Study report

An evaluation of the Netherlands Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens, Wjsg*)

Summary

Ira Helsloot
Arjen Schmidt
Berry Tholen
David de Vries
Carolus Grütters
Michiel de Vries

Nijmegen, October 2013

Commissioned by the Netherlands Ministry of Security and Justice, Research and Documentation Centre (WODC)

Background

The Netherlands Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens, Wjsg*) regulates the processing (management and transfer) of judicial data and criminal records. This Act which dates from 2004 is the product of a series of amendment bills adopted since the 1950s and may thus be regarded as organically-developed legislation. The reason for the present study lies in Article 76 of the Judicial Data and Criminal Records Act which stipulates that within five years of taking effect, an evaluation of the impact of its implementation should be presented to the Dutch House of Representatives.

The principal study question is whether the Dutch legislators achieved, in practice, the targeted goals which underpin the Judicial Data and Criminal Records Act .

During the study, the objectives of the Act (the policy theory) were reconstructed and presented to respondents for assessment of their achievement in practice.

The four themes which the study revealed to be the most relevant are:

- The purpose and necessity of the Judicial Data and Criminal Records Act as a single specific Act governing the processing of judicial data and criminal records in relation to the other Acts which regulate the processing of information within the criminal justice chain (Police Data Act (*Wet politiegegevens)* and the Personal Data Protection Act (*Wet bescherming persoonsgegevens*));
- The purpose and necessity of three separate regimes within the Judicial Data and Criminal Records Act for the transfer of judicial data and criminal records and handling of personal files;
- The purpose and necessity of the use of a graded system of data transfer in the Judicial Data and Criminal Records Act;
- The impact of supervision on the execution of the Judicial Data and Criminal Records Act.

Conclusions per theme

The distinction between, on the one hand, the Police Data Act and, on the other, the Judicial Data and Criminal Records Act is blurred in practice. Those operating within the Dutch Judicial Information Service and the Public Prosecution Service are indeed able to distinguish clearly between the regime of the Judicial Data and Criminal Records Act and those prescribed in other legislations, and do comply with the rules. Under the broader regime of the Police Data Act, however, judicial information is shared even when not permitted under the regime of the Judicial Data and Criminal Records Act. Because all historical judicial and investigation data from a current case, in fact, form part of the police records, only the accessibility of police data is relevant in practice for collaboration networks and criminal defence lawyers. In addition, a lot of information is shared with crime victims as a result of victims' ever-increasing right to information under the Code of Criminal Procedure so that the Public Prosecution Service is not bound by the more rigid constraints of the Judicial Data and Criminal Records Act.

The Judicial Data and Criminal Records Act distinguishes between separate processing regimes for judicial data, criminal records and personal files. Processing is carried out by different parties. Judicial data is processed by the Dutch Judicial Information Service, and criminal records by the Board of Procurators General, though in practice this takes place at the district public prosecutors' offices. Formally, the distinction is clear: both the Act and the Directive determine exhaustively which type of personal data from the criminal justice system should be regarded as judicial. The distinction, however, is sometimes hard to identify for those carrying out the tasks. In addition, as shown above, in practice the distinction is largely an illusion: almost all judicial data can be found in the police records (except for 'the outcome' in the sense of the charge and conviction in an ongoing investigation) and this information is (inevitably) shared widely in practice.

The Judicial Data and Criminal Records Act stipulates that the question as to whether judicial data or criminal records may be transferred and for what duration depends on the nature of the offence. In short, the more serious the offence, the sooner and for longer a period may data be transferred. A clear distinction has been made for data transfer according to purpose. In regard to both judicial data and criminal records, the further the actor along the (criminal) justice chain, the more conditions the law seeks to attach. This graded system of transfer is designed to give shape to the balance between, on the one hand, the privacy interests of the suspect and, on the other hand, the considerable general interest (including that of the victim). In contrast to previous legislation regarding judicial documentation, it is evident that larger amounts of data can now be transferred over a longer period of time. This development has put a strain on the central notion of resocialization within the criminal justice system. In practice, judicial data is retained indefinitely but no longer transferred after the period stipulated by law. Police data (which include judicial data and criminal records), however, are retained at the discretion of the police. These data are widely transferred, at least within collaborative networks.

External supervision of the application of the Judicial Data and Criminal Records Act is currently mainly symbolic. There is no systematic external supervision of processing, and given the magnitude of data transfer this seems hardly feasible. The Dutch Data Protection Authority supervises by way of audits only certain actors (such as collaborative networks) and takes action only in the event of a substantial number of complaints. Internal monitoring, however, does take place, often through assessment by various persons. This approach appears to ensure that the transfer of judicial data and criminal records occurs without complaints from those involved. It should be noted that, in practice, those who wish to access data are confronted with a broad transfer regime and can also obtain the required information through police records.

Main conclusion and recommendations

Taking all into consideration, our final conclusion is that the Judicial Data and Criminal Records Act, in its current form, no longer constitutes effective legislation.

A fundamental review of the Act's points of departure and application tools, integrated with at least the Police Data Act, is essential in order to arrive at meaningful legislation on the processing of data within the criminal justice chain.

We therefore recommend that:

- Legislation should no longer be structured according to the custodian of the various types of judicial information, but according to the grounds for transfer of judicial data;
- The assessment frameworks from within the various pieces of legislation governing transfer of judicial data should, at least, be made consistent with each other; and
- The level of knowledge within implementing agencies be raised in order to ensure operations in accordance with the spirit of the law;
- Further, external supervision and internal monitoring of the processing of judicial data should be systemised.

Finally, in the light of the above, we recommend for the future that the processing and transfer of all judicial data be integrated into and governed by a single new Judicial Data Management Act. This Act, regulating at least the areas included in the Judicial Data and Criminal Records Act and the Police Data Act, should correspond to practices characterised by an integrated and problem-focused approach and which have moved away from the illusion of a rigid chain of actors. In addition, such new legislation would be in line with a single central database for judicial data which respondents expect to be introduced in the near future.