

TOWARDS OPTIMUM AVAILABILITY OF PUBLIC SECTOR INFORMATION

Dutch Ministry of the Interior and Kingdom relations

The Hague, April 26, 2000
Lower Chamber, session year 1999-2000, 26 387,nr 7

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I. INTRODUCTION AND SUMMARY

I.1 Introduction

The Internet made its biggest breakthrough in our society in 1999. Approximately half of the population in the Netherlands currently has access to the Internet, either at work or at home. The number of services offered via the World Wide Web is growing spectacularly. E-commerce is opening interesting perspectives for economic growth.

By linking powerful PCs to the communication potential of telephone and cable, it has become possible to send text, images and sound across the globe in split seconds – even entire programs and databases can now be downloaded.

The Dutch public sector, too, can be found on the Internet with increasing prominence. More than half of all public sector bodies now have their own website, offering information and sometimes even services. The quality of these sites is improving with leaps and bounds. Some organisations even actively provide their databases (or parts thereof) to the public via the Internet. A case in point is Statistics Netherlands' Statline (www.cbs.nl/nl/statline/index.htm). These various websites have greatly increased the accessibility of public sector information, which improves the transparency of the public sector.

These types of development have an impact on the accessibility and use of public sector information and the associated legislation. To what degree does the increasingly widespread use of ICT compel us to update public sector policy on accessibility and the existing legislation on this subject? This is the central issue in this paper.

The policy objective I wish to pursue with this paper, in terms of the coalition agreement, is to ensure that public sector information is as widely accessible and available to citizens as possible. First of all because citizens need that information in order to participate in the democratic process. Secondly, national welfare is likely to benefit from public sector information being made available in an open-minded manner. Thinking in terms of the new knowledge-based economy implies that the societal value of this information will increase as more people use it.

Accessibility and availability of public sector information are not isolated phenomena (the notion of where availability not only implies that third parties have physical access to public information, but that they may also use it under certain, clearly-defined conditions). Where necessary, references will be made to other projects and developments. For instance, the Database Act which came into force in July 1999 and is aimed at protecting the investments of database producers. The Personal Data Protection Bill is currently under consideration in the Upper Chamber. A committee dealing with Fundamental Human Rights in the Digital Age has also been established. This committee will advise the government about any necessary amendments to the fundamental rights laid down in Chapter 1 of the Dutch Constitution and about the desirability of laying down new fundamental rights.

The 'Market and Government' Directive¹ indicates that making public sector databases available to third parties can only take place on a non-discriminatory basis and at uniform prices. Along these lines it also indicates that the public sector should not be allowed to make unnecessary modifications to the databases, which could be put to use by private entrepreneurs, thereby creating unfair competition. Moreover, with regard to public databases it has been stated that additional modifications by public authorities are permitted to the extent that these modifications have a bearing

¹ Directive on market activities conducted by government departments, Dutch Official Journal 1998, no. 95.

on exercising public tasks. These basic principles are currently being laid down in a proposal for a statutory regulation regarding the 'Market and Government' issues.

The objective of this paper, which also I present to you on behalf of my colleague in the Justice department, is to put my pledges into practice: to develop a framework for the commercial use of public sector databases² and a more precise definition and specification of the term 'basic information of the democratic constitutional state'³.

Prior to the development of the policy line at hand, at the request of the council of ministers, the interdepartmental working party 'Wob-auteursrecht' [Wob copyright] conducted a study into the concurrence of the Act to Promote Open Government [Wet openbaarheid van bestuur, Wob] governed by public law and the 1912 Copyright Act and the Database Act, governed primarily by private law. The working party's report is attached to this paper as Appendix 1. At the request of the Minister of Justice, the Copyright Committee issued their recommendation on the matter. This recommendation is attached to this paper as Appendix 2. The position of the Minister of Justice is also included in this paper. This also underpins the pledge to your Chamber to provide more clarity on the applicability of copyright and database-right on public sector information⁴.

I.2 Summary

Section II classifies public sector information into three categories based on the existing legal framework. These are 'the basic information of the democratic constitutional state', 'Wob information' and 'other information'. Although these categories partly overlap, it can be indicated for each category which information should pertain to that category, what the policy objective is, how and at what price the information is currently available, what citizens may do with this information and any obstructions to attaining the policy objective. Based on further analysis of the legal framework, activities to be undertaken for two information categories will be announced.

A definition is given for the term 'basic information of the democratic constitutional state' as well as a specification of which information falls into this category. The policy objective indicated here is to make this information more accessible so that it becomes suitable for electronic mining and reuse, autonomously, coherently and free of charge.

It has been established that the electronic databases of government bodies often fall under the term Wob-information. Within the considerations of the Wob, those databases (and the information therein) are, in principle, therefore open. Public sector bodies, contrary to the situation on paper, appear to reserve copyright and database-right on a massive scale. Citizens and businesses do have access to the information, but are unable to use that information at their discretion without explicit consent. This seems to be contrary to the spirit of the Wob. This course of action would appear to be undesirable in another respect as well. After all, an important characteristic of the new knowledge-based economy is that the societal value of information will increase as more people use it. Section IV therefore outlines a policy line aimed at non-exploitation of public sector information by the public sector itself. This policy line must lead to much greater accessibility of public sector information. Section V sets out the activities being undertaken to improve the availability of public sector information.

² Electronic Government Action Programme, Lower Chamber, session year 1998-1999, 26387, no. 1.

³ List of questions and answers about the Electronic Government Action Programme, session year 1998-1999, 26387, no. 2.

⁴ Report of a general consultation on the Electronic Government Action Programme. Lower Chamber, 1999-2000, 26 387, no. 6.

