



NEJVYŠŠÍ SPRÁVNÍ SOUD



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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy.

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Answers to Questionnaire: the Netherlands



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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy

(Questionnaire)

Part I

- 1. Is the central administrative supervision over providing information and protection of personal data carried out by one administrative authority or are there specialized authorities for each of these fields or is there an absence of such an authority in any of these areas? Does the chosen model cause any application problems?**

In the Netherlands, the Autoriteit Persoonsgegevens (the Authority for the protection of personal data or AP) is appointed as the supervisory authority for the protection of personal data. The AP was created by an Act of Parliament (Wet Bescherming Persoonsgegevens or Wbp) in accordance with the second chapter of Directive 95/46, Article 28. It enjoys the status of Independent Administrative Authority (zelfstandig bestuursorgaan), which means that although it is a governing body with public authority, in hierarchal terms, it is not a subordinate to the government or an individual minister.

Public and private organisations have a first responsibility to adequately protect personal data. In case of complaints over the right application of the Wbp, subjects should first make a complaint at the organisation processing their personal data. The AP is competent to handle the complaint in last resort.

Furthermore, based on the Wet Openbaarheid van Bestuur (or WOB; an Act that regulates the transparency of administration of administrative matters of government bodies), anyone can request information from a governmental body that is put down in documents. This may include a request to submit personal data. In case of such a request, the government body has to decide on that request within defined time limits. If the person who requested the information disagrees with that decision, it can start an objection procedure that obliges the governmental body to review the request. If the matter is still disputed, the case can be brought before to the district court. The Administrative Law Division of the Council of State is competent in last resort and decides on what information should or should not be made public (including personal data) based on the conditions of the WOB or any other relevant administrative Act that regulates the issue at hand.

As far as our knowledge goes, this division of competence does not lead to any application problems.

- 2. What types of information are excluded from providing? Is there one regime regarding all exclusions or is there any differentiation – e.g. absolute exclusion and relative exclusion?**

What information is excluded from providing and what information may be shared with others, depends on the objective of processing the concerned data.

The Wet Bescherming Persoonsgegevens (Wbp), clearly defines what information may be shared and under which conditions. This goes for all data collected by both private and public entities. These conditions correspond to the conditions laid down in Directive 95/46/EC, which are implemented in the Wbp. The most relevant conditions are laid down in Articles 8, 9, and 11 of the Wbp. These provisions implement the criteria for making data processing legitimate (Article 7 of the Directive) and the principles relating the data quality (Article 6 of the Directive). Furthermore, the general prohibition of Article 8 (1) of Directive 95/46/EC relating to special categories of data, is implemented in Article 16 of the Wbp. Additional exceptions to those listed in Article 8 (2) of the Directive, are implemented in the second paragraph of chapter two of the Wbp (Articles 16-24), as provided for in Article 8 (4) of the Directive.

These include exceptions to process data concerning race (Article 18), political opinion (Article 19), membership of a trade union (Article 20) and health (Article 21).

When it comes to information that is processed by governmental bodies that falls under the scope of the Wet Openbaarheid van Bestuur (or WOB; an Act that regulates the transparency of administration of administrative matters of government bodies), Article 10 and 11 of the WOB defines what information may be excluded from providing.

The WOB defines a number of grounds for refusal, and draws a distinction between absolute grounds for refusal (e.g. information that could endanger the public safety or the unity of the government and information concerning personal data) and relative grounds for refusal (e.g. information that could endanger the relations with other States, the control and supervision tasks of administrative authorities or information that could interfere with the right to respect private and family life). In case of a relative ground for refusal the governmental body has to weigh the public interest of disclosing the information against the interest of protecting the specific ground for refusal. Internal policy views during deliberations are generally excluded from the area of application of the WOB. However, in view of a good democratic administration this information may be subject to disclosure as long as this is not traceable to the individual persons involved, in order to prevent interference with the right to respect private and family life.

3. Are there any types of subjects governed by private law that have duty to provide information? If the answer is affirmative, what kind of subjects and what kind of information?

Private entities must comply with the Wet Bescherming Persoonsgegevens or Wbp (which implements Directive 95/46/EC). Any subject whose data are processed may request access to that information as provided for by Directive 95/46/EC. There is however no equivalent to the Wet Openbaarheid van Bestuur (or WOB; an Act that regulates the transparency of administration of administrative matters of government bodies) for private entities.

The only obligation for subjects governed by private law to provide information that we can think of, is the duty to publish an annual statement of accounts. The circumstances under which this has to be published are prescribed by the Civil Code.

