

## SUMMARY

### **Privacy code and evaluation**

A number of years ago, the Association of Private Security and Investigative Agencies (Vereniging van Particuliere Beveiligingsorganisaties, VPB) took the initiative to formulate a code of privacy. The privacy code consists of standards to ensure that personal information used in researches is treated with care. It can be considered as an industry specific translation of the Personal Data Protection Act (Wet bescherming persoonsgegevens, WBP). Since 1 June 2004, Dutch organisations subject to licensing under the Private Security and Investigative Agencies Act (Wet op de particuliere beveiliging en recherchebureaus, WPBR) have been required by ministerial order to observe the code of privacy. The Minister of Justice promised Parliament that use of the code would be evaluated.

The aim of the evaluation is to reveal how the privacy code is applied in practice by private investigative and detective agencies, in order to determine whether it is meeting its objectives and whether any improvements to its content or use are required.

### **The private investigation industry**

Commercial investigative or detective agencies operate on behalf of third parties, their clients. The most common types of research are investigations of employee impropriety and fraud cases. Acting as an 'extension' of the client, the agency is able to use all the investigative options open to that client. With regard to private investigative or detective agencies a licensing requirement under the WPBR applies. Licences are issued by the Minister of Justice for a maximum of five years. Apart from the private investigate or detective agencies, there are also private research firms which do not need a licence. Moreover, there are some organisations which should hold a license but do not. This study, however, covers only licensed investigative agencies.

The industry is characterised by small scale firms: nearly half of the agencies are one-man businesses, slightly over a tenth of the agencies employ more than six investigators. More than a third of the agencies have been established in the past four years (2004-2007). At the Dienst Justis of the Ministry of Justice 338 license-holders are registered.

The Association of Private Security and Investigative Agencies (VPB) is the most important industry organisation for companies covered by the WPBR. The VPB formulated the privacy code. Most of the agencies are not members of an industry organisation.

### **The study**

The evaluation study into the application of the privacy code by private investigative agencies consists of the following parts:

- a questionnaire-based survey of agencies;
- in-depth interviews at agencies;
- desk research;
- a complaints audit;
- interviews with clients.

139 private investigative agencies participated in the study.

### **Structure privacy code**

The code of privacy is divided into sections, each of which is a practical translation of an article in the WBP and contains one or more industry standards. There are general rules of conduct on the following matters:

- general principles for data processing.
- the disclosure of information to persons under investigation.
- the rights of persons under investigation.
- the exchange of data with countries outside the European Union.

In addition to this, specific rules of conduct associated with particular methods of investigation are defined. The methods in question are:

- entry to non-public places.
- interviewing of persons under investigation.
- human surveillance of persons under investigation.
- camera surveillance, clandestine or otherwise.
- investigation of computers and IT.
- confidential communications.
- trial purchases.

### **Incorporation of privacy code into management procedures**

The agencies surveyed are acquainted with the privacy code. All the respondents know of the existence of the code and often it is directly available to them. In order to stimulate that the code is applied in practice, the VPB developed a document with 'practical directions for using the privacy code' for its members. A number of non-VPB-members have also translated the privacy code into practical directions.

In general the private investigative agencies surveyed judge the existence of the privacy code positively. The privacy code is mainly seen as a frontpiece, a testing framework and an enforcement framework. The most important bottlenecks are the static nature of the privacy code, the information obligation, the open character of the standards and the conflicting standards with regard to trial purchases.

Starting from the extent to which the privacy code is incorporated into management procedures, three categories of agencies can be distinguished:

