

ECLI:NL:RVS:2018:3459

201708402/1/A3

Date of judgment: 24 October 2018

## ADMINISTRATIVE JURISDICTION DIVISION

Judgment on the appeals of:

1. the Minister of Economic Affairs (now the Minister of Economic Affairs and Climate Policy),
2. Sandd B.V., which has its registered office in Apeldoorn,  
appellants,

against the judgment of Gelderland District Court of 12 September 2017 in case no. 14/7243 in the action between:

Sandd

and

the Minister.

### Course of proceedings

In response to a request for information from Sandd pursuant to the Government Information (Public Access) Act (*Wet openbaarheid van bestuur*; WOB), the Minister, by decision of 18 April 2014, refused to disclose a number of documents.

In response to an objection lodged by Sandd against his decision of 18 April 2014, the Minister, by decision of 4 September 2014, partly upheld and partly revoked his earlier decision, and partly disclosed a number of documents.

By judgment of 12 September 2017 the district court declared the application for judicial review lodged by Sandd against the decision of 4 September 2014 well founded, set aside that decision and directed the Minister to make a fresh decision on the objection, taking into account its judgment. That judgment is attached.

The Minister appealed against that judgment. Sandd filed a cross appeal.

Sandd lodged a written statement and the Minister presented his views.

Sandd gave the Administrative Jurisdiction Division the consent referred to in section 8:29, subsection 5 of the General Administrative Law Act (*Algemene wet bestuursrecht*; AWB).

The Minister made a new decision on Sandd's objection on 31 January 2018.

Sandd lodged a further document.

The Administrative Jurisdiction Division heard the case at its sitting on 29 August 2018, where appearances were entered by the Minister, represented by D.W.M. Wenders and R.J.R. Dantuma, and by Sandd, represented by G.A. van der Veen, attorney in Rotterdam. Also appearing for Sandd was [authorised representative].

#### Considerations

1. By letter of 16 January 2014, Sandd requested the Minister, pursuant to the Government Information (Public Access) Act (WOB), to provide it with all data and correspondence exchanged between the Ministry and Koninklijke PostNL B.V. about the amendment of the Postal Regulations 2009 with regard to which the public consultation period had begun on 5 November 2013. By decision of 18 April 2014, the Minister noted that there were 62 documents, one of which was already in the public domain. The Minister refused to disclose all non-public documents, pursuant to section 11, subsection 1 of the WOB. He also refused to disclose a number of documents or parts of documents, pursuant to section 10, subsection 1, opening words and (c) and section 10, subsection 2, opening words and (e) of the WOB. By decision of 4 September 2014, the Minister partially disclosed a number of documents in so far as they contained information which, on reflection, was not covered by a ground for refusal. In all other respects he upheld the decision of 18 April 2014. The Minister also supplemented the reasons for that decision by refusing disclosure of a number of documents partly pursuant to section 10, subsection 2, opening words and (g) of the WOB.

The district court held that the Minister was not entitled to refuse disclosure pursuant to section 11, subsection 1 of the WOB and therefore declared the application for judicial review well founded and set aside the decision of 4 September 2014. In addition, the district court ruled that it could not make a final decision on the dispute

because it was unclear to which passages of the non-disclosed documents or parts of them the other grounds for refusal had been applied.

2. The Minister has argued that the district court was wrong to describe his contacts with PostNL as a form of structured rather than internal consultation, which meant that the ground for refusal in section 11, subsection 1 of the WOB did not apply. On this point, the Minister contended first and foremost that, in his opinion, the district court endorsed his position that the documents had been prepared for the purposes of internal consultation. This meant, in his view, that the issue of whether the consultation had lost its internal character due to the involvement of PostNL, a third party that did not form part of the public sector (referred to below as an external third party), could no longer be raised on appeal. He also argued that the district court failed to recognise that the contacts with PostNL took place not within the framework of structured consultation but within the framework of a specific project of limited duration. The project involved amending the Postal Regulations 2009 to revise the cost allocation system following the results of an evaluation of postal charges in accordance with an undertaking given to parliament on 22 November 2012. The project lasted from 3 June 2013, the day of the announcement to parliament that the regulations would be amended, until 29 January 2014, the day of the entry into force of the amended regulations. According to the Minister, the contacts with PostNL within the framework of this project took place in the period from 2 August to 19 December 2013.