In 80% of the cases described in Section IV, the policy line for the accessibility and availability of databases is already being adhered to. Of the remaining 20%, accessibility to half of the databases is provided for in specific legislation so that a separate price regime is possible. This will remain the case. Further research into the financing of the remaining databases has been announced. Whether the results of such research will provide scope for alternative forms of financing will be discussed in the interdepartmental coordination.

Based in part on the recommendation by the Copyright Committee, a number of smaller amendments to the Act to Promote Open Government, the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act will also be announced. Further research into the desirability and feasibility of a public law regulation for the use of public sector information will also be conducted.

II. DESCRIPTION OF THE OBJECTIVES AND BOTTLENECKS FOR THE DIFFERENT INFORMATION CATEGORIES

II.1 Basic information of the democratic constitutional state

It is prescribed by law that acts, decrees and regulations must be publicly announced before they can be implemented. After all, citizens must know the rules they are to abide by, for the citizen is expected to know the law. When push comes to shove, for instance in disputes between the public sector and citizens or between citizens themselves, there will be a need for more detailed clarifications and information on the interpretation and application of the law, legislation and where acts are concerned, parliamentary documents. ICT has excellent possibilities for making this information available in a coherent manner.

Which information can be earmarked as basic information of the democratic constitutional state?

The basic information of the democratic constitutional state is information containing the rules and regulations on how society must function in the Netherlands and on the democratic decision-making process. Without proper accessibility to those rules, participation is difficult.

In light of the report of the interdepartmental working party 'Wob-auteursrecht' and the recommendation by the Copyright Committee, the term 'basic information of the democratic constitutional state' must in any event cover:

1. Netherlands laws, general measures of government administration and decisions in the meaning of Article 1:3 of the General Administrative Law Act as well as treaties concluded by the Netherlands;
2. decisions by international organisations insofar as these have legal effect in the Netherlands;
3. court decisions made in the Netherlands;
4. decisions by international courts insofar as these have legal effect in the Netherlands;
5. agendas, reports and other public documents of representative bodies;
6. official translations of that set out in 1 through 5.

What are the policy objectives?

To ensure that this category of public sector information can be accessed autonomously, easily and coherently.

How and at what price will this information be made available?

The long-term objective is that this information be accessible to citizens free of charge and made available to them at cost price. This goal may be attained through disseminating information via the Internet and making it available for perusal in libraries and public sector buildings.

What may citizens do with this information?

Insofar as the information originates from public bodies in the Netherlands, or is contained in databases produced by Dutch Public Authorities, it is free from copyright and database-right. Citizens are under no restrictions regarding the use and reuse of this data, not even for further commercial use.

Which obstacles hinder this objective and what is the answer?

- The accessibility of information from parliament and jurisprudence is not yet optimal. At present, only the printed documents from parliament can be easily consulted electronically. ICT is likely to significantly improve the accessibility of this information. Given the importance of this information it would seem worthwhile to ensure that jurisprudence and all parliamentary information is made accessible and available to citizens. Currently only a selection of jurisprudence is available in printed form via commercial publishers, and more recently via the Internet (the ELRO project). This is dealt with in more detail in Section III.

- The present mode of publication often only contains amendments to existing legislation. This publication method forms a barrier for citizens who want the integral text of the law in question. The public sector does not yet have a database containing consolidated legislation. Neither is it possible at this time to make connections with other national and regional legislation and with printed documents of the parliamentary process. Steps have been taken in the meantime to improve the electronic availability and accessibility of this information. Official Publications are now made available free of charge to citizens, businesses and public authorities via www.overheid.nl. Attempts are also being made to make the integral body of Dutch legislation available via the Internet as soon as possible after the year 2000. A European tender is being prepared to this end. A subsidy scheme has been set up to assist local authorities in making the information about their executive bodies and their decrees and regulations available via the Internet. Law courts, finally, have also started making jurisprudence available via www.rechtspraak.nl. These activities are dealt with in further detail in the recently published Implementation Report on the Electronic Government Action Programme of 23 December 1999⁵.

II.2 Information that is public on the grounds of the Act to Promote Open Government [Wet openbaarheid van bestuur, Wob]

The Wob is aimed at promoting 'good and democratic government administration'. By making administrative information public, available and accessible to citizens, the transparency of government administration is improved and citizens are given more possibilities to monitor government administration and participate in the democratic debate. The law prescribes that all information on government administration is in principle public, provided that requests for provision of information meet certain requirements. The Wob also has some grounds for refusal and in particular, specific interests to be protected.

Not all public sector bodies are governed by the Wob – only government bodies, including autonomous government bodies (the so-called ZBOs). Parliament and judicial bodies are not included. Every person is entitled to administrative information on request, regardless of that person's interest in the information. The public sector also has the obligation to endeavour to provide information of its own accord in the interests of good and democratic government administration. Based on the Wob, public accessibility for one implies public accessibility for all.

Which information can be earmarked as Wob information?

Administrative information is information held by a government body and which pertains to policy proposals, decision-making and implementation. Databases also come under the Wob, unless such database has no relationship with, or the contents thereof have no relationship with the 'administrative tasks' of the public sector body in question. Databases, or the information therein, may therefore fall outside the scope of the Wob. When the openness of certain databases is provided for differently in specific legislation, that information does not come under Wob information either.

What are the policy objectives?

The policy objectives are to clarify the legal framework and to remove any obstacles to using Wob information. The objectives of the Wob may be attained even better if citizens have access to the electronic databases which government bodies have produced in the framework of carrying out their tasks as well as access to the associated software. An increasing number of citizens now have the necessary hardware and knowledge. The societal value of these databases can be improved if the business community can use them to produce commercially attractive products, thereby stimulating economic growth.

⁵ Implementation Report on the Electronic Government Action Programme, Lower Chamber, session year 1999-2000, 26387, no 4.

How and at what price will this information be available?