4. Are the salaries of the employees of the public sector subject to the right to free access to information as well? Does this cause any application problems regarding the personal data protection?

Public bodies publish general information concerning salary scales of their organisation in their annual statement of accounts. It also includes the number of employees that fall within a certain salary scale. This information is however, not retraceable to individuals as this is protected under the Wbp and the WOB.

5. Is the trade secret excluded from the free access to information?

Trade secrets are excluded based on Article 10, first paragraph, section c of the WOB (the Act that regulates the transparency of administration of administrative matters of government bodies). Any trade secrets or product information that is provided to a government body under confidentiality is excluded.

6. Are documents that are subject of intellectual property excluded from the free access to information?

Yes, documents that are subject of intellectual property or copy rights are excluded from the free access to information, unless the WOB prescribes otherwise. This is rarely the case.

7. Does the right to free access to information cover as well the parts of an administrative file that contain data related to individuals or are these data protected? In which areas of public administration does this cause problems?

The right to free access to information that falls within the scope of the WOB (which regulates the transparency of administration of administrative matters of government bodies) excludes information that falls within the individual's personal privacy and family life based on the Wbp. This means that information about private individuals that are involved in the administrative matters of government bodies (e.g. personal information about employees etc.) is excluded. This is an absolute ground for refusal and such information is usually cleared from the information that is provided, see the answer to question 2. In some cases however, data related to individuals is provided. This may only be done if revealing the data will unmistakably not lead to a violation of individual's personal privacy of family life.

8. Are data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature (typically files of secret police departments from the times of anti-democratic past) excluded from the right to free access to information?

Yes, information concerning criminal proceedings or administrative delict proceedings are excluded from the right to free access to information. In accordance with Directive 95/46/EC, the Wbp specifies that these are special categories of processing.

Article 8 (5) of the Directive is implemented in Article 21 and Article 22 of the WBP that provide the general exception for administrative authorities who work in the field of security and law enforcement. Article 22 of the WBP specifically concerns the processing of personal data related to criminal convictions and justified suspicions of criminal acts. It contains a general exception for administrative authorities that have the administrative power to enforce criminal law, including those who are empowered to do so based on special laws such as the Politiewet (Police Act) and the Wet Justitiële en strafvorderlijke gegevens (Act concerning judicial and criminal data).

Part II

Public availability of decisions

9.1 Are there any sorts of decisions in your jurisdiction that are not published at all (e.g. decisions with classified status or other decisions with restricted access)? If so, please describe typical cases and give indicative statistic that can illustrate the frequency and relevance of such cases.

Yes, three types of decisions are not made public.

Firstly, cases that are dealt with by a simplified procedure are not published. In these cases, an inquiry is found unnecessary and the case is decided on with without a court hearing.

Secondly, appeals against a judgment rendered by default (in absentia) are not published.

Finally, decisions that are dealt with by Article 91, section 2 of the Dutch Law of 2000 on Foreign Nationals (vreemdelingenwet 2000) are not published. These decisions concern cases of foreign nationals in which the appeal does not lead to the annulment of the appealed decision. Article 91, section 2 of the

Dutch Law of 2000 on Foreign Nationals allows the judge to merely declare that the appeal does not lead to annulment, without mentioning the grounds for this decision.

In 2015, the Administrative Jurisdiction Division decided on 11.799 cases: 2.258 of which came from the spatial planning Chamber, 3.688 from the general Chamber and 5.853 of the foreign nationals Chamber. Most of the foreign national cases are not published since they are dealt with by applying Article 91, section 2 of the Dutch Law of 2000 on Foreign Nationals. Of these 11.799 cases, 4.075 were published. This leads to the conclusion that the majority of cases are not published.

9.2 If a third person (not a party of respective case) wants to obtain your decision, what is the procedure? On-line availability of decisions is to be discussed below, so kindly describe here only other options (e.g. whether it is possible to ask for a decision by snail-mail, whether any fee apply etc.)

Any third party may request to obtain a decision of the Administrative Jurisdiction Division of the Dutch Council of State. Such requests can be done through our website. The decision is then sent to the third party by snail mail.

Natural and legal persons pay a small fee (3,18 euro per request and an additional 0,18 euro per page). Public bodies are exempted from paying this fee.

All decisions that were published after April 1, 2002 are online available through our website. Therefore, most of these third party applications concern decisions from before April 1, 2002. Decisions that were published before 1994 are stored at the National Archives. They can be obtained by sending a letter or e-mail to the National Archives, while quoting the case number.