Sandd has submitted that the district court was wrong to endorse the Minister's position that the documents had been prepared for internal consultation. To this end, it has argued on the basis of the Administrative Jurisdiction Division's decision of 20 December 2017, [ECLI:NL:RVS:2017:3497](#), that the district court failed to recognise that there can be no question of internal consultation when an administrative authority consults with an external third party that is representing its own interests and these interests actually play a role in the consultations.

2.1 Section 1, opening words and (c) of the WOB reads as follows: 'The definitions employed in this Act and the provisions deriving from it are as follows: [...] internal consultation: 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.'

Section 11, subsection 1 reads as follows: 'Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no

information must be disclosed concerning personal opinions on policy contained therein.’

2.2 As the Administrative Jurisdiction Division held in its judgment of 20 December 2017, it follows from the legislative history of section 11 of the WOB (Parliamentary Papers, House of Representatives, 1986/87, 19 859, no. 3, p. 13) that whether a document is of an internal nature 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. Documents obtained from third parties may also 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.

2.3 The Administrative Jurisdiction Division believes that the district court was wrong to classify the contacts between the Minister and PostNL as a form of structured consultation. Given the content of the documents concerned, which the Division has inspected, and the explanation given by the Minister in his appeal and at the hearing by the Division, it is reasonable to assume that the contacts took place on an ad hoc basis in the course of work performed in a limited period to amend the Postal Regulations 2009 by revising the cost allocation system. Although contacts did take place between the Minister and PostNL about the cost allocation system well before 2013, which was considered important by the district court, this does not in itself detract from the Division’s conclusion.

In his notice of appeal and at the hearing by the Division, the Minister sufficiently explained that these contacts too were of an ad hoc nature and occurred because he needed to obtain certain information which could only be provided by PostNL, in view of its specific knowledge of the cost allocation system.

In view of the above, the Minister was right to make this argument. However, for the reason given below, this is of no avail to him in achieving his intended goal.

2.4 In its judgment of 20 December 2017, the Administrative Jurisdiction Division held – unlike in previous cases (compare, for example, its judgment of 17 May 2017, [ECLI:NL:RVS:2017:1298](#)) – that consultations cease to be of an internal nature if the interests of an external third party involved in the consultations play a role as such in them. In such a case, the advice provided by the external third party is not given – or not exclusively given – in the interests of the administrative authority requesting it,

but is instead partly dictated by its own interest in the outcome of the consultations. Documents of external third parties, as referred to in the legislative history of section 11 of the WOB, which have been drawn up for the purpose of internal consultation, can come within the definition of internal consultation only if the external third party has no interest other than to advise the administrative authority on an administrative matter based on its own experience and expertise.

2.5 Contrary to the submissions of the Minister and Sandd, the district court did not express an opinion on Sandd's argument that the consultations had ceased to be of an internal nature due to the involvement of PostNL. The Administrative Jurisdiction Division is of the opinion that if the district court had addressed this issue, it would have had to allow the argument. PostNL was, after all, an external third party representing its own business interests, which played a role as such in the consultations. In giving an opinion on the amendment of the Postal Regulations 2009 based on its own experience and expertise, PostNL therefore in part had an interest which differed from that of the Minister. The Minister's submission, as stated in the views he presented and at the hearing by the Administrative Jurisdiction Division, that the judgment of 20 December 2017 does not apply to this case because the facts dealt with in that judgment were entirely different cannot be accepted. This is because the considerations from that judgment as described above at 2.4 are of a general scope and can be applied to the present case. In so far as the Minister has invoked judgments of the Division that predate the judgment of 20 December 2017, these cannot benefit him either. After all, the Division intended its judgment of 20 December 2017 to change the existing case law. Nor do the arguments put forward by the Minister, namely that PostNL's input plays a major role in changing the cost allocation system, that PostNL's own interest stems from its statutory obligation to provide the universal postal service, that PostNL has not initiated or desired the change and that as a result of the change PostNL has only limited discretion in relation to the cost allocation, detract from the foregoing. Whether consultations have ceased to be of an internal nature because of the involvement of an external third party depends on whether the third party in question has no interest other than to advise the administrative authority on an administrative matter based on its own experience and expertise. As noted previously, PostNL had another interest. The administrative court need not assess on a case-by-case basis whether the third party's input in the consultations was actually influenced by that other interest. Although the documents in question included drafts of the new Postal Regulations 2009 and the accompanying explanatory notes or comments on them, this does not mean that the consultations on these documents were of an internal nature since the documents were shared with PostNL.