- The Wob distinguishes between five methods of providing information, from issuing a copy to verbal information.
- Public bodies can demand a fee for the provision of Wob information based on a Royal decree and regulations. At state level, this is based on the cost price of producing the medium – not the costs of gathering information and assessing a request. The fee for a paper copy is no more than NLG 0.70, for electronic files no more than the price of a diskette or telephone charges.

What may citizens do with this information?

Citizens are free to use the information at their own discretion. Use or reuse outside the scope of the applicant's request is possible, unless such is limited by specific legislation. Such limitations may result from the 1912 Copyright Act (Aw), the Database Act (Dw) and the Data Protection Act (to become the Personal Data Protection Act).

Which obstacles hinder this objective and what is the answer?

- The Copyright Act, the Database Act and the Data Protection Act may present obstacles to reuse of the public sector information thus obtained. In the section Legal Framework (Section III), these obstacles are dealt with further.
- One of the requirements regarding a request for the provision of information according to the Wob is that the information must be connected in some way to administrative tasks. Jurisprudence has shown that (the contents of) databases of research institutions do not in principle have that connection with administrative tasks, unless such data was used in the preparation and implementation of policy. It is not clear whether there is always the required connection with administrative tasks in databases (or selections therefrom) of government administration. The potential consequences of ICT developments on the Wob are currently being studied. Your Chamber will be informed of this in a report at the end of this year.
- Citizens are not aware of the databases held by government bodies. This makes it difficult for them to specify a request for information provision in sufficient detail (which is one of the requirements a Wob request must meet). There are two ways in which attempts are being made to improve this. Firstly, public sector bodies are invited to indicate via www.overheid.nl those areas in which policy is being prepared. In addition, government bodies will be invited to indicate for each sector which databases are in their administration.
- Information that is made public on request may also be interesting for third parties, for instance for economic (re)use. The fact that Wob information on request is aimed at the individual means that third parties often are not aware that a government body has decided to make certain information public. This could be overcome if every government body were to publish all information provided on the basis of the Wob. However, this seems a rather impracticable option in view of both the quantity and the large diversity of forms in which Wob information is provided. A workable solution seems to be an open-minded implementation of the instruction norm contained in Article 8 of the Wob, aimed at actively providing information 'in the interests of good and democratic government administration'.
- Being able to inform citizens properly is limited by the possibilities of finding administrative information in the (paper) records and having rapid access to them. Current ICT tools can greatly improve this situation. This will require modifications to the internal administrative and registration systems within the public sector. Research is being conducted into this possibility within the scope of the Digital Longevity Programme and pilots are being financed.
- Public sector databases often contain information provided in confidentiality, or information that can be traced to individuals. Before information or a database can be provided, that confidential information must be removed from the database (impoverishing a database). If impoverishing a database proves to be labour-intensive (it interferes with the normal activities), this may constitute a reason to refuse the provision of information. A possible consideration is to accommodate the costs of impoverishing databases under the pricing scheme of the Wob. The

previously mentioned research into the functionality of the Wob in the ICT age may provide more clarity on this aspect.

- Information services to the public often fail to reach their target and are physically too far from the citizen, for instance at post offices, libraries and public sector buildings. By using ICT, and particularly the World Wide Web, information services can be specifically targeted and reach citizens more directly. The various government sites and those of provinces, municipalities, water boards, ZBOs and PBOs (industrial organisations governed by public law) are good examples. This application has to be developed further.
- The owner of the software (a private party in almost all cases) determines the price for a licence on the software. The Wob does not oblige the provision of software. If citizens do not have the necessary software, a government body may decide to let them use the software at its disposal. The upcoming evaluation of the Wob may provide more clarity on this point too. It is recognised that this option also involves copyright aspects.
- Based on the Wob, government bodies may be obliged to provide information on which third parties have copyrights. This would imply possible infringement on those rights. This is dealt with further in the Section Legal Framework (Section III).

II.3 Other information

Besides ‘Basic information of the democratic constitutional state’ and Wob information, the public sector also has information that does not fall into either category, and is therefore classified here as other information.

Which information can be earmarked as other information?

All information held by the public sector which cannot be classified as basic information of the democratic constitution and Wob information. To be more precise:

- a. Information from government bodies of which the openness and use (usually including pricing) are provided for separately in specific legislation. This sometimes results in the information not being public (Police Records Act, Security and Information Services Act), and sometimes being accessible and usable (the Kadaster Act [governing land registry], the Act on the Central Bureau and the Central Committee of Statistics and the Municipal Personal Record Database Act). This specific legislation has preference over the Wob.
- b. Information from public sector bodies that is not related to administrative tasks. This class of information would appear to be fairly comprehensive. It includes information of research institutions (research reports and database files) and cultural institutions (catalogues).
- c. The software with which public information can be read and processed.

What are the policy objectives?

The information in this category is sundry. Building and managing databases in this category are often paid from public resources at high costs. The objective is therefore to make this category of databases more accessible and usable to a wider audience. Provided, of course, that there is no legislation against such publication, for instance in the case of sensitive information about individuals or businesses.

How and at what price will this information become available?

- Insofar as access and use are provided for by specific legislation, the conditions for access and use are contained in such legislation. Those conditions vary according to each law.
- Providing information from the second sub-group depends fully on the willingness of the public sector body in question. By law, public sector bodies are free to demand a fee and to determine the amount thereof.
- The owner of the software determines the price for a licence on the software. The Wob does not oblige the provision of software.

What may citizens do with this information?

How citizens may use this information is subject to the conditions prescribed by law (first sub-group) and by the public sector body (second sub-group). Over and above that, use or reuse for a wider audience than the applicant is limited by special legislation, such as the Copyright Act, the Database Act and the Data Protection Act.

Which obstacles hinder this objective and what is the answer?