9.3 Is there any official collection of selected decisions of your instance (apart on-line publication of decisions – see below)? If so, please describe in detail the procedure of its issue. In particular, please focus on the selection process of decisions that are to be published, the frequency of publication and the form of publication. Indicate, whether the collection is published directly by your instance, by some other public body or by an independent publisher. If the collection is published by an independent publisher, please describe the form of cooperation (i.e. whether the publisher has exclusive rights to publish the collection, whether the publisher does any editing of published decisions etc.) Are decisions that are chosen for the publication regarded more relevant by your instance or by general public?

Apart from cases that are included in the National Archives, no official collection of the selected decisions exists. However, the Dutch Council of State publishes a selection of its decisions in its annual report. Remarkable cases of all three chambers of the Administrative Jurisdiction Division are selected and a summary of the case is included in the annual report. A selection of our decisions are furthermore published by independent and well known publishers, such as NJB (www.njb.nl). Some of our State Councillors are affiliated with these publishers and contribute to the selection process of the publishers.

10. Editing and anonymization of decisions

10.1 Do you anonymize published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of anonymization, whether there are any particular statutory or other rules governing anonymization (apart general privacy/data protection rules) and what data are anonymized.

All courts in the Netherlands apply the *anonimiseringsrichtlijnen* (anonymising guidelines), a standard set of guidelines that set out what and in which cases, information in a decision should be anonymised. These guidelines are publicly available online, see:

<https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Anonimiseringsrichtlijnen.aspx>

As a standard rule, all information that can be traced back to a natural person, or a natural person working at a legal entity, is anonymised. At the Council of State, the communication department is in charge of anonymising the decisions.

10.2 If anonymization practice changes, does it affect already published decisions (i.e. are past decisions subsequently anonymized/de-anonymized with every change of anonymization rules)?

This is not the case in the Netherlands. The anonymising guidelines are seldom amended and if amendments occur, these usually concern supplements to the existing set of guidelines. In any case, past decisions are not affected by such changes as they are already publicly available.

10.3 Describe any subsequent problematic issues that you noted in your jurisdiction regarding the anonymization (e.g. different practices of different supreme instances, strong public debates, impact of de-anonymization of decisions by media etc.)

There are hardly any problematic issues regarding anonymising that we have noticed in our jurisdiction. All judgments by any of the courts in the Netherlands are anonymised in a consistent way by applying the anonymising guidelines. See the answer to question 10.2.

The only relevant issue we notice is that in some cases, it would be superfluous to anonymise a decision. This goes, for instance, for cases that are excessively covered by the media or in cases where the appellant actively seeks the attention of the media himself/herself (e.g. by inviting media to attend the court hearing). In such circumstances, we therefore choose not to anonymise a decision. Consequently, a natural person's name is fully cited in the decision, contrary to the main rule of the anonymising guidelines.

10.4 Do you edit published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of editing, what information is added/removed in the process of editing (incl. metadata).

Published decisions are accompanied by metadata. Our own communication department adds this information to the decision before it is published. This allows decisions to be classified, for instance by law branch, type of procedure or subject matter. The metadata is both published on our own website (www.raadvanstate.nl) as on the online central database of all court decisions in the Netherlands (www.rechtspraak.nl).

10.5 Has the development of the right to be forgotten affected in any way the anonymization or publication of your decisions? If not, is it a topic that is being considered in your jurisdiction with regards to the publication of court decisions?

The right to be forgotten has no significant effect on the way decisions are anonymised or published in the Netherlands. This is explained by the fact that all information in court decisions, that will allow the identification of a natural person, is in principle anonymised based on the anonymising guidelines for courts. Incidents do occur however. Incidentally, a decision may contain information that can be linked to a natural person (for instance, a person's name was accidentally not deleted in the decision). In such cases, we immediately repair the mistake.

11. On-line publication of decisions

11.1 Are decisions of your instance available on-line? If so, please indicate whether on-line all or only selected decisions are published on-line (if only selected decisions are published, please describe the procedure of their selection).

All decisions that are public, are online available on our website (www.raadvanstate.nl) and on the online central database of court decisions (www.rechtspraak.nl). There is no selection procedure for publishing decisions: decisions are either published or not. For an overview of the decisions that are published, see the answer to question 9.1.

11.2 Describe the form of on-line publication of you decisions. In particular, indicate whether your decisions are published through your own website or whether it is done through some different on-line service (e.g. through a common platform operated by a ministry of justice, by a judicial council etc.) Kindly add also sample screenshot(s) or link(s).

