[NL] Council of State decision on media access to information

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Maxime J.A. Hanhart
Institute for Information Law (IViR), University of Amsterdam

On 25 October 2017, the highest Dutch administrative court, Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) (Council of State) overruled a decision of the Midden-Nederland Court concerning a request for public access to government information about the air crash of Flight MH17. Both parties - the Minister of Justice and Security and the Dutch media organisations (broadcasters 'NOS' and RTL Nieuws, and the newspaper 'De Volkskrant') - made an appeal in this case that focuses on the decisions about public access to reports by the Ministerial Commission for Crisis Management (MCCb), which coordinates interdepartmental crisis management and makes decisions on a coherent approach to major incidents.

The Minister argued that, instead of what the Midden-Nederland Court had held, the Minister can completely refuse public access to the MCCb's reports, by invoking article 10(2)(g) and 11 of the Dutch Government Information (Public Access) Act (Wet openbaarheid van bestuur — WOB). Because of the unity of state policy and of the interest of the unrestricted exchange of ideas, the decisions of the MCCb can remain intact. The Administration Jurisdiction Division agreed with the Minister and held that, in this situation, "the right of the government to secrecy of its activities, the unity of state policy and sensitivity of the question outweigh the importance of disclosure."

The media organisations' appeal concerned the Midden-Nederland Court's judgment on Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).They argued that the Court overlooked the fact that MCCb must ensure, "in each specific case", that a (lawful) refusal to public access is necessary in a democratic society, in light of one of the legitimate interests set out in Article 10(2) ECHR. Therefore, even if a refusal for public access has a basis in a national legal act, the media argued that every individual decision needs an evaluation in the context of Article 10(2) ECHR.

The Council of State disagreed with the media organisations and considered that it can generally be presumed that the legislator defined refusals in the WOB that are in line with Article 10(2) ECHR. However, the Council of State acknowledged, for the first time, that exceptions are possible. In this regard, when "very special circumstances" lead to a claim that, despite the application of the WOB, the appellant's right to receive and impart information is restricted without this being

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justified under Article 10(2) ECHR. Thus, the appellant is exercising the specific right to request information under Article 10 ECHR (citing Magyar Helsinki Bizottság v. Hungary) (see IRIS 2017-1/1), and Article 10 ECHR may set the WOB aside under certain circumstances. However, in the instance case, the media organisations have neither argued nor substantiated that there were such "very special" circumstances.

Afdeling bestuursrechtspraak van de Raad van State, 25 oktober 2017, ECLI:NL:RVS:2017:2883

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2017:2883

Administrative Law Division of the Council of State, 25 October 2017, ECLI:NL:RVS:2017:2883

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