- Prior to use or reuse of the database files mentioned in specific legislation, the files often require intensive processing, for instance the removal of confidential information and information that can be traced to individuals. The activities involved in such processing as well as the structural provision generally do not fall within the scope of the assigned public task. It may be a consideration to have the law prescribe such processing and provision as constituting a public task. This was the course taken in making Land Registry data available for reuse.
- Access to publications and provision of scientific and cultural information of knowledge institutions in the areas of scientific research (e.g. universities and research institutions) and culture (museums and archives) is provided for in specific legislation such as the Higher Education and Research Act for universities, the Royal Netherlands Academy of Sciences and the National Library of the Netherlands, the Act governing the Netherlands organisation for scientific research and the TNO Act [Netherlands Organisation for Applied Scientific Research] as well as the Act on specific cultural policy. The application of ICT tools makes it easier to have access to information which is not published (e.g. underlying data, information on the collection).

In this context, the Minister of Education, Culture and Science is looking into the adequacy of the existing legal framework for the policy on information that knowledge institutions have in the ICT age.

III. ANALYSIS OF THE LEGAL FRAMEWORK

III.1 Access to the ‘basic information of the democratic constitutional state’

Proper availability of information in this category is essential to the functioning of our society. The Constitution states that assemblies of parliament are public and that barring exceptions, court sessions are public and judicial decisions are made in public. This implies that parliamentary information and judicial decisions are public, in principle. For every judicial chamber, there are rules for the provision of copies of judgments and procedural documents.

The Publication Act and the Provinces- and Municipalities Acts make publication of legislation compulsory. The Dutch Official Journal, the Law Gazette and provincial and municipal publications are the media by which this is done. However, the form in which legislation is published is not such that it is readily accessible to and convenient for citizens. Usually only amendments to acts are published, not the new integral text of an act. At this juncture, it is important to make ‘basic information’ electronically accessible to citizens in an effective and uncomplicated way. The recommendation by the Copyright Committee is in line with the Cabinet’s standpoint as set forth in the Electronic Government Action Programme.

The Action Programme also indicates that after 2000, the State will endeavour to make available a database with all the integrated legislation of the central government as soon as possible. In the first implementation report of the Electronic Government Action Programme, I stated that as soon as the contract with Kluwer terminates in September 2000, there will be a European tender for making a public sector database of acts accessible via the Internet, which means that the contract with Kluwer will not be extended.

With respect to the accessibility of legislation and regulations, this at least solves the problem that the State is currently not the owner of a consolidated database of the wording of acts and, pursuant to a relevant clause in the contract, therefore cannot assist in the development of another database of public sector laws while the contract is still valid.

The publication of jurisprudence is currently provided for by publishers in cooperation with lawyers of law courts and ministries in publishing a selection from jurisprudence. Some law courts have tentatively started publishing jurisprudence on their websites. In view of the great significance of jurisprudence for a proper understanding of legislation and regulations, expanding the latter initiative further would seem to be expedient. Accessibility of jurisprudence to citizens must be properly organised. This is in line with the recommendation by the Copyright Committee.

European policy and European regulations are increasingly becoming conditioning factors for the functioning of Dutch society. Neither the openness of the basic information of the European democratic institutions nor the actual accessibility and availability of that information – from the point of view of the Netherlands – are properly regulated. The first impressions of a proposal in the making for new regulations are not optimistic. This proposal will result in far too limited public access of information. The government of the Netherlands will endeavour to bring about modification of the proposal in favour of public access.

III.1.2 The availability of the ‘Basic information of the democratic constitutional state’

The wording of the freedom from copyright and database-right pertaining to this category of information no longer corresponds to the current diversity of this information, nor with the possibilities modern ICT has to offer in using this information.

The Copyright Commission's recommendation to modernise and streamline the rules in the Copyright Act and the Database Act are endorsed. With regard to the 'basic information of the democratic constitutional state' it must be absolutely clear that there should be no intellectual property rights on this information. To this end, the statutory architectonics will be made to match the underlying principle of the cabinet memorandum 'Towards accessibility of public sector information'⁶ For that matter, it will not lead to a radical change of current practice. Rather, it is a confirmation of what historically has come to be. This is true in particular where the recommendation concerns the basic information that was made available in electronic form via the website www.overheid.nl at the end of last year. This involves all Parliamentary documents, the acts of the Lower Chamber, Questions to the Lower Chamber, parliamentary agendas, the Dutch Official Journal, the Law Gazette, the Treaties Publication Paper for the Kingdom of the Netherlands, etc. which are offered via this website free of charge. The Copyright Committee's recommendation is endorsed inasmuch as this information must be made accessible free of charge.

The Cabinet sees no added value in explicitly stating stenographic reports of parliamentary sessions as being documents which should be free from rights, as the Copyright Committee has done. Stenographic reports and other documents merely serve as preparation for official reporting. They are not laid down and therefore do not constitute basic information of the democratic constitutional state.

The Cabinet is hesitant about the idea put forward by part of the Copyright Committee that documents and collections of non-public sector parties should be exempt from rights. For instance, in the case of a commercial publisher who produces a database of laws or jurisdiction which, either because of the originality of the collection or the substantial investments made, meet the conditions of protection prescribed by the Copyright and Database Acts, the government feels that these products must be protected from reproduction. Reference is made here to the standpoint taken by the government during the discussion of the Database Bill to implement EU Directive 96/6 on the legal protection of databases (Parliamentary documents II 1998/99, 26 108, no. 6, page 12-13). Article 11 of the Copyright Act and Article 8, Paragraph 1 of the Database Act therefore pertain solely to the public sector. In the case of legal protection of databases, EU Directive 96/6 furthermore contains a comprehensive enumeration of restrictions relating to the database-right, and this does not specify the exemption as advocated by the said part of the Committee. In the situation in which the public sector is responsible for access to (collections of) consolidated legislation and jurisdiction, there would be no need for such a stipulation. After all, based on the database made available by the public sector, everyone is able to consult and download legislation and process it in their own database, be it for commercial purposes or otherwise.