In view of the foregoing, the district court's conclusion that section 11, subsection 1 of the WOB is not applicable to the documents concerned is correct.

3. The appeal and cross-appeal are unfounded. The appealed judgment must be upheld, subject to amendment of the grounds on which it is based.

4. To implement the judgment of the district court, the Minister made a new decision on Sandd's objection on 31 January 2018. Pursuant to sections 6:19 and 6:24 of the AWB, Sandd has by law a right to apply for judicial review of this judgment. The Division will therefore assess that decision below in the light of the arguments made against it by Sandd.

5. Sandd has argued that the Minister, in his decision of 31 January 2018, was wrong to refuse disclosure pursuant to section 10, subsection 2, opening words and (g) of the WOB of the documents to which he had previously incorrectly applied section 11, subsection 1. To this end, Sandd has submitted that since the Minister is still relying on the arguments he used earlier in the context of section 11, subsection 1, he has incorrectly implemented the district court's judgment. Sandd has also queried the credibility of the Minister's argument that disclosure of the documents concerned would make external third parties such as PostNL less willing in future to provide information. After all, such third parties retain an interest in ensuring that the rules are amended in such a way as to benefit them as much as possible. Nor, according to Sandd, does the Minister's argument that PostNL's contribution is essential mean in itself that disclosure should be refused. On the basis of the Administrative Jurisdiction Division's judgments of 13 January 2018, [ECLI:NL:RVS:2018:314](#), and 30 May 2018, [ECLI:NL:RVS:2018:1773](#), Sandd has also submitted that the decision wrongly fails to give reasons applicable to separate documents or parts of documents.

5.1 Section 10, subsection 2, opening words and (g) of the WOB reads as follows: 'Nor must disclosure of information take place in so far as its importance does not outweigh [the importance of preventing] disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.'

5.2 As previously held by the Administrative Jurisdiction Division (judgment of 27 June 2018, [ECLI:NL:RVS:2018:2143](#)), section 10, subsection 2, opening words and (g) of the WOB provides – according to its legislative history (Parliamentary Papers, House of Representatives, 1986/87, 19 859, no. 3, pp. 36 and 37) – the most general ground for an exception that can be applied in cases where the disclosure of information would excessively prejudice interests other than those referred to in

section 10, subsection 2, opening words and (a) to (f). As such, it meets the need to be able to apply the WOB in a range of very different and unpredictable situations. The nature of the provision means that natural or legal persons or third parties involved in the matter are also deemed to include public bodies. However, the provision should not enable administrative authorities to withhold data on the grounds that their publication might show a policy they are pursuing in an unfavourable light or reduce the chance of a proposed policy being accepted. In such a case, their interests are outweighed by the public interest in disclosure, which the WOB is intended to protect. Nonetheless, government ministers, other public administrators and public servants may also be persons involved in the matter, certainly if information is requested about matters that concern themselves. This refers not to cases involving an infringement of their privacy, but instead to cases in which the proper functioning of the public body of which they are part is in jeopardy.