1. The first category consists of investigative agencies which have explicitly incorporated the privacy code into their management procedures. Investigation requests are tested for compatibility with the privacy code. With regard to the choice of methods of investigation considerations of proportionality and subsidiarity play a part. The aim to comply with the privacy code becomes evident by the fact that the privacy code is used as a testing framework in every investigation request. The use of the privacy code is stimulated by providing relevant knowledge to employees (and thereby making the privacy code available), descriptions of work processes (e.g. a checklist for carrying out the information obligation), standard letter formats (e.g. including standard phrases on the information obligation) and clear policies on the application of the privacy code. This way of incorporating the privacy code does not guarantee full compliance, however, it increases the chance of behaviour that is in conformity with the standards.
2. The second category consists of investigative agencies which incorporated the privacy code less explicitly in their management procedures, but which, on the basis of intuition or experience, trust that they operate within the norm system of the privacy code. They do not use the privacy code actively as a testing framework. This means that the privacy code is not used as a guideline in every separate investigation and that there are no descriptions of work processes or instruments in which the privacy code is incorporated. However, it is the intention of the agencies in this category to comply with the rules in a general sense.
3. The third category consists of investigative agencies which have neither incorporated the privacy code in their management procedures, nor attach much value to the tenor of the code. They put the realisation of the investigation objective above the aim of the privacy code. The privacy code is not consulted and in cases in which the investigation objective is incompatible with the privacy code, the investigation is not carried out in the spirit of the code. These agencies are aware of the fact that they violate the standards of the privacy code (e.g. collecting more information than is necessary, choosing a more thorough method of investigation than is necessary or illegal data collection).

The extent to which the privacy code is incorporated into the management procedures has been determined in in-depth interviews with representatives of 26 agencies. This selection is not a random sample survey, but was made by taking into account distribution over various categories (type, scope, region, membership industry organisation). Three fifth of the agencies in this selection are in the first category, a quarter is in the second category, and one out of ten is in the third category. This division is only an indication, which shows that in practice the categories are all filled.

It is reasonable to assume that the agencies which have set up conditions in order to comply with the privacy code, violate the standards less often than agencies which at the most have only assigned a marginal role to the privacy code in management procedures. Even the highest level of securing does not guarantee (full) compliance. In this study, however, the relation between securing and compliance could not be measured due to methodological reasons.

### **Compliance with the privacy code**

The focus of this study was on a number of general standards (considering the methods of investigation to be applied with a view to a proportionality and subsidiarity, collecting and retaining data in accordance with the law, informing persons under investigation) and on a number of standards that apply to specific methods of investigation.

The standard regarding explicitly considering to apply the least intrusive method of investigation with which to achieve the investigation objective, is violated in more than half of the investigations (56 per cent). A reason which is often mentioned is that investigators on the basis of their experience state that specific investigation objectives and particular methods are logically compatible. Another reason why investigators do not take the privacy code into consideration when choosing a method is that priority is given to the quickness with which the investigation objective is achieved (in other words the interest of the client). Refraining from considering which method to choose according to the principles of proportionality and subsidiarity may lead to choosing a too intrusive method or to applying the method too severely. Too intrusive and severe here means that the invasion of the private life of the person under investigation is more intrusive than is necessary in view of the objective of the investigation. Eighteen per cent of the investigative agencies hold the opinion that, looking back on the most current completed investigation, a disproportionate investigation method has been applied.

A number of agencies state that data are not always collected in accordance with the law, that sometimes more information is passed to the client than is allowed, that data are sometimes retained too long, that data irrelevant to the investigation in question are retained too long and that the security level is not always consistent with the standard.

The standard stipulating that persons under investigation should be informed of the investigation is often, but not always, observed. The agencies state that the persons under investigation have been informed of the investigation at some point in the process in 91 per cent of the investigations. However, with regard to this a comment must be made: many persons under investigation are informed only when they are confronted with the results. The problem that people are not always informed mainly occurs in cases where no evidence could be found. The reason for not informing these people is that revealing the conducted research may damage the personal or labour relation between the client and the person under investigation.

In this study, which is on seven methods of investigation (that are explicitly mentioned in the privacy code), the extent to which the standards that apply to these methods are observed, is verified.

The standard requiring that interviews should be conducted by two investigators or recorded on tape, is violated in nearly two third of the cases. With regard to the methods human surveillance and camera surveillance in approximately a third of the cases not all the directions are observed. According to the interviewees in ten to fourteen per cent of the cases a less intrusive method could have been applied.

With regard to all the methods together (with the exception of interviewing) in more than a quarter of the applications one or more standards are violated.

