



OMBUDSMAN

SINT MAARTEN

FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Ministry of Public Housing, Spatial Planning, Environment and Infrastructure

Summary of Complaint:

By letter submitted on 29 December 2020 addressed to the Minister of Public Housing, Spatial Development, Environment and Infrastructure (Minister), Complainant objected on behalf of some of the residents [REDACTED], to a hinderance permit request for a garage [REDACTED] in Cole Bay. The hinderance experienced by Complainant included noise from pounding metals and odors from the spraying/painting of vehicles taking place. According to Complainant the activities at the garage have not stopped since submitting the objection to the Minister. Complainant also indicated that the information provided by the Ministry in its public announcement regarding the location of the garage was incorrect and should be adjusted accordingly; as it incorrectly mentioned Welfare Road #2 as the location whilst the garage is operating on [REDACTED].

In a follow up letter submitted on 20 January 2021 Complainant requested firm enforcement from the Minister against hinderance activities of the garage. According to the letter, the Minister was aware that the garage in question required a hinderance permit to operate and still no action was taken against the activities despite the complaint filed by Complainant. In said letter Complainant further stated that allowing the activities to continue are not in line with the existing legislation and policy nor does it conform with the principles of good governance.

To date of filing the complaint with the Ombudsman on 9 July 2021 no response has been given to Complainant's objection letter of 23 December 2020.

Conclusion:

The core task of the Ombudsman is the investigation of *Propriety* applied by government bodies and government agencies in their relationship and dealings with the public. The scope of *Propriety* goes beyond the law; it reflects the norms expected from government in executing the laws, policies and established procedures. Government is expected to be open and clear, respectful, involved and result oriented, honest and trustworthy.



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The main question for consideration is: Did the Minister observe propriety in handling Complainant's objection letter submitted on 29 December 2020 and request for enforcement dated 21 January 2021?

By letter submitted on 29 December 2020 Complainant objected on behalf of the residents of [REDACTED] to a hindrance permit being issued to a garage operating in close proximity to their homes. Despite the Minister being aware of the concerns raised by the residents [REDACTED] through previous correspondence and a court decision dated 5 July 2021¹, no response or update was provided within a reasonable timeframe.² Following the objection filed on 29 December 2020, Complainant submitted a request for enforcement on 21 January 2021, no response was provided. This resulted in Complainant filing a complaint with the Ombudsman on 8 July 2021, approximately 7 months after submitting her initial objection. To date of this final report no decision has been provided to said objection.

Hindrance Permit

The authority to investigate, issue administrative fines, confiscate, close and/or (conditionally) grant a hindrance permit is derived from '*Hinderverordening* (National Ordinance)'.³ Pursuant to this National Ordinance it is prohibited to erect facilities that may cause danger, damage or nuisance without a permit or written consent from the Minister unless otherwise stated in said National Ordinance⁴. The establishments which require a hindrance permit are specified in a National Decree containing general measures (National Decree).⁵ According to article 1 paragraph 2 of the National Decree⁶ containing general measures, a hindrance permit is required in order to operate a motor vehicle repair facility (garage).

¹ It was established that the granting or denial of *hindrance permit* would be the means to determine whether the activities of the business in question can be deemed as a hindrance.

² Term provided for by law or jurisprudence to answer or decide on a request

³ '*Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken*'

⁴ Artikel 1 par 1, '*Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken*'

⁵ Artikel 1 par 2, '*Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken*'

⁶ 'Artikel 1, jo. par 2, Landsbesluit, houdende algemene maatregelen, ter uitvoering van artikel 1, tweede lid, van de *Hinderverordening*'



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Once an application for a hinderance permit has been submitted the Minister is obligated in accordance with the National Ordinance⁷ to make the request with attachments available for anyone to submit their objections within 14 days. The National Ordinance⁸ further describes the investigative procedure required from the Minister to ensure that the objections are properly considered before issuing a permit. Upon receiving an objection, the Minister initiates an investigation, whereby ‘*Korps Politie Sint Maarten*’ (KPSM) conducts interviews with residents within a specified radius. Once the investigation is completed the Minister is required to provide a decision in writing within 14 days after the report of the investigation conducted has been submitted.⁹. It has been nearly 3 years since the objection was submitted and to date no decision has been provided.

