Brandstof voor de opsporing

Summary

Toine Spapens
Mirjam Siesling
Ellen de Feijter

Until several years ago, the police and the special investigation services experienced a number of problems as regards the competence of their criminal investigation departments to request information from third parties. The government installed the Mevis Committee, named after its chairman, to study whether the Code of Criminal Procedure (*Wetboek van Strafvordering*, *Sv*) still offered a satisfactory legal framework for obtaining third party information in criminal investigations, particularly in view of new developments in information and communication technology. The Committee concluded that adaptation of the Code of Criminal Procedure was indeed advisable, and drafted a bill accordingly. Parliament ultimately passed the proposal into new legislation: the [Investigative] Powers to Request Information Act (*Wet bevoegdheden vorderen gegevens*, *Wbvg*), effective from 1 January 2006. The Act's main purpose is to provide a clear legal framework for the investigation services and the third parties from whom they request information, as well as to give the latter better legal guarantees. The powers defined by the *Wbvg* are part of the Code of Criminal Procedure.

The Minister of Justice agreed with Parliament that the *Wbvg* would be evaluated four years after it had become effective. The Department of Criminal Law at Tilburg University and IVA, the institute for policy research affiliated with Tilburg University, conducted the evaluation study. The project started in November 2009 and concluded in September 2010.

Evaluation of the *Wbvg* focused on three main topics. First, the study was to explore the number and nature of the requests for information based on the *Wbvg*. Secondly, it was to address how the investigative authorities apply the Act in practice and to what extent the legal guarantees included in the *Wbvg* function as intended. Thirdly, it was to explore how both those requesting data and those receiving these requests assessed the Act. These topics were cast into four main research questions:

1. To what extent and for what purposes do parties make use of the *Wbvg* in practice?
2. Is the Act functioning as the legislative authorities intended?

3. Do investigative authorities follow the rules included in the *Wbvg* that guarantee the interests of the information holders and of the individuals and legal entities about whom information is requested?
4. How do the parties who receive requests for information assess the workings of the *Wbvg*?

Methodology

The evaluation of the *Wbvg* was based on empirical data sources. The first source consisted of quantitative data on information requests submitted to third parties registered by the investigative authorities. The second source consisted of the files of closed investigations that had involved requests based on the *Wbvg*. Thirdly, researchers conducted interviews with representatives of various investigation services and private companies that receive information requests regularly, such as banks and transport authorities. The first two sources, however, proved to be of only limited value.

To begin with, a complete overview of the number of requests based on the *Wbvg* would require having a national database that records such requests. Unfortunately, no such database exists. Nor are requests for information registered consistently at local level by the public prosecution service districts, the police regions or the four special investigative departments.[183] In order to present quantitative information, then, we needed to access individual requests based on the *Wbvg* and register those in a specific temporary database. The intention was to gather information from three local public prosecution service districts (Amsterdam, Den Bosch, Groningen), the Functional Prosecution Service at the national level,[184] three police regions (Amsterdam-Amstelland, Brabant-Noord, Groningen) and one special investigation service (FIOD). Due to practical problems at the other locations, however, it was only possible to obtain information from the districts of Den Bosch and Groningen, and from the FIOD.

[183] The Dutch public prosecution service comprises 19 local districts. The police are organized into 25 police regions. The four special investigation departments are attached to the Ministry of Finance (Fiscal Intelligence and Investigation Service, FIOD), the Ministry of Social Affairs and Employment (Social Intelligence and Investigation Service, SIOD), the Ministry of Agriculture, Nature and Food Quality (General Inspection Service, AID) and the Ministry of Housing, Spatial Planning and the Environment (Intelligence and Investigation Service, IOD). As of 14 October 2010, the new government reorganized the latter two, which are now part of the Ministry of Economic Affairs, Agriculture and Innovation and the Ministry of Infrastructure and the Environment respectively.

[184] The Functional Prosecution Service acts on behalf of the special investigation services.

