act 1998.

of the Provincial Executive of *Groningen* and by decision of 13 March 2009 of the Provincial Executive of *Friesland*.

7. Greenpeace lodged an appeal with the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, the Council of State), which is the highest administrative court in the Netherlands, against the permits granted to Nuon and RWE on the basis of the Nature Conservancy Act. The Council of State declared Greenpeace's appeal against RWE's permit well-founded by its judgment of 24 August 2011. No judgment was given with respect to Nuon's permit. Nuon revoked its application for a permit relating to the coal-fired part of the power plant, which amongst others led Greenpeace to revoke its objection to this permit. Nuon's permit for a gas-fired power plant pursuant to the Nature Conservancy Act became irrevocable at the end of 2011.

8. During the appeal proceedings before the Council of State, the Provincial Executive of *Groningen* commissioned the Dutch Energy Centre (*Energie Centrum Nederland,* ECN) to issue an advice on the necessity of selecting the *Eemshaven* as the location for the two power plants.

9. On 19 June 2012, RWE was granted a new permit in accordance with the Nature Conservancy Act 1998, which also led to an objection and, following its rejection, Greenpeace lodged an appeal with the Council of State. The Council of State declared Greenpeace's appeal unfounded by its judgment of 9 September 2015 and the permit became irrevocable on the same date.

10. In addition to permits under the Nature Conservancy Act 1998, the Provincial Executive of *Groningen* also granted permits in 2008 to Nuon and RWE on the basis of the Environmental Management Act (*Wet milieubeheer*). These licenses became irrevocable in 2011.

Application for information and subsequent proceedings

11. On 1 June 2011, Greenpeace applied to the Province of *Groningen* for information on the basis of the Act containing regulations governing public access to government information (*Wet openbaarheid van bestuur*, the Government Information (Public Access) Act) [4] . In its application, Greenpeace requested "to disclose all documents and data concerning the granting of permits for the construction of the power plants of Nuon/Vattenfall and Essent/RWE in the *Eemshaven*, including information on the adjustments to and around the *Eemshaven* of port and waterway for coal ships". The application related to the period of 1 January 2005 until 1 June 2011.

[4] Appendix 2: English translation of the Act containing regulations governing public access to government information.

12. The dispute concerning Greenpeace's application for information predominantly concerned the access to documents relating to the appeal proceedings at the Council of State in connection with the granting of the permits for the two power plants.

13. The Provincial Executive of *Groningen* decided on Greenpeace's application for information on 19 July 2011 by fully disclosing 1,120 documents out of a total of 1,724 documents.

14. On the basis of a formal procedure for filing a notice of objection, Greenpeace lodged an objection to these decisions. In the decision that was taken further to the objection on 15 August 2012[5], the 604 non-disclosed documents were re-assessed and further reasons were given for either their disclosure or non-disclosure. Out of the documents re-assessed in this decision on objection, another 304 documents were fully disclosed and 87 documents were partially disclosed.

15. Greenpeace applied for judicial review of the decision not to disclose the remaining documents with the North Netherlands District Court, sitting in *Groningen*.

16. By judgment of 18 July 2013[6], the District Court declared the appeal relating to the definition of the term 'internal consultation' well-founded, considering that the Provincial Executive of *Groningen* could not qualify the documents concerned to be documents drawn up for 'internal consultation' on the basis of the participation of the permit holders in the decision-making process on account of their own interest[7]. With respect to the appeal concerning the scope of the term 'environmental information', the District Court declared Greenpeace's appeal (partially) unfounded, considering that the Provincial Executive was correct in not treating all information on the imperative reasons of overriding public importance contained in the documents, as environmental information [8].

17. Both Greenpeace and the *Groningen* Provincial Executive appealed to the Council of State against the judgment of the District Court. Just like the District Court, the Council of State was able to take note of the non-disclosed (extracts of) documents, with the consent of Greenpeace, on the basis of Article 8:29 of the General Administrative Law Act (*Algemene wet bestuursrecht*). As a result of the disclosure of the information to the courts, both the District Court and the Council of State were able to assess whether the decision of the Provincial Executive of *Groningen* with respect to the disclosure of the documents was correct. By judgment of 16 July 2014, the Council of State declared the Provincial Executive's appeal well-founded by supporting its reading of the term 'internal consultation'. However, a new decision