To date of this final report no investigation has been conducted in accordance with the National Ordinance nor has a decision been issued to Complainant regarding the objections levied against the request for a hinderance permit. Based on the investigation of the Ombudsman it was established that besides the publication of the hinderance permit request no other procedures required for issuing a hinderance permit were followed.

Furthermore, the address issued in the Daily Herald’s publication of 9 December 2020 was incorrect and raises further concerns regarding the legitimacy of the documents that were provided by the applicant to the Ministry and the internal mechanisms/procedures used (by the Ministry) to verify said documentation.

Although the Minister was made aware of the situation via correspondence with Complainant, no corrective measures were taken to address the publication of 9 December 2020. It was later established that the garage was unlawfully operating at an incorrect address without the required permits. Despite this discovery no enforcement measures have been taken thus far.

As it pertains to enforcement the National Ordinance gives the authority to the Ministry to close businesses, issue fines and seize equipment. In the event there is no hinderance permit for ongoing activity that could pose a potential danger, harm or hinderance articles 17 and 18 of the National Ordinance enable the Minister to penalize violators and take coercive action.

⁷ Artikel 4 Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken’

⁸ Artikel 5 Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken’

⁹ ‘Artikel 7 Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken’



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Additionally, the absence of a decision for such a prolonged period, also further erodes the rights of Complainant(s) by not enabling them to properly contest the position/decision of the Ministry.

Inspection

An inspection was carried out on 29 August 2022 in reaction to the request for enforcement submitted on 21 January 2021 and the complaint filed with the Ombudsman (approximately 1 year and 7 months later). However, the controlled manner in which the inspection had been conducted raises some serious concerns regarding legitimacy and transparency. Contacting alleged offenders and setting a specific time and date for inspections defeats the purpose and limits the capacity of the Inspectorate to accurately/effectively assess whether an individual or organization is violating the law. The failure of the Inspectorate to properly document its findings and execute follow up inspections to support its conclusion in this case, also undermined the legitimacy of the report¹⁰ provided by the Inspectorate.

The discrepancies in the statements provided by the residents [REDACTED] in the Inspectorate's report and the statements received by residents during a follow up site inspection conducted by the Ombudsman warrant a follow up inspection or independent investigation. As such inspections/investigations should have been conducted in order to ascertain all the facts surrounding Complainant's objection.

Despite Complainant having filed the objection, there was little to no interaction between Complainant and the Inspectorate. At no point in time was Complainant contacted to provide additional information or substantiate the objection.

The Ombudsman has also taken note of the failure of the Inspectorate to investigate the additional concerns that were raised in Complainant's objection which were namely:

- a) Traffic congestion caused by the garage being situated in a cul de sac;
- b) Spraying being conducted during late hours,
- c) Noise pollution;
- d) Environmental impacts of the operations of the garage.

¹⁰ Ministerie van Volkshuisvesting, Ruimtelijke ontwikkeling, Milieu en Infrastructuur, Inspection Report, 30 August 2022, INSP21-6352 b



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The inability to conduct air quality testing also undermines the validity of the conclusions drawn by the Inspectorate. In order to come to sound conclusions, the Ministry must eliminate all alternative factors that could be a cause of the odor nuisance experienced. During the hearing conducted with the Ombudsman, the Inspectorate alluded to the possibility of the odor nuisance originating from a nearby garage, however during the hearing it was confirmed that the other garage located in the nearby vicinity could not be the cause of nuisance. In cases where a definitive conclusion cannot be drawn the Ministry is required to investigate further. This implies that the Inspectorate actively gathers the relevant facts and circumstances and, if necessary, continue investigating to establish the facts adequately and accurately before coming to its final decision.