Secondly, in-depth study of the files of closed criminal investigations made only a limited contribution to answering the research questions stated above. The researchers reached this conclusion after studying approximately thirty investigation cases. Consequently, evaluation of the *Wbvg* came to depend more than intended on interviews with the representatives of parties holding or requesting information.

Content of the *Wbvg*

The *Wbvg* offers competent police detectives, detectives working for the special investigation departments, and public prosecutors (either independently or with the consent of the investigative magistrate) six specific powers to request information from third parties. First, a competent detective may request information for identification purposes (Art. 126nc *WvSv*). Secondly, the public prosecutor has the power to request other types of information, both historical information registered by third parties (Art. 126nd *WvSv*) and information which they may register in the future as part of their regular business processes (Art. 126ne *WvSv*). Thirdly, the public prosecutor may request a holder of information to assist in decrypting information that has been encrypted before storage (Art. 126nh *WvSv*). Fifth, he or she may order a search of electronically stored data (Art. 125i *WvSv*). If, however, the public prosecution service requests information regarded as extremely sensitive to privacy, for example concerning a persons' religious or ethnic background, a higher level of suspicion is needed and the public prosecutor also needs the consent of the investigative magistrate (Art. 126nf *WvSv*).

It is clear from the above that the more sensitive the information being requested and the more effort it takes a data holder to comply with a requisition demand, the more restricted the *Wbvg*. The Wbvg makes it possible to request information about suspects in criminal investigations, but also about other individuals if doing so contributes to the purpose of the investigation. Art. 552 *WvSv* allows holders of information to file a complaint against a requisition, albeit only in retrospect. The following sections address the empirical outcomes of the present research.

Practical use of the Wbvg

This section begins by considering the extent to which investigation services submit requests based on the *Wbvg*, the background of such requests, and the operating procedures put into place.

The first important conclusion is that only two of the specific powers included in the *Wbvg* are widely used, namely requests for information for identification purposes (Art. 126nc *WvSv*) and requests for historical information

registered by third parties (Art. 126nd *WvSv*). Criminal investigations, however, seldom require application of the other powers defined in the Act.

The second major observation is that, although requests may and do cover a broad spectrum in terms of content, only two types of enquiries predominate, namely requests for financial information and requests for CCTV images. The two categories account for 72% of all requests based on the *Wbvg*. Not surprisingly, banks and financial institutions receive the majority of the requests, not only for financial information but also for CCTV footage of ATM transactions, for example. In addition, other government bodies, such as the Tax and Customs Administration and local councils handle a relatively large number of requests.

Criminal investigation services and the public prosecution service use a standard protocol for requests based on the *Wbvg*. Contrary to the expectations of legislators, however, the authority to file a request for information for identification purposes (Art. 126nc *WvSv*) is not restricted to just a few detectives. In some cases, all the police officers designated as auxiliary to the public prosecution service may file such requests, while in other police regions and special investigation departments, all competent investigators have the authority to do so. Financial information is exempt from this rule, however, owing to a special arrangement made with banks and financial institutions; only a police officer designated as auxiliary to the public prosecution service may request such information.

How the investigation services assess the *Wbvg*

Representatives of investigation services use the *Wbvg* regularly to request information, and view the legislation as part of their daily routine. In their view, the Act did not lead to changes as far as the content of the information is concerned. It did, however, result in increasingly formal procedures.

The investigative authorities assess their relationships with holders of information as good and say that the latter comply with almost all requests. The representatives interviewed also appreciate the fact that investigation services have handled information requests more carefully since the *Wbvg* came into effect. The compulsory nature of valid requests for information has put an end to discussions with the privacy experts of third parties. The guarantees against claims from individuals and legal entities who feel that their interests may be harmed by disclosure are seen as useful, not only for the holders of information, but for the investigation services as well.