Although the interdepartmental working party had not formulated a proposal on the matter, the recommendation by the Copyright Committee that Article 15b of the Copyright Act accordingly be made applicable to the Neighbouring Rights Act, can in principle be endorsed. It is emphatically noted that there should be no running ahead of any discussion on the significance, place and content of Article 15b of the Copyright Act with regard to the conceptualisation about a general statutory regulation on the accessibility of public sector information. The only proposition being made here is that there need be no separate regime for the material protected by neighbouring rights to that in place for copyright. For that matter, it should be mentioned that there have been no problems in practice thus far. The broadcasting corporations currently providing the broadcasts of parliamentary discussions allow the other corporations to use this material in their programmes. Nevertheless, it would be more correct in systematic terms if the legislator were to remove the imbalance between the copyright regime and that of the neighbouring rights.

⁶ Towards accessibility of public sector information, Lower Chamber, session year 1996-1997, 20644, no. 30.

The European 'basic information', after all, is not free from copyright and database-right. In its response to the European Commission's Green Paper 'Public sector information: a key resource for Europe', the government of the Netherlands insisted that the EC make this category of information free from copyright and database-right, both in European Union institutions and Member States, and that this category of information be electronically available free of charge.

III.2 The legal framework for accessibility and availability of public sector information under the Wob

With regard to the availability of databases, the Wob, the Copyright Act and the Database Act interact. This problem was already recognised in the framework of an evaluation made in 1996 on implementing the Wob. This incentive resulted in an interdepartmental working party examining the relationship between the Wob and the Copyright Act.

III.2.1 Openness and accessibility of electronic databases

The openness of public sector information is governed by public access law, of which the Act to Promote Open Government [Wet openbaarheid van bestuur, Wob] is the most important. Pursuant to the Wob, the electronic databases maintained by public sector bodies are in principle also public, and in the framework of the Wob regime, must be provided on request.

The Wob governs the openness of the information, not its accessibility. A number of bottlenecks can be identified in making electronic databases accessible:

- making selections from files may result in losing the required connection with administrative tasks;
- the Wob has no provisions for charging a fee for removing data that can be traced to individuals, confidential information and non-public information, and this may present a barrier to providing such information;
- it is not clear whether such a type of 'impoverished' document can be classified as an 'existing document';
- it is not clear whether impoverishing a document must be considered part of the public task of a government body;
- it is not clear how applicants can comply with the requirement to make an adequate specification if it has not been made public which databases actually exist;
- it is not clear how applicants may be given access to the information contained in the databases if they do not have the required hardware or software;
- nor is it clear whether in such a case applicants may be given the opportunity to process databases on the information system of the government body in the context of the licence agreements in place;
- the Wob does not stipulate that applicants must be given continued access to updated information in databases;
- it is not clear how third party rights on the information to be provided can be sufficiently protected.

The previously mentioned research into the how the Wob functions in the ICT age may provide more clarity on this.

III.2.2 The use of public information

The possibilities of using public sector information which has been made public is governed by private law in the Copyright Act and in the recently implemented Database Act.

The Wob obliges government bodies to provide information held by it and which pertains to administrative tasks (insofar as the exemption grounds and privacy legislation so permit). Research has shown that that obligation also applies to information on which third-party rights have been vested. Providing the requested information can result in an infringement on those rights. The Wob should specify more clearly that provision in accordance with the Wob does not infringe on any rights attached to the information.

Research has also shown that there is no priority, either of the Wob or the Copyright and Database Acts. Both regimes apply concurrently. This means that information that must be provided on the basis of the public law obligation in the Wob can at the same time have copyright or database-right vested in it. If the public sector organisations have reserved those rights, then that information may not be used without their permission, even if it must be provided under the Wob. In other words – the information is public on the grounds of the Wob, but reuse would seem to depend on the explicit permission of the holder of the copyright and/or database-right.

An example: Most public sector organisations at present indicate that they reserve copyright and database-right on their databases. If a group of citizens who wish to assess the expansion of Schiphol airport request a database produced by the Civil Aviation Authority and if the Civil Aviation Authority has indicated upon providing the file that it reserves copyright and database-right, then an individual citizen may obtain the database for perusal but may not reproduce, copy, process or send it without explicit permission from the Civil Aviation Authority. Without that explicit permission, those databases or parts thereof may not be circulated among those citizens.

The electronic databases maintained by government bodies, which often entail high public funding, can in many cases be used for other purposes than the particular public task for which they were created. As such, they can be of great economic significance. This relatively new phenomenon seems to have unexpected and sometimes even unintentional consequences for the current legal framework.

Copyright and database right – only of incidental consequence for public sector information in the past – now seem to be instruments by which government bodies can commercially exploit their databases. The Wob (aimed at making public sector information public to improve democratic government administration) does not take this factor into account. The Wob does not impose restrictions on government bodies that wish to reserve those rights. Research⁷ has shown that the reservation of rights takes place on a very large scale. This is often done to protect the privacy or confidentiality of information and sometimes to exact a license fee for using it. Each government body draws up ‘decentralised’ conditions for the use of databases on which rights are reserved. This includes the fee that has to be paid for obtaining a license. Because each government body formulates conditions independently, there is a multitude of conditions resulting in a situation that is not at all transparent for citizens and businesses. Harmonising the contracts would bring about major improvements.

A more fundamental issue is whether it is desirable for government bodies to charge a fee for a license to use public information. And, along these lines, whether they must be able to impose conditions in the same way as commercial operators.

⁷ Electronic databases of government administration, BDO Consultants, Groningen 1998, commissioned by the Ministry of the Interior.