Interministerial Cooperation

Based on inter-ministerial meetings held with the Ministry of TEZVT, Justice and VROMI, it became apparent that there is a need to urgently address a number of structural issues that may hamper enforcement in the short and long term. The lack of a comprehensive zoning policy coupled with the lack of cooperation between the Ministry of TEZVT, VROMI and Justice must be addressed in order to ensure that the regulations stipulated in legislation are being effectively upheld.

It was established that when issuing permits to operate businesses such as a garage, Ministries VROMI and TEZVT issue permits based on their independent policies without considering whether the garages or businesses have the required permits. On the other hand, the Ministry of VROMI issues building permits for garages without first establishing if a hindrance permit can be issued for said location. The Ministry of TEZVT has a published Residential Economic Policy (REP) that outlines the granting of business licenses. Based on said policy no business licenses are issued for garages in a residential area. However, this policy is not consistently adhered to.

The interpretation of what is considered residential in the REP does not coincide with the draft zoning policy of the Ministry of VROMI. Some areas that the Ministry deems as commercial are deemed residential by TEZVT and vice versa.

It was further established that garages are often operating from a different location than the address stated in their business license. This has been attributed to the lack of communication, cooperation and sharing of information between these Ministries and departments, enabling businesses to operate without the proper business license, hindrance permit and/or a building permit.



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In the meantime, the Ministries of TEZVT and VROMI have agreed to collaborate closely when issuing such permits. A government body may not hide behind its limited task and competence but take the initiative to work with other entities to ensure the law is being effectively applied.

Enforcement

The '*Beginselplicht tot handhaving*¹¹' obligates the Ministry to properly follow up on requests for enforcement and act once violations are established.

The investigation of the Ombudsman established that a hinderance permit had not been issued and the garage was not operating at the address indicated in the newspaper publication of 9 December 2020 however no enforcement measures were taken. During the hearing the Inspectorate acknowledged that the backlog of the Ministry gives cause for the Inspectorate to allow persons to continue to operate once they have submitted a request for such.

Once an administrative order has been issued and there is no adherence to the order, there is very little that can be done to ensure compliance as the policy for the fine book is yet to be completed.

Both Ministries (TEZVT and VROMI) have acknowledged that they are limited in the extent they can enforce. Lack of capacity to inspect during the evening hours remains a challenge, as inspectors have indicated that they do not inspect after hours making it difficult to penalize violators. According to the Ministries of TEZVT and VROMI, it is the responsibility of KPSM to follow up on violations that take place during the evening hours. It was further established that the Minister is solely authorized to close businesses.

KPSM on the other hand is of the opinion that once a building or business stop order has been issued the Inspectors are authorized and obliged to enforce. KPSM is also limited in their enforcement as they do not have a storage facility to store confiscated goods.

According to the Ministry of VROMI, it is not the intention of Government to close businesses. As, the Ministry of VROMI would contact garages and allow them to request the necessary permits. However, this should not be the case especially as it relates to activities

¹¹ De beginselplicht tot handhaving houdt in dat het bevoegd gezag verplicht is om tot handhaving over te gaan zodra zij van een overtreding op de hoogte raakt. Reden hiervoor is het algemeen belang dat met handhaving gediend wordt. Een bestuursorgaan kan uit eigen beweging tot handhaving overgaan of op grond van een handhavingsverzoek. Een dergelijk verzoek kan bijvoorbeeld door een omwonende worden gedaan die overlast van een overtreding ervaart.



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that may be potentially detrimental to the public health and safety. Therefore, creative ways should be sought to execute in such a manner that gives content to the law.

However, this should not be the case especially as it relates to activities that may be potentially detrimental to the public health and safety.