[5] Appendix 3: Dutch text of the decision on objection of 15 August 2012. An English translation of this decision will be made available in January 2016.
[6] Appendix 4A: Judgment of the District Court of 18 July 2013. Appendix 4B: English translation of grounds 5.-5.8. and 7.-7.4.1. of the judgment.
[7] Appendix 4B: ground 5.6. of the judgment of the District Court of 18 July 2013.
[8] Appendix 4B: ground 7.4.1. of the judgment of the District Court of 18 July 2013.

had to be taken with respect to 23 documents[9] since, out of these 23 documents, 6 documents contained environmental information which the Provincial Executive had failed to recognize, 11 documents needed to be re-assessed for information on emissions, and as for the remaining 6 documents it was not sufficiently clear where the environmental information contained in these documents had already been made public. This new decision was taken on 23 September 2014, which led to another 2 documents being completely disclosed, 11 documents being partially disclosed and 10 documents not being disclosed. Greenpeace appealed to the Council of State against this decision and these appeal proceedings are still ongoing.

18. The way in which Article 2, paragraph 3, and Article 4, paragraph 3 (c), of the Convention were applied in connection with access to information contained in documents that were exchanged during the appeal proceedings concerning the permit procedures for the two power plants in the *Eemshaven*, is explained in more detail in Section C.2 of this Statement.

C. Implementation of the provisions of the Convention with respect to access to environmental information and their application in connection with the two plants in the *Eemshaven*

C.1 Implementation of the provisions of the Convention with respect to access to information in environmental matters by the Netherlands in general

Introductory remarks

19. The Convention has been implemented in the Netherlands through the Act on the Implementation of the Aarhus Convention (*Wet Uitvoering van het Verdrag van Aarhus*). As for the first pillar of the Convention on the access to environmental information, the Government Information (Public Access) Act and the Environmental Management Act were amended. The basic principle of the Government Information (Public Access) Act is access to information. An application for access to information is granted, unless one of the exceptions in Sections 10 and 11 of the Government Information (Public Access) Act applies[10]. Some of the exceptions – generally available under the Government Information (Public Access) Act, were qualified[11] or excluded[12] and some exceptions – specifically for environmental information – were introduced to implement the Convention[13]. Moreover, some material provisions were introduced in

[9] Appendix 5A: Judgment of the Council of State of 16 July 2014. Appendix 5B: English translation of grounds 6.1.-6.4. and 12.3. of the judgment. An English translation of the complete text of the judgment will be made available in December 2015.
[10] Appendix 2: Section 3, subsection 5, of the Government Information (Public Access) Act.
[11] Appendix 2: Section 10, subsections 4 and 5, and Section 11, subsection 4, of the Government Information (Public Access) Act.
[12] Appendix 2: Section 10, subsection 6, of the Government Information (Public Access) Act. Moreover, Section 10, subsection 4, of the Act stipulates that Section 10, subsection 1, opening words and (c) and (d), subsection 2, opening words and (e), subsection 7, opening words and (a), are not applicable to environmental information relating to emissions into the environment.
[13] Appendix 2: Section 10, subsection 7, of the Government Information (Public Access) Act.

Chapter 19 of the Environmental Management Act[14] which already contained provisions on public access.

20. In the context of access to information related to the granting of permits for power plants in a Natura 2000 area, the following is relevant:

    - The implementation of Article 2, paragraph 3, of the Convention in Section 19.1a of the Environmental Management Act in conjunction with Section 1 (g), of the Government Information (Public Access) Act;
    - The implementation of Article 4, paragraph 3 (c), of the Convention in Section 1, opening words and (c), and Section 11, subsections 1 and 4 of the Government Information (Public Access) Act.

21. The relevant elements of the implementing legislation are discussed in detail in the paragraphs below.

Environmental information (Article 2, paragraph 3)

22. Under the Convention, the term 'environmental information' is broadly defined, including not only environmental quality and emissions data, but also information from decision-making processes and analyses.

23. The Court of Justice of the European Union also applies a broad definition. In the case of *Mecklenburg*,[15] the Court found that it appears from the wording of the term in the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[16] that the legislature intended to provide for a broad definition, embracing both information relating to the environment and any information on the state of the various aspects of the environment mentioned therein as well as on activities which may affect those aspects. However, only documents that actually include this information can be considered to be environmental information, a mere reference to environmental information is not sufficient to fall under the definition[17].