III.2.3 Use of public sector information on which third-party rights are attached

Actual information provision on the grounds of a Wob request

The interdepartmental working party has proposed that the Copyright Act should contain an explicit restriction in view of the provision of information further to a Wob-related request. The underlying principle is that copyright issues might be relevant to the actual information provision. In the place of the working party's recommendation, the Copyright Committee has recommended that the Copyright Act contain a referral to the Wob stipulating that the use of the material by the person to whom it is provided is permitted "insofar this is justified by the purpose", in accordance with the tenor of the Wob. The Cabinet believes that this recommendation cannot be pursued.

In view of possible copyright, the question of what use the applicant may make of the requested information can be separated from the technical operations involved in providing the applicant with information. The Cabinet believes that there must be absolute clarity about the permissibility of technical operations necessary for passive publication on the grounds of the Wob. Modern ICT provides the possibility of sending an electronic copy to the applicant via diskette or on-line. Such operations should not be frustrated by claims to exclusive rights. Within the scope of international rules on copyright, there is leeway to exclude this. The Cabinet therefore advocates – in so many words – inclusion of a restriction on copyright in the Copyright Act, as recommended by the interdepartmental working party. The Minister of Justice touched upon this issue previously in his policy paper of 10 May 1999.⁸

Other use of information provided on the grounds of the Wob

Contrary to the interdepartmental working party, the Copyright Committee has recommended not to include such a stipulation in the Wob, which means that a decision following a request for information does not impair the provisions of the Copyright Act and the Database Act.

During the preparation of the Wob, in connection with the relationship between the Wob and the Copyright Act, the government took the stance that the provision of information pursuant to Article 7 of the Wob – even if there were third-party copyright on the document – would not be considered an infringement on such right. The government also believed that the applicant should be aware, and if necessary be made aware by the relevant government body, of the fact that supplying a copy does not imply that copyright license is granted for publication or other activities for which permission is required by the copyright owner.

The text of the Wob does not provide clarity on this issue. Although third-party copyright may only be significant in a limited number of cases involving Wob-related requests, inadvertent failure to observe such copyright must be prevented by informing the applicant of third-party rights. The Cabinet therefore feels that it would be desirable to incorporate a statutory stipulation into the Wob as proposed by the interdepartmental working party.

Information provision based on Article 3 of the Wob essentially does not impair any protection of copyright (and database-right) in place. This does not detract from the fact that under the Copyright Act, there are restrictions that permit the use of copies for personal use, quotations, educational purposes and the like. Neither can there be any objections to a factual summary of the contents and making such a summary known to a wider audience. Copyright is thus not necessarily an obstacle to using material provided under the Wob within the meaning of the law.

⁸ Lower Chamber, session year 1998-1999, 26538, no. 1, p. 5.

IV. INITIATIVE FOR A POLICY FRAMEWORK

The 'Accessibility'⁹ memorandum already mentioned that there is an increasing trend among government bodies to charge a fee for issuing a license to use databases in addition to the fee for providing those databases. This higher fee may be exacted on the grounds of copyright and database-right. In part, the pricing for those databases is provided for by law following political discussion.

Is it desirable that government bodies charge a license fee for using public Web information over and above the Web rate? I am inclined to answer in the negative. The databases maintained by the public sector should originate in the service of tasks assigned to the public sector. These tasks are financed from public funds and the databases are in the public interest. The policy's key issue should therefore be that information resulting from the core tasks of the public sector must not be put to commercial use by the public sector itself. Citizens and businesses must be entitled to 'free' use of public information. First of all because this enables them to participate better in the democratic debate. A second reason is that our national welfare is likely to benefit from public sector information being made available in an open-minded way. Thinking in terms of the new knowledge-based economy implies that the societal value of this information will increase as it is used by an increasing number of people.

The societal value of the investment from public funding can thus be maximised. It goes without saying that a number of legitimate, public interests must be guaranteed: the public sector should not make unnecessary modifications to the databases, which could be put to use by private entrepreneurs, thereby resulting in unfair competition. The 'Market and Government' directive states that with regard to public databases, additional modifications by public authorities are permitted to the extent that these modifications have a bearing on exercising public tasks.

I would therefore put forward the following policy lines:

- the primary objective of public sector databases should be maintained as such: support for the public tasks assigned to public sector bodies;
- on request, public sector databases must be made available to the widest possible extent for external use, provided of course that this does not obstruct analogous application of the criteria of the Web and of the Personal Data Protection Act;
- the making available of public sector databases to third parties must be on a non-discriminatory basis and at uniform prices; if a uniform price is maintained; the users should only be charged the marginal costs of making the information available; (those marginal costs are for instance telephone charges, the price of a diskette and any additional costs of processing the data so that it is suitable for provision, e.g. removing information that can be traced to individuals);
- moreover, no license fee should be charged for the use of public sector databases, making commercial exploitation by the public sector itself impossible;
- to the extent that conditions for the external use of databases are required (in view of the copyright and new database-right), these should only have the purpose of protecting public interests to be defined and to protect third-party rights on the information;
- in principle, there should be no difference between the use of databases by other public sector bodies and by private individuals (whether or not for commercial purposes).

Regarding the last item, I should like to point out the following. Some people have suggested that the policy line only be implemented for use by public authorities and by citizens in the context of participating in the democratic debate. For commercial use by businesses, it should be possible to charge a license fee.

⁹ Towards the accessibility of public sector information, policy framework for improving the accessibility of public sector information and communication technology, Lower Chamber, session year 1996-1997, 20644, no. 30.

