[NL] Judgment on Minister's refusal to release documents to broadcaster on Flight MH17 disaster

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On 11 February 2021, the District Court of Midden-Nederland (*Rechtbank Midden-Nederland*) delivered a notable judgment on a government ministry's refusal to release documents to the media relating to the Flight MH17 disaster, following a freedom of information request under the Public Access to Government Information Act (*Wet openbaarheid van bestuur)* (WOB) (see also IRIS 2021-2/9). The Court held that the release of certain documents could be refused, due to the potential harm caused to "relations of the Netherlands with other states and with international organisations". Importantly, however, the Court ordered the Minister of Justice and Security (*Minister van Justitie en Veiligheid*) to reassess the refusal to release other documents, including correspondence from the Dutch National Coordinator for Counterterrorism and Security. This followed a recent judgment from the highest Dutch administrative court, Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), on other media requests for access to government information about the Flight MH17 disaster (see IRIS 2018-1/33).

The case arose in January 2018, when a journalist with the news programme *RTL Nieuws* submitted a freedom of information (FOI) request to the Minister of Justice and Security concerning the Flight MH17 disaster. The disaster occurred in 2014, when Malaysia Airlines Flight 17 (MH17) from Amsterdam to Kuala Lumpur was shot down over eastern Ukraine, resulting in the death of 298 persons. The FOI request concerned documents included in the so-called "MH17 Archives" held by the Ministry of Justice and Security, which includes documents and correspondence relating to MH17 from the National Coordinator for Counterterrorism and Security (*Nationaal Coördinator Terrorismebestrijding en Veiligheid*) (NCTV), the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*) (AIVD), the Military Intelligence and Security Service (*Militaire Inlichtingen- en Veiligheidsdienst*) (MIVD) and the international Organisation for Security and Co-operation in Europe (OSCE). In response to the FOI request, the Ministry released some documents, but crucially, refused to release, or redacted, certain documents from NCTV to the AIVD, MIVD and the Dutch police, and a threat analysis on the airports sector. These documents were refused on the basis of Article 10(1)(b) and Article 10(2)(a) of the WOB, which allow refusal to release information that "could harm the security of the State" or "the relations of the Netherlands with other states and international

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organisations".

RTL Nieuws appealed the Minister's decision to the District Court of Midden-Nederland, arguing that access to the documentation should be granted under the WOB. In order to determine whether the Ministry was right to redact or not to disclose the documents, the Court inspected the documents confidentiality, and then delivered its judgment. First, in relation to a document on the situation in Ukraine dating from 2014 that had been refused under Article 10(2)(a) of the WOB, the Court agreed with the Ministry on its refusal to release the information. Crucially, the Court held that document "was not intended to be made public", contained positions of certain international organisations that had not been approved by these parties, and the interest in its disclosure did not outweigh the interest in protecting the "relations of the Netherlands with international organisations". The Court rejected the broadcaster's argument that the passage of time should have changed that assessment. Importantly, however, in relation to other documents sought by *RTL Nieuws*, namely certain correspondence from the NCTV distributed to the AIVD, MIVD and the Dutch police in 2014; and from the MIVD on the threat analysis of the NCTV in 2014, the Court held that the Ministry had not provided "sufficient reasons" for redacting certain passages. Further, the Court rejected the Ministry's reason for refusal to release the MIVD report, holding that the "mere circumstance that the report dates from after the air disaster is insufficient" reason for refusal. In light of the Court's findings, the Court ordered the Minster to reassess the refusal to fully disclose those documents at issue. Finally, the Court rejected *RTL Nieuws'* submission that the Ministry's search of documents relating to the MH17 Archive had been "insufficient", holding that there was no evidence to doubt the Ministry's assertions as to the extent of the MH17 Archive covered by the FOI request.

District Court of Midden-Nederland, ECLI:NL:RBMNE:2021:500, 11 February 2021

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