Conclusion

Based on the investigation conducted the Ombudsman concludes that the Ministry failed to do the following:

1. The Ministry failed to provide Complainant with a response to the objection
2. Adhere to the procedures stipulated in the National Ordinance
3. Conduct a fair and transparent investigation
4. Execute enforcement measures

The concerns of residents remain unaddressed while the garage continues to operate without the required hindrance permit and business license

The existing capacity challenges of the Ministry are evident, the inability of the Ministry to respond to the petitions and queries of the public is structural. However, this does not exonerate the Ministry from its responsibility to respond within an adequate timeframe to requests and ensure enforcement of the law when applicable. It is ultimately the responsibility of the Minister to address the urgent needs of the Ministry to ensure that the law is being upheld.

Considering the failure of the Ministry to adhere to the requirements and timeframes stipulated in the National Ordinance¹², carry out enforcement measures and provide a response to the objection filed, the Ombudsman concludes that the garage has been operating unlawfully without the required permit and the concerns of residents were not adequately addressed by the Ministry.

Judgment:

- The complaint is founded. The standards of promptness, adequate organization of services, cooperation and fair play have been violated.
- The Ministry acted improper with regard to the complaint.

¹² *Lvo houdende maatregelen ten aanzien van het oprichten van inrichtingen die hinder, schade of gevaar kunnen veroorzaken'*



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Considering the investigation and findings as stated hereinafter, the Ombudsman recommends as follows:

Recommendation(s):

- Execute enforcement measures in accordance with the *beginselplicht tot handhaving* and the National Ordinance
- Execute an inspection in accordance with the National Ordinance
- Provide Complainant with a decision to her objection within 1 month of this report
- Execute joint controls based on complaints received regarding hindrances that negatively affect the general public;
- Ensure cooperation between the Ministries of VROMI and TEZVT to ensure that business licenses, building permits and hinderance permits are issued in accordance with the law and existing policies;
- Ensure proper execution of the Hinderverordening (e.g. informing those persons, within the legal parameters, by means of a notification at their address of the establishment of a business and its potential activities);
- The current system used to respond to incoming objections, letters, requests and grievance should be thoroughly reviewed to address existing bottlenecks.
- Provide the Ombudsman with an update on the status of the finalization of the fine book;
- Provide the Ombudsman with an update regarding the completion of the zoning policy;

The Ombudsman requests a status report on the recommendation(s) within three (3) months from the date of this letter.

Elucidation:

Findings:

A publication issued on 9 December 2020 in The Daily Herald, conveyed a request for a hinderance permit [REDACTED] for a garage located on [REDACTED] Cole Bay. Said publication indicated that the general public would be able to submit their objections between 9 December 2020 and 23 December 2020.

By objection letter submitted on 29 December 2020 Complainant had made the Minister aware of the residents' position regarding the establishment of a garage [REDACTED]



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██████ in Cole Bay. To date of this report Complainant has not been provided with an acknowledgement of receipt or an update on the status of her objection.

By court verdict dated 5 July 2021 (SXM202001233) it was established that the '*Hinderverordening*' would be the means to establish whether the activities of the business in question can be deemed as a hinderance.

According to article 1 of the '*Hinderbesluit*' jo. Article 1 paragraph 2 of the '*Hinderverordening*' a hinderance permit is required for the operation of a vehicle repair facility (garage). Pursuant to article 4 of the '*Hinderverordening*' the Minister is required to publish the request for such a permit and allow a timeframe of two weeks to submit objections. Article 5 of the '*Hinderverordening*' describes the investigate procedure laid upon the Minister to ensure that the objections are properly considered before issuing the permit.

Pursuant to article 7 of the '*Hinderverordening*' the Minister is required to provide a decision on the request for a permit within two weeks of the request or two weeks after the report on the objections have been submitted. This allotted timeframe had elapsed and to date no response or report has been issued in regards to the objections levied against the request for a hinderance permit. This constitutes 16 months. Additionally, it is unclear whether such a hinderance permit has been issued for the operation of the garage, however the garage remained in operation.

In the event there is no hinderance permit for ongoing activity that could pose a potential danger, harm or hindrance articles 17 and 18 of the '*Hinderverordening*' enables the Minister to penalize violators and take coercive action.