### **Experiences of persons under investigation**

The experiences of persons under investigation have only been measured in this study by way of the investigative agencies, complaints regulations and legal aid workers. Persons under investigation hardly ever – if at all – use the opportunity to verify how and which personal information is processed by the investigative agencies and neither are they inclined to request that information is rectified or erased. Only very few complaints are lodged with the investigative agencies or other organisations such as the VPB, the Dutch Data Protection Authority (College Bescherming Persoonsgegevens, CBP) and legal aid workers.

The small number of complaints may be caused by the fact that the persons under investigation have not been informed of the investigation that is conducted. However, this can only be the case with regard to a small minority of people (9%). After all, the rest of the persons under investigation are informed. A second possible explanation may be that persons under investigation do not have a lot of complaints. In conclusion, it is also possible that persons under investigation are not aware of the standards investigative agencies have to comply with.

The interviewed representatives of investigative agencies mainly point out the second explanation. They suppose that persons under investigation usually aim at reducing personal damage: they choose to confess their guilt, or to resist the accusation or charge and are not very eager to bring up for discussion the proper application of investigative methods, if in fact they are even aware of this. With regard to this, it should be noted that a number of respondents have the experience that the way the investigations have been carried out is hardly ever disputed in continued civil proceedings either and therefore does not play a significant part.

### **Conclusion**

The main conclusion of the study is that the privacy code is not fully complied with. Only to a small extent does the privacy code meet the set objectives. It does offer a clear legal framework for the execution, testing and enforcement of the privacy code. However, due to insufficient compliance no justice is done to the objectives of transparency and information.

With regard to a number of standards the privacy code is insufficiently

complied with: standards concerning the general principles of data processing as described in the privacy code, specific methods of investigation as distinguished in the privacy code, the way files come about, are protected and are retained, and the way persons under investigation are informed of the investigation.

A few standards are violated more often than they are complied with. This is the case with regard to explicitly considering the proportionality and subsidiarity of the methods of investigation. This consideration does not occur in more than half of the investigations. The same goes for the standard which stipulates that interviews should be recorded on tape or should be conducted in the presence of a second investigator.

Other standards are violated less often.

An analysis by means of the Table of Eleven model shows that the incentive to spontaneously comply with the code is weak. The agencies surveyed consider the chance of being caught small, as a result of which the privacy code is not regarded as a compulsory regulation by a part of the industry. This also becomes clear in the noncommittal way the privacy code is dealt with by a part of the investigative agencies.

### **Improvement points**

With regard to the content of the privacy code only few improvement points can be discerned. No fundamental objections are raised to the contents. Most of the issues that are regarded as bottlenecks by the respondents stem from European or national legislation and regulation and can therefore not be adapted. The inclination to explicitly consider the proportionality and subsidiarity of methods of investigation, which is considered a difficult task, can be positively influenced by improving the skills of private investigators. The most logical way to do this is by increasing the attention that is paid to this in education programs.

A second improvement point concerning the contents of the privacy code is to specify how long personal information can be retained in files. For the sake of the privacy protection of persons under investigation the retention period is limited to a maximum of five years. However, no minimum period has been specified, which means that transparency is at issue. If the file is destroyed immediately or shortly after the investigation, it is no longer possible to test the execution of the investigation against the privacy code.

The most important issue with regard to which improvements are necessary, is compliance. A privacy code is essentially a self-regulating instrument.

However, the mechanisms which should stimulate compliance with the privacy code within the context of self-regulation, are only weak. It boils down to self-discipline, complemented with a complaints procedure which is seldom used, due to the precarious position of the persons under investigation whose right to protection of private life is protected by the privacy code.

Nevertheless, the government chose codification and the privacy code was declared binding for all investigative agencies. It seems that with regard to unorganised agencies, the government trusted on incentives to spontaneous

compliance, even though these are not well-developed in the organised industry. Self-regulation hardly contributes to compliance. In practice investigative agencies mainly fear sanctions outside the system of self-regulation, namely the statutory sanction of suspending the licence. At the same time they are not afraid of this, because they estimate the chance of being checked very small.

The effectiveness of self-regulation has its limits (just as the effectiveness of government regulation for that matter) and the question is justified whether the public interest of protecting persons under investigation can be sufficiently achieved by means of the public instrument of self-regulation. Currently detection and prosecution occur so rarely that the codified privacy code is mainly a form of *soft law* agencies can too easily back out of.

