

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 26)

EXPLANATORY MEMORANDUM

1. General section

According to Article 107 of the draft Constitution, the government aims for openness in the performance of its tasks, to the extent that this cannot be regarded as counter to the interests of the country and the Kingdom, or to other interests that justify non-disclosure. This draft national ordinance open government lays down rules in that regard.

This draft is based on the national ordinance of 17 November 1995, containing rules relating to open government (National Ordinance Open Government). Naturally, the provisions concerning the island territories have been omitted. The transitional provisions concerning the situation before the Netherlands Antilles National Ordinance entered into force also no longer applied, as the national ordinance also applied for the island territory of Sint Maarten.

Openness and open government are of major importance for a good, democratic administration. The transparency and verifiability of administrative actions as such benefit the functioning of a democratic state under the rule of law. Timely awareness of differing views can lead to more careful and more democratic decision-making. Furthermore, the provision of information promotes control of administrative action.

The terms 'openness' and 'open government' play a key role in this matter. 'Openness' refers to the administration's willingness to provide information to the society. It is not easy to regulate willingness in a national ordinance; it can be promoted, however, by imposing, in this case, the obligation to provide information on policy, as laid down in Article 2. The term 'open government' is reflected in the provision of public access to government information. The draft serves to make all information held by the government available in principle for everyone. A distinction is made here between the provision of information on request, the 'passive open government' (Chapter 3) and the provision of information at the government's own initiative, the 'active open government' (Chapter 4). The government cannot simply ignore requests for information. A decision on a request must be made within three weeks, to be prolonged by a maximum term of a further three weeks. At the same time, rules are laid down regarding the form in which the requested information is provided.

Open government is limited in the cases described in Article 11. Naturally, the security of the country, serious economic and financial interests, the detection and prosecution of criminal offences and respect for personal privacy are considerations that prevent the provision of information. Furthermore, no information need be provided from documents containing policy views that can be traced to persons. Finally, a special national ordinance can impose restrictions on the general principle of open government, as laid down in this draft.

The Minister of General Affairs sends a report to Parliament each year on the application of this national ordinance in the preceding year.

2. Article by Article Section

Article 1

In comparison with the Antillean national ordinance, the definitions have been adjusted to the fact that Sint Maarten is a country with no island territories, with a government that is in direct contact with its citizens.

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Article 3

First and foremost, every request for information on an administrative matter should be regarded as a request on the grounds of this national ordinance. With a request for information, this need not be mentioned. The request can be made in various ways, through a personal telephone call, by letter, e-mail, fax, etc. The applicant must concretely state the matter concerning which information is requested.

Article 4

A document may be lent out or have been transferred elsewhere. In that case, the applicant is referred to the administrative body that holds the document. It is also possible that a document may be missing. In that case, the administrative body must attempt to acquire a copy of the document from the administrative body that, according to inquiries made, holds it, if necessary as a copy.

Article 5

Most cases will be settled orally. In the case of a refusal, it is fair to assume that this will be justified in writing. The applicant can then institute proceedings under administrative law. If a third party is involved in the information requested, the administrative body must investigate with due care whether the provision of the information will affect that party's interests to an unreasonable degree. In cases of doubt, it is advisable to notify the third party of the request and to ask its opinion. However, it is always the administrative body that takes the decision. The third party can also institute proceedings under administrative law if it feels that its interests have been harmed.

Article 6

Swift provision of information is important in order to attain the goals of the draft. The aim should always be to settle the request within three weeks.

Article 8

This Article is intended as public information on accepted policy and non-controversial matters. Interested parties and stakeholders should be able to form an independent opinion from the information provided. Obviously, the information must be presented in a comprehensible form and in such a way that it reaches citizens as effectively as possible and in time.

Article 9

It makes no difference for the application of this Article whether a permanent committee or an ad hoc committee is involved. Reference is made to the passage 'with a view to policy to be formed'. Mandatory active publication of adopted policy would represent too heavy a burden for the administrative bodies. A National Gazette will be published for Sint Maarten. The provision for inspection in relation to this national ordinance will take place in that Gazette. The information will also be posted on the official website of the country.

Article 10

This Article concerning the publication of the advisory reports of the Council of Advice and the Social and Economic Council naturally concerns the advisory reports of these new advisory bodies of the government of Sint Maarten.

Article 11

Openness cannot be unlimited. There are interests that take precedence over the interest of the provision of information. In all cases referred to in the Article, a very careful consideration of interests must be carried out. In the case of rejection, the decision must be justified. The first paragraph contains the 'absolute' grounds for refusal, while the second contains the 'relative' grounds for refusal. The absolute grounds for refusal are not intended as confidentiality provisions. There is special legislation for this. They state the cases in which an

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administrative body does not provide information. If that decision cannot stand the test of assessment by the courts, the test in terms of the relative grounds for refusal comes into effect. The relative grounds therefore do not go as far as the absolute grounds for rejection. In principle, a consideration takes place of the public interest in the provision of information, as laid down in law, and the interest concerned that is protected in law.

In comparison with the Antillean national ordinance, the ground for refusal in paragraph 1(a) has been added: information will not be provided to the extent that this could jeopardise the unity of the government. This could include reports from the Council of Ministers showing differences of opinion between ministers regarding a particular policy. The provision is based on Article 10(1)(a) of the Dutch Government Information (Public Access) Act. In paragraph 2(g), 'the relations of the country or the Kingdom with other states and with international organisations' has been added. This, too, can represent a justified interest for non-disclosure of information.

Article 12

Obviously, it must be possible for an open exchange of ideas to take place in relations between civil servants or between the minister and civil servants or between ministers themselves, and that who said what in which way need not be made public. This provision serves that purpose.

Article 16

The draft is directed at administrative bodies. According to Article 1(a), this refers to the government or the minister directly concerned. It may be desirable at a later date to declare this national ordinance to apply likewise to independent administrative bodies, for which the basis is laid in Article 98 of the draft Constitution. These are administrative bodies that are not hierarchically subordinate to a minister and are not advisory boards. The provision is drawn from Article 11 of the Aruban national ordinance concerning open government.

Article 17

With a view to the evaluation of the regulation, an obligation has been included for the Minister of General Affairs to send a report to Parliament each year on the functioning of the national ordinance.

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