24. In Dutch law, a definition of the term 'environmental information' is included in Section 19.1a, subsection 1, of the Environmental Management Act. This definition is based on the definition included in Article 2, paragraph 3, of the Convention. Section 1 (g) of the Government Information (Public Access) Act refers to the information as defined in Section 19.1a of the Environmental Management Act.

[14] Appendix 6: English translation of Chapter 19 of the Environmental Management Act.
[15] *W. Mecklenburg v. Kreis Pinneberg – Der Landrat*, 17 June 1998, C-321/96.
[16] The definition of environmental information, currently in Article 2, paragraph 1, of Directive 2003/4/EU, Official Journal of the European Union, L 41, 14 February 2003, p. 26-32.
[17] Council of State of the Council of State, 4 November 2009, ECLI:NL:RVS:2009:BK1977.

25. From the text of subsection 1 (a) of Section 19.1a, it follows that information relating to the state of the various elements of the environment is to be considered to be environmental information within the meaning of this provision.

26. Pursuant to subsection 1 (b), information on factors which harm or probably harm the elements of the environment referred to in subsection 1 (a) is to be considered environmental information.

27. From the text of subsection 1 (c) and (e), it follows that 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 subsection 1 (a) and (b), and measures or activities to protect these elements, are to be considered environmental information. Cost-benefit and other economic analyses and assumptions used in connection with the measures and activities referred to in subsection 1 (c) are to be considered to be environmental information as well.

28. According to Section 19.1a, subsection 1, opening words and (d), of the Environmental Management Act, reports on the application of environmental legislation are to be considered environmental information.

29. According to Section 19.1a, subsection 1, opening words and (f), of the Environmental Management Act, information on the state of human health and safety, including contamination of the food chain if applicable, human living conditions, areas of cultural importance and buildings of special interest is to be considered environmental information in so far as they are or may be harmed by the state of elements of the environment referred to in subsection 1 (a) or, through these elements, by the factors, measures or activities referred to in subsection 1 (b) and (c).

Internal communications of public authorities (Article 4, paragraph 3 (c))

30. In the Convention, the term 'internal communications' is not defined. In the Aarhus Implementation Guide, parties to the Convention are invited to clearly define the term when implementing the Convention[18].

31. Article 4, paragraph 3 (c), of the Convention offers public authorities the possibility to refuse a request for environmental information "if the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure". The text of the Convention does not exclude the involvement of external actors in 'internal communications'. In the Netherlands, the concept of 'internal

[18] United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, second edition, 2014.

communications' and the taking into account of the public interest is provided for in Section 11, subsections 1 and 4, of the Government Information (Public Access) Act.

32. Section 11, subsection 1, of the Government Information (Public Access) Act provides that, where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein. Section 11, subsection 4, of the Government Information (Public Access) Act stipulates that, when an application as referred to in Section 11, subsection 1, concerns environmental information, the interests of protecting personal opinions on policy shall be weighed against the public interest served by disclosure.

Definition of internal consultation in the Government Information (Public Access) Act

33. In Section 1, opening words and (c), of the Government Information (Public Access) Act, 'internal consultation' is described as follows: "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".

34. The Explanatory Memorandum to the Government Information (Public Access) Act recognizes the issue of involving external experts as well as advisory and other bodies in forming an opinion on documents that are still the subject of internal deliberations.[19]

35. The internal character of a document is determined by the purpose for which it is drawn up. Pursuant to well-established case law, a document can only qualify as internal consultation when the people who drafted the documents, or the people responsible for their content, intended the documents to be used by themselves or by others within the administrative authority.

36. Furthermore, when external actors or bodies are involved in collecting data, the development of policy alternatives and/or the finalization of the deliberation within the administrative authority can be characterized as internal consultation.

37. However, such an involvement of external actors does not qualify as internal consultation when this can be characterized as advice or structural deliberations. In this context, advice should not be understood as incidental advice on a specific project, but as (general) advice given in a structural manner. An example of the latter is advice by a permanent complaint's committee of an administrative authority. In addition, the size of the circle involved in the deliberations may lead to the conclusion that such deliberations cannot be characterized as

[19] Appendix 7: English translation of part 6 of the Explanatory Memorandum to the Act containing regulations governing public access to government information.

internal consultation. The bigger the circle, the less likely the deliberations are to be considered as internal consultation.

38. Documents, drawn up for internal consultation, include: notes of civil servants to their political and official superiors; correspondence between divisions of a ministry or between ministries amongst each other; draft versions of documents, agendas, minutes, summaries and conclusions of internal discussions; and reports of civil servants' advisory committees.