5.3 To justify applying section 10, subsection 2, opening words and (g) of the WOB to the documents to which he had previously incorrectly applied section 11, subsection 1 of the WOB, the Minister took the position that disclosure was precluded by the confidential nature of the consultations with PostNL and hence the proper functioning of the Ministry. According to the Minister, the free and unrestricted exchange of information, ideas, arguments and opinions is crucial to the proper functioning of the Ministry and the performance of its work. Disclosure of this information would be detrimental to the confidential nature of these views. To safeguard the free and unrestricted exchange of views, third parties must be able to trust that views expressed in confidence will not be made public. Moreover, disclosure of this information could in future deter PostNL or another universal postal service provider from supplying the Ministry with information about the cost allocation system. Some of the documents and their annexes also relate to drafts of the Postal Regulations 2009 and the accompanying explanatory notes. These documents contain provisional views of civil servants and sometimes even relate to very rough drafts of the Postal Regulations 2009 and the accompanying explanatory notes. Disclosure of these documents would, above all, jeopardise the scope for formulating personal opinions on policy and the ability to ensure that those concerned can express their thoughts and opinions in complete freedom and confidence. According to the Minister, disclosure of this information could also frustrate the decision-making process and the consultations in the future.

5.4 In the Administrative Jurisdiction Division's opinion, situations could arise in which the consequences of disclosing information exchanged in confidence with an external third party would be so detrimental to the relevant administrative authority or

other party concerned that disclosure may be refused pursuant to section 10, subsection 2, opening words and (g) of the WOB. However, the Division considers that the Minister, in his decision of 31 January 2018 and the accompanying explanation, failed to adequately explain why he believes such a situation exists in this case. It cannot be reasonably assumed that if the documents in question, which contain technical information about changes to the cost allocation system and how this could be incorporated into the Postal Regulations 2009, were to be disclosed, PostNL or any other provider of the universal postal service would not be prepared in future to engage in meaningful consultations with the Ministry on this subject. A breach of the confidentiality promised to PostNL would not in itself change this since it would be in the interests of PostNL or another provider of the universal postal service to ensure that the Ministry is properly informed. Nor does the Administrative Jurisdiction Division believe that there is any reason to assume that disclosure of the documents relating to drafts of the Postal Regulations 2009 and the accompanying explanatory notes would frustrate the decision-making process and the consultations in the future.

To this extent, the submission is successful.

5.5 In his decision of 31 January 2018, the Minister refused disclosure of parts of documents, pursuant to section 10, subsection 1, opening words and (c) and subsection 2, opening words and (e) and (g) of the WOB.

The Administrative Jurisdiction Division considers that in this respect too the decision is based on unsafe reasoning. After all, it is not clear from the decision exactly what information the Minister had in mind when refusing disclosure on these grounds.

The submission is also successful in this respect.

6. The application for judicial review is well founded. The decision of 31 January 2018 must be set aside. The Minister must make a new decision on the objection lodged by Sandd, taking into account the considerations of this judgment.

With a view to the efficient resolution of the dispute, the Administrative Jurisdiction Division considers it necessary to rule that any application for judicial review of the new decision may be made only to the Division, pursuant to section 8:113, subsection 2 of the AWB.

7. The Minister must be ordered to pay the costs of the proceedings in the manner referred to below.



## Decision

The Administrative Jurisdiction Division of the Council of State:

I. declares the appeal to be unfounded;

II. declares the cross-appeal to be unfounded;

III. upholds the appealed judgment;

IV. declares the application for judicial review of the decision of the Minister of Economic Affairs and Climate Policy of 31 January 2018, reference WJZ/18005611, to be well founded;

V. sets aside that decision;

VI. directs that any application for judicial review of the new decision on the objection of Sandd B.V. may only be lodged with the Administrative Jurisdiction Division;

VII. orders the Minister of Economic Affairs and Climate Policy to reimburse Sandd B.V. for the legal costs it has incurred in connection with the hearing of the appeal and the application for judicial review of the decision of 31 January 2018, amounting to €1,252.50 (one thousand, two hundred and fifty-two euros and fifty cents), which are entirely attributable to legal assistance provided by a third party in a professional capacity;

VIII. directs that the Minister of Economic Affairs and Climate Policy pay a court fee of €501 (five hundred and one euros).

As given by J.A. Hagen, presiding judge, and D.A.C. Slump and H. Bolt, members, in the presence of T. Hartsuiker, clerk of the court.

(signed) Hagen  
presiding judge

(signed) Hartsuiker  
clerk of the court

Pronounced in open court on 24 October 2018