The legislator's primary aim with the *Wbvg* was to put an end to the practice of information being handed over to investigation services voluntarily with liability resting with the holders of information. Interviews with representatives of investigation services reveal that the Act has generally accomplished

this goal. Investigators and public prosecutors are familiar with the regulations set out in the *Wbvg* and comply with these when requesting information. In turn, holders of information, particularly those frequently contacted, are also well aware of their rights, and now refuse to hand over information without being requested to do so officially. Representatives of companies that receive occasional requests may still hand over information voluntarily, however. At times individual police officers may also still seize information when a request would be the appropriate tool. Finally, there are rare instances not covered by the legal framework where the only option is to ask a third party to hand over information voluntarily.

Practical bottlenecks identified by the investigative authorities

The investigative authorities requesting information from third parties identify two practical bottlenecks and four problems with regard to legislative aspects of the *Wbvg*. We discuss these practical difficulties below.

The first practical problem mentioned is the growing administrative burden placed on investigative authorities after the *Wbvg* came into effect. Submitting a request for information usually requires the authorities to draw up a verbatim report explaining the nature of the case and the reason for requesting specific information. Except in cases where an investigator requires information for identification purposes only, he or she must have the consent of the public prosecutor first, and the latter may need to consult the investigative magistrate if the information is sensitive in nature. The public prosecutor needs to draw up the formal request, and send it to the holder of the information. Finally, when the investigator receives a reply, he or she has to write another verbatim report confirming receipt. Furthermore, investigation services are, in specific cases, also required to notify the persons or legal entities to whom the information refers. Representatives of investigative bodies are particularly critical of the paperwork involved in the procedure.

The second practical bottleneck concerns compliance with information requests by banks and financial institutions. Representatives of the FIOD are particularly critical of this, because their investigations often depend on large volumes of financial information. For a start, they state that banks and financial institutions are usually slow to hand over information. Furthermore, the holders of financial information insist on delivering data only on paper. This results in higher costs, not only because the investigation service has to pay for every transcript separately but also because detectives first need to digitize the data to be able to analyse it.

Legislative bottlenecks identified by the investigative authorities

The evaluation identified four problems with regard to the legislative aspects of the *Wbvg*. The first problem is the result of the ruling of the Dutch Supreme Court in the Translink case. The second problem is how to distinguish adequately between Articles 126nc *WvSv* and 126nd *WvSv*. Thirdly, the definition of information overlaps with the definition of objects carrying information, and the overlap causes difficulties. Finally, the *Wbvg* exempts certain holders of information, such as lawyers, from the obligation to disclose information, and criminals can use this exemption to their advantage.

The Translink case concerned a public prosecutors' request for copies of photographs of holders of electronic travel cards used in public transport. The Supreme Court considered this information sensitive because a photograph can reveal ethnic background, and because an image may be linked directly to other information, such as the subject's name. Consequently, in such cases it is the investigative magistrate, rather than the public prosecutor, who is competent. Furthermore, a higher level of suspicion is needed for requests for sensitive information. Although we may question the ruling as such, it being impossible to say beyond a doubt whether a personal characteristic visible on a picture is sensitive, for instance, this particular case law had far-reaching implications at first. That was because the public prosecution service concluded that the ruling also extended to CCTV images recorded by cameras installed in public places. Such material is also widely used in cases of relatively minor offences, but now that would no longer be possible. This particular problem has yet to be resolved, although lower courts have since ruled that CCTV images do not compare to photographs and other personal information registered when someone subscribes to a specific service, for example. The Minister of Justice concluded that images recorded in public places are generally not sensitive information and instructed the public prosecution service accordingly, although individual public prosecutors may decide otherwise in specific cases.

The second legislative problem is how an investigator is to distinguish adequately between information for identification purposes, which he may request on his own authority, and other historical information for which he needs the public prosecutors' consent. The problem arises because the *Wbvg* is open to interpretation with respect to the scope of Art. 126nc *WvSv*. An investigator may request 'administrative characteristics' recorded about a person by a private company or a public body. The *Wbvg* only gives examples of administrative characteristics, such as the number of an insurance policy. In practice, investigators define such characteristics more broadly than the legislator appears to have intended.