39. The term 'internal consultation' as contained in the Government Information (Public Access) Act has been interpreted in case law. Pursuant to well-established case law, the advice of a lawyer for the purpose of decision-making of an administrative body on an administrative matter can be considered to be a document intended for internal consultation. The same can be said about the advice of an expert. This illustrates that the intention of the author of the document is decisive. Also, for deliberations to qualify as internal consultation, it is not necessary that all participants of the deliberations have the same interests. Nor are personal interests or responsibilities relevant for the qualification of deliberations as internal consultation. Preliminary consultations with the applicant of a(n) (environmental) permit cannot be considered to be internal consultation since such preliminary consultations are intended for the formulation and presentation by the applicant of an application, including for instance an environmental impact report, for a permit in accordance with the applicable legislation. The documents drafted during these preliminary consultations do not have an internal character because they are not intended to be used within the administrative authority but will be used by the applicant for the formulation and presentation of an application.

The exception of internal consultation in the Government Information (Public Access) Act

40. When assessing an application on the basis of the Government Information (Public Access) Act, it is first determined whether the document is drawn up for internal consultation on the basis of the definition in Section 1, opening words and (c), of the Government Information (Public Access) Act.

41. If it concerns a document drawn up for internal consultation, a distinction is made between facts and personal opinions on policy. Section 11, subsection 1, of the Government Information (Public Access) Act provides that information on personal opinions on policy, contained in documents drawn up for the purpose of internal consultation within administrative authorities, shall not be disclosed. Section 1 (f) describes the term 'personal opinion on policy' as follows: "an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof". Factual information is not covered by the exception of Section 11 of the Government Information (Public Access) Act. This information is disclosed, unless an exception of Section 10 of the Act applies. Pursuant to well-established case law, the mere fact that factual

environmental information is inextricably linked to personal opinions on policy is not sufficient to refrain from disclosure of this information.

42. Pursuant to Article 4, paragraph 3 (c), of the Convention, under Section 11, subsection 4, of the Government Information (Public Access) Act, the exception provided for in subsection 1 for personal opinions on policy contained in documents drawn up for the purpose of internal consultation within administrative authorities is qualified in the case of environmental information. Accordingly, in the case of environmental information, the interests of protecting personal opinions on policy must be weighed against the public interest served by disclosure on a case-by-case basis. Interests should be weighed on, bearing in mind that the underlying principle of the Government Information (Public Access) Act is access to information. The applicants or their intention are of no relevance in this process. Section 11, subsection 4, of the Government Information (Public Access) Act should, however, be explained in a restrictive manner. This is in line with Recital 16 in the Preamble of the Convention and Article 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[20].

43. If the decision comes down in favour of disclosure, the second sentence of subsection 4 provides for the possibility of disclosing the information on personal opinions on policy in a form that cannot be traced back to any individual. This possibility has been included in Section 11, subsection 4, to prevent a situation in which administrators and public servants would be reluctant to express their personal opinions on policy. Such reluctance is undesirable. An open mutual exchange of opinions between administrators and civil servants should remain possible.

44. Personal opinions on policy may be provided in a form that can be traced back to individuals with the agreement of the persons who have expressed or supported these opinions. This option is provided for in the third sentence of Section 11, subsection 4, of the Government Information (Public Access) Act.

Conclusion

45. When a document is drawn up for the purpose of internal consultation and merely contains factual environmental information, this environmental information shall be disclosed, unless one of the exceptions of Section 10 of the Government Information (Public Access) Act applies, in accordance with the exceptions provided for in Article 4 of the Convention. 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.

46. On the basis of the foregoing, the Government concludes that Article 2, paragraph 3, of the Convention has been correctly implemented in the Netherlands, in particular in Section 19.1a

[20] Council of State of the Council of State, 7 January 2009, ECLI:NL:RVS 2009:BI6049.

of the Environmental Management Act in connection with Section 1 (g) of the Government Information (Public Access) Act.

47. The Government also concludes that Article 4, paragraph 3 (c), of the Convention has been correctly implemented in the Netherlands, in particular in Section 1, opening words and (c), and Section 11, subsections 1 and 4, of the Government Information (Public Access) Act.

