

NEW POWERS FOR MISSING PERSONS INVESTIGATIONS?



REGIOPLAN
BELEIDSONDERZOEK

NEW POWERS FOR MISSING PERSONS INVESTIGATIONS?

- summary -

Authors:
Ger Homburg
Ad Schreijenberg
Janneke Stouten

Regioplan
Jollemanhof 18
1019 GW Amsterdam
Tel.: +31 (0)20 – 531 53 15
www.regioplan.nl

Amsterdam, February 2015
Publication no. Regioplan: 13225

© 2015 Dutch Research and Documentation Centre (WODC) of the Ministry of Security and Justice.
All rights reserved. No part of this report may be reproduced and/or published by print, photocopy, microfilm, digital processing or in any other form by any other means, without the prior written consent of the Dutch Research and Documentation Centre (WODC).

SUMMARY

Legal obstacles in missing persons cases

In the Netherlands, several tens of thousands missing persons are reported to the police each year. In the absence of hard evidence that a crime is involved, the police investigation falls under the police force's duty to provide assistance. Contrary to criminal investigations, the police have no special powers to gather information regarding the whereabouts of the missing person during these investigations within the scope of providing assistance.

Investigation into broadening the powers

In practice it appears that it is not always possible for the police to acquire the information they consider necessary. The experience of police officers shows that this can have serious and even fatal consequences for the missing person. Reports by the Dutch National Working Group on Missing Persons (LWVP) and the National Ombudsman conclude that the current legal framework for missing persons investigations is too limited. This study aims to define the legal obstacles faced when exercising the powers to trace missing persons in urgent cases and the opportunities for resolving these obstacles.

Problems

In relation to the power to use tools for tracing missing persons, problems arise in urgent cases of missing persons in which there is no hard evidence that a crime is involved. Missing persons cases are urgent if there is substantial reason to believe that the missing person is in danger (because the fact that the person has gone missing is totally contrary to that person's usual behaviour); if there is substantial reason to believe that the missing person poses a danger to society and/or other persons or if there is reason to believe that the missing person is the victim of a crime. The problems that have been defined are partly the result of organisational causes, in particular an insufficient use of the expertise of coordinators and police specialists in missing persons cases. It is to be expected that organisational improvements through modernized work processes will reduce the problems but not eradicate them. There are permanent problems of a legal nature in the absence of the power to deploy tools for tracing missing persons that breach privacy.

No statistical evidence

The quantitative scale of the legal problems is hard to pinpoint. There are no reliable registration data. The best indication is that we are looking at several hundreds of cases a year. There is also a lack of quantitative data available with regard to the nature of the cases in which police powers are insufficient. According to police officers, the features of individual cases can be substantiated but there are no general factors that characterise the cases. The lack of statistical data is a problem, because statistical data would form a good basis for an expert assessment of the problems and the need for additional powers.

Tension between looking for missing persons and privacy

The background to the legal problems defined is that the tools used to trace a missing person might result in a breach of a person's privacy. The use of tools that might result in a breach of privacy is limited by Article 10 of the Dutch Constitution and Article 8 of the European Convention on Human Rights (ECHR). The breach of privacy must be necessary and regulated by law. The relevant legislation is the Dutch Data Protection Act (Wbp) Companies such as telecom providers and banks can provide data voluntarily at the request of the police if this is necessary to safeguard a vital interest of a missing person. Each time they have to assess whether the provision of the data is legitimate. For the companies it is not always clear how they should assess the relevant interests and whether or not they are acting legitimately (in the interest of a vital interest of their customer) when they provide details about the missing person at the request of the police. They can also be hesitant because some forms of providing data are time consuming (such as looking for camera images). For this reason the police do not always acquire the data they consider to be necessary or do not acquire them on time.

Need for powers

Police officers are calling for a broadening of their statutory powers. In particular, they name the powers to use the following tools for tracing missing persons:

- historic telephone details (printed list);
- positioning mobile telephone;
- bank details;
- public transport transactions and airline check-in details;
- camera images;
- computer search;
- social media data.

Public prosecutors name a more limited range of powers and tools for tracing missing persons, namely historic telephone details, positioning mobile telephone and debit card transactions.

Breach of privacy versus the protection of citizens

Article 10 of the Dutch Constitution and Article 8 of the ECHR limit the use of powers that breach the privacy of missing persons. On the other hand, the state has a duty to protect the life of citizens according to Article 2 of the ECHR and should therefore sometimes take action. Protecting the privacy of a missing person (a 'right to disappear') is not necessarily more weighty than the positive duty to protect life and health. Which constitutional right prevails depends on the circumstances. In cases of vulnerable persons reported missing, such as young children or demented elderly people, the balance leans towards the right to the protection of life and health. For less vulnerable groups the right to privacy can prevail. But still, breaches of privacy, even those considered necessary to protect a missing person, must be regulated by law.