Thirdly, investigative authorities in some cases have trouble distinguishing between information and the objects carrying information. If a holder

of information hands over original documents, for example, these are also objects that investigation services might subject to forensic tests, for instance. The question is whether the *Wbvg* allows them to do this when the object is obtained by means of a request for information. Another problem is that legal guarantees are more extensive in the event of seizure. In such cases, a person may ask the court to order the investigation services to return the object to him, for example; that is not possible if they obtained the information by means of the *Wbvg*.

Finally, one of the public prosecutors interviewed brought up the problem that criminals might misuse the fact that certain parties are exempt from the obligation to deliver information upon request. In one particular fraud case, the main suspect had involved a law firm in all of his business transactions; as a result, the investigative authorities could not obtain any information about these transactions. Although this is currently not a major problem, it may develop into one in the future, as there are already law firms advertising this particular 'advantage' of hiring their services.

How holders of information assess the *Wbvg*

Based upon the number of requests, we may divide holders of information into banks and financial institutions on the one hand and other third parties on the other. The first category receive by far the most requests based on the *Wbvg*.

The evaluation concludes that banks and financial institutions are generally satisfied with the changes brought about by the *Wbvg*. For the holders of information, the new legislation created greater transparency of procedures and put an end to the sometimes lengthy discussions with investigation services about handing over information voluntarily. They had experienced no serious problems handling requests based on the *Wbvg*, although there are two points that require attention.

To begin with, banks and financial institutions in particular complain about the growing number of requests submitted to them and their increasing complexity. In their view, investigative authorities unjustifiably think that delivering almost all the information in their possession only requires them to 'push a button'. Secondly, although banks and financial institutions receive financial compensation for handling information requests, they do not feel that it makes up for the costs involved. Other companies – only banks and financial institutions are compensated – also complain that handling requests for information is often time consuming and costly. All third parties sometimes question the broadness of the information requests submitted by the investigation services.

Another observation is that Art. 552 *WvSv*, which offers parties the opportunity to complain about specific requests, is seldom used in practice. This is not because this particular safeguard is inadequate, but because such parties and

the investigative authorities usually solve their disputes bilaterally. They regard filing an official complaint as a last resort.

Finally, the *Wbvg* also requires the individual or legal entity about whom the authorities have requested information to be notified, albeit only on specific occasions and when this no longer interferes with the investigation. This rule does not function adequately, however, because many public prosecutors are unaware of it and because investigation services generally regard it as difficult to interpret and use in practice.

Concluding observations

The *Wbvg* evaluation study resulted in a number of concluding observations. We present the most important of these below.

Generally, our study revealed that most holders of information generously comply with requests submitted to them by investigation services. Only banks and financial institutions raise the threshold somewhat by taking their time to deliver information, and by submitting it only on paper. It may be advisable to impose stricter requirements on those parties, given the growing importance of financial investigation.

The problem of overlap in the definition of information on the one hand and of objects carrying information on the other can be solved by allowing investigation services to decide how they wish to receive information. This may prevent the parties receiving requests from delivering original documents when a copy would suffice, and it may also put an end to holders of information delivering information in formats of their own choice.

The legislator could furthermore provide a more detailed definition of Art. 126nc *WvSv*. It would also be advisable to restrict the competence to submit requests for information for identification purposes to police officers designated as auxiliary to the public prosecution, and offer them additional training in adequately assessing the nature of specific requests.

This evaluation study showed that the scope left by the legislator with regard to the definition of sensitive information, particularly when investigative bodies receive such information without specifically asking for it, has led to practical problems, culminating in the ruling of the Dutch Supreme Court in the Translink case. Although lower courts have already qualified case law to a certain extent, a more definitive solution has been suggested by Professor Mevis: lower the level of suspicion needed for requesting CCTV images recorded in public spaces.

Finally, the authorities should address the possibility that criminals misuse parties who are exempt from the obligation to comply with information requests. There are several ways to solve this problem, but these should first be subject to a detailed legal review.