C.2 Application of the provisions of the Convention with respect to access to environmental information in connection with the two power plants in the *Eemshaven*

Introductory remarks

48. The Government would first like to note that, following the request by Greenpeace for access to 1,724 documents concerning the development and the permits for the two power plants in the *Eemshaven*, only 298 documents were, after the decision on objection, not or only in part disclosed. Most of these non-disclosed documents were exchanged between the public authorities and the permit holder in the context of the appeal proceedings, whereas some of the other documents related to the granting of the environmental permits. All the documents exchanged in the period before the appeal proceedings in connection with the granting of the permits to Nuon and RWE on the basis of the Nature Conservancy Act, were immediately disclosed. The Government would like to note in this respect that, by disclosing the documents relating to the objection procedures, the Provincial Executive of *Groningen* generously assessed the application for information.

49. The decision not to disclose or only disclose in part the remaining 298 documents was taken further to a diligent assessment by the Provincial Executive of *Groningen* and reviewed by the District Court as well as, on appeal, by the Council of State. The dispute is centered around the following questions:

- *Can information concerning imperative reasons of overriding public interest – that led to the permits for operation of the two power plants in spite of the environmental effects – considered to be environmental information?*
- *Can the communications exchanged between the Provincial Executive of Groningen and Nuon/RWE during the appeal proceedings considered to be internal communications?*

Environmental information (Article 2, paragraph 3)

Environmental information contained in the documents

50. The mere fact that the construction and operation of the power plants in the *Eemshaven* have environmental consequences does not mean that every personal opinion of people involved in the permit procedures, expressed during the decision-making process, concerns environmental information pursuant to Section 19.1a of the Environmental Managament Act and Article 2, paragraph 3, of the Convention. The designation of environmental information depends on the nature of the information and its relation to possible environmental consequences[21].

51. As will be explained below, all environmental information was disclosed in this case.

Information on imperative reasons of overriding public interest

52. The Government notes that only some of the documents that were not disclosed in the present case relate to information on imperative reasons of overriding public interest, of which only a few relate to communications with the external adviser ECN in connection with the appeal proceedings on the granting of the permits. Since these documents were disclosed to both the District Court and the Council of State, these courts were able to establish that these documents do not include information concerning the state of environmental elements, factors affecting these elements, or the state of human health and safety. The documents do not concern measures and activities which affect or may affect the elements and factors of the environment, measures or activities to protect these elements, or cost-benefit and other economic analyses and assumptions used in connection with these measures and activities. The documents refer to studies on the question whether the power plants in the *Eemshaven* serve an imperative reason of overriding public interest. The Provincial Executive of *Groningen* exchanged information with ECN preceding the drawing up of a report, including on the assets of the *Eemshaven* from an economic and administrative perspective. The actual studies on the imperative reasons of overriding public interest as contained in the final ECN report have been made public.

53. Other documents referring to imperative reasons of overriding public interest that were not disclosed are 'question and answer' documents and reactions on the grounds of appeal as presented by Greenpeace, all used in preparation of the District Court hearing.

54. Imperative reasons of overriding public interest can be considered to be environmental information and these reasons, as contained in the final ECN report, were disclosed. Documents merely referring to these reasons cannot be considered to contain environmental information.

Internal communications (Article 4, paragraph 3 (c))

[21] The Hague district court, 25 November 2009, ECLI:NL:RBSGR:2009:8L0767.

Involvement of external actors

55. The Government notes that the documents that were not disclosed in the present case predominantly concern communications between the public authorities and external actors, being the permit holders Nuon and RWE, Groningen Seaports (GSP), and the advisers consulted by them.

Purpose of the documents exchanged during the appeal proceedings

56. The documents exchanged between these parties were intended to be used for internal communication in the phase of judicial review of the permit decisions for the construction of the two power plants in the *Eemshaven*. The parties concerned intended the documents to be used by themselves or by others within the administrative authority. The documents predominantly concern emails with text suggestions, explications on technical or legal matters, drafts of documents lodged in the action, such as memorandums of oral pleadings and statements of defence with comments as well as 'question and answer' documents used in preparing for the District Court hearing[22]. The final version of most of these documents, for example the pleadings and other procedural documents, became public afterwards. Furthermore, all documents exchanged with RWE, Nuon and GSP preceding the appeal proceedings, including the objection procedures, have been disclosed. Accordingly, all environmental information has been disclosed.