Solutions without new powers

Police officers observe that companies and institutions are often willing to assist in missing persons investigations within the context of providing assistance, but are (too) hesitant in doing so due to uncertainty about the interpretation of the Data Protection Act (Wbp). To reduce this problem, an opinion can be requested from the Dutch Data Protection Authority (Cbp). In an opinion, the Cbp adopts a position on the interpretation of the act in specific circumstances. In addition, a legal disclaimer could be considered with regard to the consequences of providing data for missing persons investigations within the context of providing assistance. Leads for this can be sought in the Data Protection Act.

Solutions through new legislative powers

If new legislative powers are to be created, under which legal regime should these fall? Previous reports have suggested the Police Act, the Municipalities Act, the Criminal Procedure Code, the Criminal Code and the anti-terrorist legislation or a completely new act as possible frameworks. Arguments for a choice can be found in the character of the investigation in respect of which the powers are used (assistance) in relation to the fields falling within the scope of the different legal regimes. The regime of the Police Act seems to be the most suitable regime for establishing powers within the context of tracing missing persons. The police force's duty to provide assistance offers a sound basis. Investigations to trace missing persons in cases in which no crime is suspected do not need to be redefined as semi-criminal investigations, as would be the case if the powers were to be regulated under the regime of the Criminal Procedure Code and the Criminal Code. The Municipal Act is less suitable because assistance in the case of a missing person is not the primary responsibility of the mayor or other municipal actors, but is the responsibility of the police.

Proportionality

Proportionality is fundamental when creating new powers. This is facilitated by a distinction between target groups and circumstances. A person from a particular (vulnerable) group is more likely to have gone missing involuntarily than a person from another group. In addition, it concerns the circumstances (including the person or persons reporting the person missing to the police) and the importance and objective of the search. Ultimately such 'missing person profiles' could be linked to specific powers and data. As the application of powers is more molded to the target groups and the circumstances, there is better compliance with the criteria of foreseeability: citizens will be aware of the circumstances under which the public authorities will be able to use specific tools for tracing missing persons.

Material and procedural angles

Although a closed system based on material criteria is preferred, this might not be feasible for the tools for tracing missing persons in urgent missing persons investigations. There are currently no data available on the basis of which missing persons profiles can be created. Whether this will become possible in the future with improved registration is uncertain. If the situation remains unchanged, this will make it more difficult to create a closed system. A good alternative is based on procedural safeguards. This means that the use of a tool for tracing missing persons that could breach a person's privacy is always subject to an assessment conducted by an authority. The more a tool breaches a person's privacy, the higher the authority should be that is allowed to exercise the power. Less invasive tools are eligible for assessment by the public prosecutor; tools that breach a person's privacy more seriously could be assessed by a supervisory judge.

This is in line with the Belgian rules where softer tools (such as requesting telecom details) in missing persons cases giving cause for concern can be used more or less routinely in a so called 'mini investigation' after an assessment by the public prosecutor. Other tools can only be used after an assessment by the investigating judge.

A limited range of powers

There are objections that can be raised against such a decision-making structure for procedural safeguards. In practice, the police are worried about the organisational and logistical complications. And the involvement of the supervisory judge within the context of the Police Act is a first, which might be substantiated with arguments but which will also be dubbed as desperate and forced. A balance needs to be struck. Stricter assessments are needed where more powers resulting in more serious breaches of privacy are considered necessary. Where the range of powers is limited and therefore the breaches of privacy less serious, a less stringent form of assessment can suffice.

If the latter option is chosen, this implies that powers will be limited to the powers in respect of which it can be argued that assessments by the public prosecutor will suffice. This concerns the following tools for positioning and for establishing whether a crime might be involved:

- (short term) mobile telephone positioning;
- printed list of telephone calls (historic details of calls during a limited period of time);
- place and time of debit transactions (plus accompanying camera images);
- place and time of public transport transactions (plus accompanying camera images);

Such a system has the advantage that there is one way to obtain permission to use the statutory powers. Due to the close cooperation with the Public Prosecution Service there is a relatively small barrier, which does not pose a serious obstacle to the efficient conducting of the police investigation.

The consequence of this option is that there will be no statutory provisions for any of the other tools for tracing missing persons and that they can only be used with voluntary cooperation.

Conclusion

The research has shown that more powers are desirable to enable the police to act adequately in urgent missing persons cases. From the point of view of the proportionality of new legislation and regulations, better statistical evidence is particularly desirable here.

There are two main tracks for resolving the legal problems:

- clarifying the requirements laid down by privacy legislation for the voluntary cooperation of companies and institutions in missing persons investigations falling within the police force's duty to assist, and possibly reducing the consequences by way of a legal disclaimer;
- the creation of statutory powers, with the Police Act being the most likely regime.

These two tracks are not necessarily alternatives, but could complement each other. Clarifying the privacy legislation will not remove all the obstacles to voluntary cooperation. For instance, it does not affect reticence caused by the burden imposed on the capacity of companies and institutions. And, especially when limited to a few tools, statutory provisions would not mean that companies and institutions will not be called upon to cooperate voluntarily in the future, in appropriate cases.

Both tracks could easily be followed at the same time.

Regioplan Beleidsonderzoek

Jollemanhof 18 (6^e etage)

1019 GW Amsterdam

T 020 531 531 5

E info@regioplan.nl

I www.regioplan.nl