During a meeting with the Ombudsman on 15 October 2021, representatives of the Ministry acknowledged that the staffing challenges and lack of specialized expertise (within the local context) in evaluating permits (hinderance and building) has led to the current backlog of VROMI.

During a meeting with representatives from the Ministries of TEZVT, VROMI and Justice regarding inter-ministerial cooperation and enforcement, it was established that the business license for the garage of 20 January 2017 was not for the location at ██████████. The permit has 2 conditions: 1) that the actual business operation is convened within 6 months of the issuance of the permits and 2) the obligation to employ local



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workers. It was established during the hearing that the company had requested a change of address.

According to articles 7, sub I and xi of the general guidelines of the Residential Economic Policy (REP) no business licenses are issued for garages within a residential area. The request to approve the change of address was therefore on hold until the hinderance permit is granted.

During the hearing it was confirmed via Department of Economic Licenses (DEL) that no cooperation/checks take place with VROMI or applicant before granting a business license (e.g., regarding the required hindrance permit being granted or not.)

It was further established by the Inspectorate of TEZVT that in the absence of approval for change of address and the necessary hindrance permit the Business regulation ordinance can be enforced. Decision to issue an administrative order (business stop) is done solely by the Minister upon advice of Inspectorate. This process took the Ministry of TEZVT 2 months.

During the hearing the Head Inspector of VROMI could not elucidate on the process of issuance of hindrance permits as the authority lies with the head of permits. However currently the Head Inspectorate VROMI, the legal advisor VROMI are working on enforcement tools/measures. The Head Inspector of VROMI could not clarify why VROMI was unable to enforce further than issuing a hindrance stop.

The discussions ended with the Inspectorate of TEZVT and VROMI committing to collaborate and follow up on the complaint.

During a follow up meeting with the various representatives from the Ministries of TEZVT and VROMI to discuss the progress made on agreements made during the previous meeting the following was established:

- The garage located in Cole Bay was acting outside the guidelines that were issued in the building permit; as the garage is required to operate within the boundaries of the parcel.
- There were no inspection reports to substantiate whether the established garage has violated the National Ordinance since the objections were filed;
- The advice to provide a building permit was largely based on the projected use for the area;
- The garage in question was not physically located in the location stated in its business license;



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- It remains unclear whether the garage is in possession of the relevant hindrance permit or business license, it also remains unclear why an inspection had not been carried out once the objection had been submitted;

Based on the *'beginselplicht tot handhaving'* both Ministries are obligated to carry out enforcement measures once a violation has been established. Based on the facts established during the meeting, the Ministries have allowed the garage to operate illegally and outside the parameters of the law.

Considering that the Ministry had not provided a response to the PFR, the Ombudsman considered the findings factual and recommendations approved by the Ministry.

On 23 February 2023 the Ombudsman was provided with an inspection report dated 29 August 2022 (approximately more than 2 years after the objection was filed). Based on the conclusions drawn by the Inspectorate in said report, namely that there is no hindrance being experienced by the garage. The Ombudsman had conducted interviews with Complainant and residents [REDACTED] during a follow up site visit. Considering the conflicting statements provided by the residents, a hearing was held with the Inspectorate and Complainant.

The following facts were established:

- 5 of the 7 persons mentioned in the Inspectorate's report were interviewed by the Ombudsman. One (1) person was unwilling to cooperate with the investigation, one (1) person [REDACTED] confirmed being interviewed by Government representatives and not experiencing any hindrances, whereas the other 3 persons denied ever being interviewed by the Inspectorate. These individuals provided written statements attesting to this fact. One of the individuals interviewed indicated that they do not reside and has never resided at [REDACTED] and therefore could not have been interviewed, however was listed on the inspection report as being interviewed on 29 August 2022.
- The Bureau Ombudsman was not able to verify if the residents residing in the structure at the entrance were interviewed and if the hindrance was (still) being experienced.
- Businesses are operating without the required permits due to a lack of capacity and failure to issue requested permits within a reasonable timeframe. As such, no