There are three reasons why I am against doing so. Firstly, businesses already contribute to the establishment of the databases through the tax system. Moreover, in many cases they have had to provide information stored in those databases on the grounds of obligations prescribed by public law. I do not find it correct to charge them yet again by way of a license fee on such a database. The second reason is that in the coming years businesses will be expected to create commercially attractive products based on public sector information. Products that will result in significant economic growth in our country. The public sector could act as an important launching supplier on the Electronic Highway. The welfare impact of providing the databases against no more than provision costs might well be far greater than the revenue generated for the public sector – now and in the future – of selling licenses for the use of databases. The third reason is of a practical nature. The difference between users as citizens, public authorities and businesses can be made, in theory, but is impossible to maintain in practice.

In all likelihood, public law regulations will be required in order to implement the option of non-exploitation of public sector information. Such an ‘Act governing user rights on public sector information’ would vest copyright and database-right on all public sector information, with the exception of the basic information of a democratic constitutional state, stating the conditions under which that information can be used, including at what price. My commitment is for that price to be no more than the costs of provision (telephone charges or the price of a diskette). Such a regulation would also have to contain stipulations on liability and acknowledgement of sources.

Potential consequences

a. financial

What are the potential budgetary consequences of a prohibition on the exploitation of public sector information? As indicated, public sector databases now are already public on the grounds of the Wob. Citizens and businesses are already entitled to submit a request for a database. In extreme cases, the court may decide whether a request for a database should be granted or not. Nothing will change in this respect. What is at issue here is that government bodies utilise the concurrence of legislative systems mentioned in the previous section in order to charge license fees for use of the databases.

The vast number of databases and their large diversity make it impossible to get an unequivocal picture of the potential loss of revenue. Research has been conducted into this matter. In 1996 Coopers & Lybrand¹⁰ conducted a study into the returns for the public sector from payments for providing information. Based on a limited spot check, the researchers came up with a total of approx. NLG 170 million a year. This was revenue, the costs of which were not yet deducted. Approx. NLG 70 million of that sum went to the Land Registry. The researchers also reported that in the vast majority of cases, information was provided free of charge. In 1998, BDO Consultants¹¹ conducted a study into the nature and use of the electronic databases of the public sector. They ascertained that 70% of public sector databases were already being used by others. For that matter, 80% were reused by another government body. In 70% of cases in which databases were provided, this was free of charge. In 9%, only the costs of provision were charged. In 16%, part of the costs of building and managing a database were also charged to the user, and in 5% of the cases prices were fully cost-effective. No profit was made in any of the cases.

¹⁰ Proceeds from public sector information, inventory of the maximum loss of revenue as a result of easy accessibility of public sector information, Coopers & Lybrand Management Consultants, Utrecht 1996 commissioned by the Ministry of the Interior.

¹¹ Electronic databases of government administration, BDO Consultants, Groningen 1998, commissioned by the Ministry of the Interior.

If the results of this second study are extrapolated, it turns out that currently 80% of the requests for databases are granted at the price which I advocate: no more than the additional charges of provision. The BDO study into the databases of the public sector show that in 80% of all cases the policy line set out above is already being followed. In the remaining 20%, access and use of a number of frequently used databases is governed by specific legislation (e.g. the Land Registry Act, the Act on the Central Bureau and the Central Committee of Statistics and the Municipal Personal Record Database Act). On the basis of specific legislation, a separate price regime is possible for those databases. The influence of these specific laws will not be modified. The policy line will therefore have no impact on this. What remains is a relatively small group of databases for which budgetary problems may arise. There is no specific legislation for these databases, although a higher fee is charged for them. Research has shown that this involves some 10% of all databases. Examples are the 'Top 10 vector database' of the Netherlands Topographic Authority and the municipal WOZ (Valuation of Immovable Property Act) related databases. A number of case studies will be conducted into the nature and method of use of these databases and the revenue involved. These case studies will also examine which financing method (budget financing instead of output financing [direct benefit principle]) will have the greatest welfare impact on a national scale. Whether a recommendation for a form of financing can be formulated on the grounds of this research will be discussed in interdepartmental coordination.

b. organisational

There are two likely organisational effects of implementing this policy line. First of all, government bodies will have to assess requests for provision of (information in) databases and, if these meet the criteria, supply that information. In itself not a new task, since this obligation already exists. The effect of the policy line, however, may be to increase the number of requests and therefore the work load. This is not a new concern. It was also expressed at the implementation of the Wob. One of the consequences then was that a fee was introduced for provision on request. Such a fee was to act as a barrier against unlimited requests. The anticipated deluge of requests was not forthcoming. A significant increase in work load is unlikely. Moreover, if certain databases are frequently requested, the public sector body concerned could consider actively supplying those databases via its Internet site. The requests would automatically stop.

More cumbersome would be if government bodies are to make databases suitable for provision beforehand. For instance to remove from the database information that can be traced to individuals or business information provided in confidentiality. The associated costs could be considerable. The Wob currently has a ground for refusal to provide information if such activities interfere with the normal course of work. That is: if high costs are incurred in order to provide this information. In this case, it is not unreasonable to charge the costs of such processing to the applicant. Any additional work load could thus be compensated. The preliminary inquiry into the evaluation of the Wob also pays attention to this matter.

c. liability

Databases are primarily intended for internal use by the government body concerned. Information in those databases is often derived from data provided by third parties. The information in the databases may be incorrect or outdated, and this may not always be the fault of the government body concerned. If incorrect or outdated information is reused by third parties, persons or businesses may suffer damage. To what extent is the public sector liable for such damage? The database study shows that 6% of the organisations impose restrictive conditions on use in order to prevent liability problems.

My colleague at the Ministry of Justice is preparing research into whether it is desirable or feasible to limit liability, and if so, how this may be brought about.

V. FURTHER STEPS

The previous sections introduced a number of studies, actions and intentions to amend legislation; partly in setting specific action routes, but also for their relevance for the subject under review. The mutual connection and the relationship with the effect of the policy line under review can be summarised as follows.