57. The Government is of the view that the involvement of external actors in internal communications does not exclude that the exchanged documents be kept confidential. The involvement of these actors was necessary in the present case to be able to use their technical and legal expertise in the court proceedings. This view has been upheld by the Council of State on several occasions, including the appeal proceedings in the present case. The exchanged information was not intended to enable the Provincial Executive of *Groningen* to take a decision on the application for a permit. The documents do not relate to the preparation and submission of such an application, but 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 permits in a legal action[23]. They were intended to assist the Provincial Executive to defend its – already taken – position in court. During the appeal procedures, consultation with the permit holders was necessary because of the technical and legal complexity of the case. Even if participants in internal communications have interests of their own, this does not automatically mean that the documents involved cannot be claimed to be an internal communication. As mentioned above, the Council of State has confirmed that the intention of the authors of the documents when drafting them is decisive in qualifying the information as internal consultations or not[24].

[22] Appendix 5B: ground 6.3. of the judgment of the Council of State of 16 July 2014.
[23] Appendix 5B: ground 6.3. of the judgment of the Council of State of 16 July 2014.
[24] Appendix 5B: ground 6.4. of the judgment of the Council of State of 16 July 2014.

58. Since all environmental information has been disclosed, it cannot be argued that the Provincial Executive of *Groningen* denied Greenpeace access to this information or that it advantaged RWE and Nuon in the proceedings regarding the granted permits, thereby weakening the procedural position of Greenpeace. The exchanged information that was not disclosed only concerns technical and legal comments on the pleadings and other procedural documents. The final version of these documents became public afterwards. Therefore, the non-disclosure caused no disadvantage to the procedural position of Greenpeace.

Personal opinions on policy

59. In addition, the Government notes that the non-disclosed internal communications in this case concern personal opinions on statements of defence or procedural strategy. The documents hardly contain factual materials and when they do, this factual information cannot be separated from the personal opinion of the provincial officials.

60. The documents containing environmental information concerning emissions have all been disclosed, also when these documents concerned personal opinions on policy. For the remainder of the environmental information contained in the documents, the public interests of the disclosure of the environmental information were weighed against the protection of the personal opinions on policy. This weighing of interests has been justified for each and every document. Documents were disclosed if they could be presented in a form that could not be traced back to any individual. As for the documents exchanged in the phase of court proceedings, a phase during which an open and confidential exchange of opinions is essential, the protection of personal opinions on policy was of decisive importance where these opinions concerned environmental information that became public anyway when the definitive documents were submitted to court. The public interest in disclosure was thus sufficiently served since the final documents and reports became public. Taking this into account, the decision came down in favour of the protection of the personal opinions on policy.

61. The Provincial Executive of *Groningen* decided on Greenpeace's application for information by fully disclosing 1,120 documents out of a total of 1,724 documents. The decision was accompanied by a list of all documents, indicating the subject, the date and the persons with whom the documents had been shared, including where applicable the reasons for refusing disclosure based on the exceptions in the Government Information (Public Access) Act.

62. During the objection proceedings, the *Groningen* Provincial Executive indicated to disclose all documents exchanged between the public authorities and the permit holder in the period before the decision was taken on the objection against the permits granted to Nuon and RWE on the basis of the Nature Conservancy Act. Accordingly, there was complete transparency in the procedure on the granting of the permit. As for the documents that were exchanged between the public authorities, the permit holder and its advisers during the appeal proceedings on the basis of the Nature Conservancy Act, Section 11 of the Government

Information (Public Access) Act on internal consultation was applied. Insofar as the documents contained environmental information, interests were weighed in accordance with Section 11, subsection 4, of the Act. In the decision that was taken further to the objection[25], the 604 non-disclosed documents were re-assessed and further reasons were given for either disclosure or non-disclosure. Out of these documents, another 304 documents were fully disclosed and 87 documents were partly disclosed. This decision was split in three separate parts in which for every document the purpose of the document was clearly set out, indicating whether the document contained environmental information and/or personal opinions on policy. For each document, the interests of disclosing the environmental information were weighed against the interests of protecting personal opinions on policy. Where environmental information was considered to be information on emissions, the information was made public. Following the appeals proceedings in connection with the access to information, another 2 documents were fully disclosed and 11 partially. Hence, 200 documents were not disclosed and 98 only partially.

Conclusion

63. On the basis of the considerations above, the Government concludes that all requirements for access to information under Article 2, paragraph 3, and Article 4, paragraph 3 (c), of the Convention have been complied with in connection with the permit procedures for the two power plants.

[25] Appendix 3: Dutch text of the decision on objection of 15 August 2012. An English translation of this decision will be made available in January 2016.