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- enforcement measures are taken by the Inspectorate once a request for a hindrance permit has been submitted due to the existing backlog;
- The garage has operated since January 2021 without the required hindrance permit and business licenses;
 - No enforcement measures were taken by the Ministry of VROMI regarding the established violations;
 - Specific names and addresses provided in the Inspectorate's report were incorrectly documented;
 - Several inspections were conducted [REDACTED], however no Inspection reports were drafted except for the Inspection report of 30 August 2022;
 - The procedures to issue a hindrance permits had not been implemented by the Ministry to date;
 - Complainant has not been interviewed or contacted at any point in time since filing the objection/ complaint;
 - Despite claims made by the Inspectorate that the spraying is not a nuisance to residence residing in the area, there has been no air quality test conducted in order to establish such, nor does the Ministry have the capacity to do so;
 - The Inspectorate has not followed up to establish whether a hindrance permit would be issued;
 - The garage is possibly operating in the evening hours when inspections can not be executed;
 - The placement of the garage in a cul de sac has led to increased traffic and congestion of the public road;
 - The findings and conclusions drawn in the Inspectorate's report could not be further substantiated as there were no previous or recent reports to validate said findings and/or conclusions;
 - The Inspectorate did not approach Complainant's objection with a sense of urgency as it took nearly 2 years for an inspection to be conducted ;
 - It is unclear whether authorization was received by the owners of the parcel to allow the garage to be built;
 - Before inspections are conducted businesses are notified in advance that an inspection will take place, hence reducing the effectiveness of the inspection;
 - The requirements laid down in the '*Hinderverordening*' were not adhered to;



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Notwithstanding agreements made to provide Complainant with a decision to the objection received. To date of this FR no updates have been provided nor has Complainant received a decision on the objection submitted on 23 December 2020.

Legal Basis:

Pursuant to article 19 sub 1 of the National Ordinance Ombudsman, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation. The persons mentioned in the article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 sub-4).

- *Hinderverordening artikelen 1, 4 t/m 8’ en 17 t/m18*

-*Hinderbesluit*

-*Residential Economic Policy*

-*Beginselplicht tot handhaving*

Standard(s) of Proper Conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are *adequate organization of services, promptness, fair play and cooperation*.

Adequate organization of services

Administrative bodies are required to organize their administration and operation in a manner which guarantees proper service to the public. Proper service refers to the principle of meticulousness in the administration. Proper service also includes organizing the administration in a manner that is lawful, effective, transparent, accessible, equipped to provide prompt service and information. Continuity should be guaranteed; proper registration and archiving are essential in achieving and guarantee continuity in the administration.

Promptness

A government body should act decisive and sufficiently swift.

A public body is expected to be dynamic and as such be decisive and swift in its decision making. Hence, providing a response or decision within the legal timeframe or at least within



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a reasonable time is required. When a public body expects citizens to adhere to deadlines, based on the principle of equality the public body should strive to adhere to deadlines provided by law. Not adhering to a legal time frame will undermine the authority of the public body as well as tarnish its credibility with the citizen.

Fair Play

Fair play requires that administrative bodies and civil servants provide the citizen the opportunity to properly utilize procedural opportunities provided for by law and otherwise. The principle of Fair Play entails that a public body is expected to allow the citizen the opportunity to express and defend their views and opinions, while also being able to object the position and or point of view of a public body. Thus, the behavior of the public body has to attest to openness, honesty and loyalty. A public body should be transparent and cannot prepare covert actions against a citizen. On the contrary a public body is required to actively assist the citizen in utilizing its procedural options. There are various ways to provide the citizen the opportunity to utilize the different procedural options.

Cooperation

Government should on its own initiative cooperate with other (government) agencies and entities in the interest of the citizen. The standard of cooperation includes sharing of information between Departments and or Ministries; cooperation during decision making procedures; cooperation in the execution of policies.