All decisions are simultaneously published on our own website and on a different online service (www.rechtspraak.nl): a databases that is operated by the Council for the administration of justice (*De Raad voor de Rechtspraak*). The Council for the administration of justice is an independent organisation, in which all the courts in the Netherlands are organised, except for the Administrative Jurisdiction Division of the Council of State. The Council for the administration of justice is funded by the ministry of Justice, but operates independently.

11.3 What are available file formats in which your decisions are available on-line? Apart enumerating particular file formats, kindly indicate whether your instance systematically sticks to any commonly accepted open data policy. Also, please indicate whether your instance publishes on-line only individual decisions or whether whole datasets are available to the public for further re-use. If datasets are available for further re-use but not publically, please describe to whom and under what conditions such datasets are made available.

Recent decisions are available in database files. Some older decisions are also available in pdf-format. The database contains all individual decisions and is freely available for use and re-use.

12. Public availability of other documents

12.1 Are there published on-line personal information about members of your instance? In particular, please describe whether there are CVs available, in which length and form (e.g. on a court website) and eventually what information is regularly published (e.g. education, memberships, political beliefs, marital status etc.) Also, please indicate whether the publication of information about members of your instance is compulsory, whether the members of your instance are free to decide about the structure and content of such information and whether you noted any issues in that regards (e.g. there was a big debate in the Czech Republic over the publication of past membership of the judges in the communist party). Please add a sample link or a screenshot of how such personal information about a member of your instance looks like.

A to-the-point list of personal information of all members of the Dutch Council of State is made available online on our website. For an overview, see: <https://www.raadvanstate.nl/over-de-raad-van-state/organisatie/leden-en-staatsraden.html>. This information includes their CVs (education, career path and current associated activities). The publication of associated activities of the members is compulsory.

Information concerning political beliefs is explicitly considered irrelevant when appointing members of the Administrative Jurisdiction Division. This information is therefore not included in their online CV's. However, when selecting members for the Advisory Division (safe for the members with a quality seat)¹, political information is considered relevant, as this Division is ought to represent the political spectrum of the Netherlands. Yet, the online CV's do not explicitly contain information on their political beliefs, apart from information that follows from their previous career path (e.g. former members of parliament or members etc.).

12.2 Which case-related documents other than decisions of your instance are published on-line (e.g. dissenting opinions, advocate general submissions, submissions of parties, records of chamber deliberations etc.)? Please, describe how these documents are published, i.e. where and in which format (e.g. on a website through a search form, in open data formats, etc.). If your instance publishes these documents in open formats, kindly provide a sample link to a particular dataset.

Only the decision is published. Incidentally, an advocate general is asked to give a conclusion. This conclusion is given prior to the decision of the Administrative Jurisdiction Division of the Council of State. The decision therefore contains a link to the decision. Decisions only contain hyperlinks of our own (previous) judgements that are available on our website.

12.3 Are the members of your instance allowed to publically comment or annotate on their own decisions or other decisions of your instance? If so, please describe common forms in which this is done (e.g. in law journal articles, in public debates on case-law organized by the respective instance etc.)

Members of the Council of State are not allowed to publically comment or annotate their own decisions or any of the decisions of the Administrative Jurisdiction Division of the Council of State.

Part III

13. What trends, threats and challenges do you foresee to come in the field of freedom of information and protection of privacy during the next decade? What should be the role of supreme administrative jurisdictions in facing these trends, threats and challenges?

This kind of question seems to be too broad for answering it with concrete data. Therefore our aim is not to pursue you to fill it with some concrete and clear statement but what we intend is to know your opinion on what trends could or will influence this scope of decision-making of your jurisdiction. Your answer will serve as the basics for further discussion during the third part of the Colloquium and we hope that this "look into the future" will be pleasant and useful ending of the meeting.

We would very appreciate if the presidents of the Supreme Administrative Courts/Councils of States could provide us with answers to this question.

Digitalising data processing is a trend. Public and private entities increasingly process (personal) data digitally. This allows personal data to be shared more easily with others. The drawback of this trend is that the entities processing the data depend more on digital technology. In case of a technical problem or technical calamity, it would become much more difficult to fall back on the old mode of operation (e.g. physical papers) and there is no way back. This challenges the security and continuity of processing data. The chance of others getting access to the databases by by-passing security poses a threat. If the data is

¹ These are member that are selected based on specific expertise e.g. European law.

then for example published on the internet after such a hack, it is much more difficult to control the consequences. Public and private entities should therefore be more aware of these threats and safeguard that personal information is only accessible by authorised personnel. Based on the Wbp, the Autoriteit Persoonsgegevens (the Authority for the protection of personal data or AP) has enough capacity to adequately handle any violations. The Administrative Law Division of the Council of State has a lesser role to play, see the answer to question 1.