

# ACCESS TO FACILITY-SPECIFIC ENVIRONMENTAL INFORMATION



## THE NETHERLANDS

This memo describes the European framework that applies to the Netherlands as an EU Member State and in the final section discusses and links the country specific implementation of these requirements as well as national variations.

### Environmental Information Directive

Netherlands is a Member of the European Union and has transposed the [Environmental Information Directive, Directive 2003/4/EC](#). This is a broad-based disclosure requirement that requires transparency for information about the environment.

*“The directive defines “information relating to the environment” in a very broad manner, covering “any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites and on activities or measures adversely affecting, or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.”<sup>1</sup>*

The exceptions where disclosure may be denied are actually fairly limited.<sup>2</sup> The exceptions include, however, criminal and disciplinary proceedings and proceedings by public authorities which are confidential under national law.<sup>3</sup> This particular exception

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<sup>1</sup> Resources for the Future, “Public Access to Environmental Information and Data,” 2001, p. 23.

<sup>2</sup> [Article 4](#): “2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; (b) international relations, public security or national defence; (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy; (e) intellectual property rights; (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law; (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; (h) the protection of the environment to which such information relates, such as the location of rare species.” (emphasis added).

<sup>3</sup> There is no explicit authority to include administrative enforcement measures within this definition of exceptions. However, the European Court has ruled that proceedings with possible penalties may come

varies widely by Member State in its implementation. Preliminary investigations can also be excluded. However, the Court of Justice for the European Union has indicated that the reason for confidentiality of certain public proceedings – even where set by national law – may not apply after the proceedings are resolved. See [Flachglas Torgau GmbH v Germany](#), C-204-09, February 14, 2012. Actions related to imminent threats to public health or the environment are also mandated for disclosure. See Article 7(4). The Aarhus Convention<sup>4</sup> requires that the interest of disclosure of public proceedings must be balanced against the need for confidentiality in each case, so that a blanket exemption is not the intent of the EU Directive implementing the Convention.<sup>5</sup> All restrictions on disclosure are discretionary with each Member State and national authorities are not necessarily compelled to have the same exemptions in their individual country's laws. See "National Law" section below.

## European-Pollutant Release & Transfer Registry

In line with the Aarhus Convention and the EU EID, all emissions data must be publicly available. The EU also maintains the online European Pollutant Release and Transfer Registry or E-PRTR which requires by regulation ([Regulation EC No. 166/2006](#)) the reporting of releases – both accidental and deliberate – to the air, water or soil. E-PRTR searches can be done [online](#). The data base is about two years out of date, but it can be useful to identify past problems at facilities. Reports of discharges or releases from facilities are themselves not confidential under EU law and can also be readily obtained from each Member State.

## National Law

[Chapter 19 of the Environmental Protection Act](#) of the Netherlands transposed the Directive on access to environmental information. However, certain key provisions remain in effect from the [Open Government Act](#) (nick-named WOB, in Dutch, Wet Openbaarheid Van Bestuur).

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within the exemption as to "secret" information involving internal preparation of a proceeding or decision. See [Mecklenburg v. Pinneberg](#),, C-321-96, 1998 ECRI 3809, 3835. After the matter is resolved by officials, the reason for the exemption is arguably no longer valid. See [Flachglas Torgau](#), supra.

<sup>4</sup> The [Aarhus Convention](#) on access to justice in environmental matters also has relevant disclosure requirements. The objective is the right to participate in environmental decision-making and the information covered includes administrative measures by public authorities affecting the environment. See Article 2 (definitions). Most of this convention has been incorporated into the Environmental Information Directive at this point.

<sup>5</sup> See Dirk Bunker, DEFICITS IN US AND EU MANDATORY ENVIRONMENTAL DISCLOSURE, (Springer 2011), p. 141.

The definition of environmental information and other provisions implementing the Directive are in Chapter 19 of the Environmental Protection Act and the exceptions to disclosure are in the WOB. The exceptions remain discretionary and must be balanced against the public interest in access. Article 10, section 2 of the WOB provides for this balancing test to be used for "(c) *the investigation and prosecution of criminal offenses*" and "(d) *inspection, control and supervision by administrative bodies.*" A discussion of the legislative history of the criminal proceedings exception makes it clear that it applies only to internal and otherwise undisclosed investigative and internal documents (not the existence of the proceedings or the public charges communicated to the defendant). See [WOB Help Desk](#).<sup>6</sup> Similarly, the internal administrative process is protected in case of non-criminal proceedings by agencies. *Id.* These provisions do not apply where there would be no effect on the government's case by disclosure. See Schram, "[Legal review of the Decree of March 26, 2004 concerning open governance](#)," July 2009, p. 122 and *cases cited therein*.

Subsequently, it is difficult to see what valid grounds could be cited for denying access to environmental enforcement notices and cases which have been provided to the facility.

For information on how to obtain information, the [WOB Help Desk](#) is available. The [Dutch Government help desk](#) also has useful information.

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<sup>6</sup> "This ground for refusal is intended to prevent, according to the legislative history, that the investigation and prosecution of criminal offenses could be frustrated by disclosing data investigating whether the prosecution have already gathered. In addition, see this land settled law not only to the protection of interests in the individual case to investigate and prosecute criminal offenses, but also on the detection strategy in general. This includes the means by which officers carry out the strategies."