1. Follow-up evaluation of the Wob

During the discussion of the evaluation of the Wob on 28 October 1997 (TK, 1997 – 1998, 25 600, VII, No., 28), the then Minister of the Interior promised your Chamber that further research into the consequences of ICT developments on the Wob would take place in 2000. In preparation of a promised evaluation regarding the matter, my colleague at the Ministry of the Interior has in the meantime commenced a study. The key issue in the evaluation is how ICT developments can be put to use for the Wob. One of the questions that arises in this context is how to deal with the fact that the Wob currently supposes a one-off provision of information, whereas information frequently has obvious added value if there is continuous access to databases that are kept up-to-date on a daily basis.

The evaluation may prove that ICT will in due time prompt a more radical amendment of the Wob. Should that be the case, it would be wise to examine whether it would be desirable to expand the objective and/or the scope of action of the Wob. Currently, the Wob is aimed at promoting good and democratic government administration. Considerations for the future could be to improve the effectiveness and efficiency of the public sector or to enable commercial use of public sector information.

In anticipation of the results of the evaluation, I would like to point out that in my opinion, government bodies within the Wob regime should already now make their databases available in a form that can be processed. I thereby withdraw the reservation made in the Accessibility memorandum regarding the provision of databases in a form that can be processed.

It should be pointed out that in accordance with the Wob, the information must be provided in a prevalent form and that the required software need not be supplied as well. If the requested information cannot be reproduced without the software, then the relevant government body may permit the applicant to have access to the database.

2. Research

Effects of the American Freedom of Information Act

The proposed policy line has clear similarities with the American Freedom of Information Act. The effects of that act on the availability of electronic databases deserves closer attention. With this in mind, I have commissioned a study in which the following questions will be dealt with: What were the effects of this act on the American federal government? Which flanking policy was applied? What was the effect on the quality and availability of the databases? What was the effect on the economic development of businesses? Did the act result in more or different forms of participation by citizens?

The study is due to be finished by mid-2000. The findings of this study will contribute to the further development of the proposed policy.

Alternative forms of financing

In close collaboration with the interdepartmental coordination to be set up, a number of case studies will be implemented to study the potential welfare effects different forms of financing – namely output financing (direct benefit principle) and budget financing – may have on the development and

management of electronic databases. The research institute will also be asked to indicate, on the basis of the study, where possible turning points may lie – situations in which the returns are higher if there is a change in the financing form. This study may provide more insight into how – upon implementation of the proposed policy line – to guarantee the financing of the databases for which co-users must now pay a contribution towards management costs.

Should that prove infeasible, then in the framework of the interdepartmental coordination, criteria will be sought on the basis of which the principle of free accessibility may be deviated from. I will inform you further on the matter in 2000.

Liability

Databases are primarily intended for internal use by the government body concerned. Information in those databases is often derived from data provided by third parties. The information in the databases may be incorrect or outdated, and this may not always be the fault of the government body concerned. If incorrect or outdated information is reused by third parties, persons or businesses may suffer damage. To what extent is the public sector liable for such damage?

My colleague at the Ministry of Justice is preparing research into whether it is desirable or feasible to limit liability, and if so, how this may be brought about. This study will be finished by mid-2000.

Adapting contracts

Many of the problems concerning the reuse of public sector information could be avoided if all the operating rights were to be claimed by the public sector when commissioning research institutions and consultants to carry out assignments. This is the only way of ensuring that information can be reused according to specific needs. Many organisations do have adequate conditions for this in their contracts. The impression though is that these contracts often are not adapted to the recent Database Act. In consultation with my colleagues at the Ministries of Justice and of Education, Culture and Science, I shall look into whether there is a demand for developing standard passages which the public sector bodies could include in their contracts.

3. Invitation to the various government policy sectors

The RAVI – the real estate and geo-information sector – requested that attention be paid to the risk that in the event of tight statutory price regulation, there could be negative consequences for the quality of databases or service in the provision of information by the public sector. Useful databases may even disappear. They proposed to indicate themselves which databases could be freely used and to make an inventory of alternative forms of financing for the remaining databases. Not only does this make it clear for third parties which databases are available, it may also assist in the collation of data on which basis criteria could be formulated for weighing up the various financing forms. In essence, this opens the way for a form of self-regulation. I would like to adopt this proposal and invite the other sectors to make a similar inventory prior to legislation.

4. Interdepartmental coordination and research

Interdepartmental coordination will commence shortly in order to supervise the further development and implementation of the policy line. Representatives from central government, other public authorities and a number of autonomous government bodies will be invited to participate in the consultation.

5. Market and Government

The Market and Government Bill to be submitted for consideration this year contains a number of conditions that are to ensure that the use of public databases by public sector bodies for market activities do not lead to unfair competition.

6. Amendments to the Wob, Copyright Act, Database Act and the Neighbouring Rights Act

Amendments to these Acts is needed on a number of points. Articles 11 of the Copyright Act and Article 8, Paragraph 1 of the Database Act must be modernised and amended. The Copyright Act will be supplemented with a stipulation that the de facto provision of information on the grounds of the Wob does not constitute copyright infringement. The Wob will include the stipulation that information provision on the grounds of that act does not constitute third-party copyright infringement. Finally, Article 15b of the Copyright Act will be declared to apply mutatis mutandis on the Neighbouring Rights Act. The Minister of Justice will take the necessary steps for a proposed amendment to be submitted to the Council of State for advice within the short term.

Initiatives will be taken at European level to bring about freedom from property rights of the basic information of the European Council, Parliament and Commission. You will be duly informed of further developments.

7. Further research into the desirability and feasibility of public law regulations for the use of public sector information.

Further research into the desirability and feasibility of public law regulations for the use of public sector information will be initiated. This will also examine how more standardised conditions or contracts, as the case may be, for the commercial use of public sector information could be achieved. I will report to you on the matter at the beginning of 2001.