Confidential/Registered

Date

Nov 19, 2019

Topic

Imposition of reprimand

Our reference

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Dear Mr Van Haperen, Dear Mr Rooke,

The Dutch Data Protection Authority (AP) has established that the Alliance has quality in mental health healthcare (hereinafter: Akwa GGZ) has processed personal data about health. This one processing has taken place by taking over a so-called depleted dataset of Stichting Benchmark GGZ (hereinafter: SBG). The processing of health data is based on Article 9, first paragraph, of the General Data Protection Regulation (GDPR) prohibited, unless Akwa GGZ acts as controller on an exceptional ground as included in Article 9, second paragraph of the GDPR.

In the opinion of the AP, Akwa GGZ cannot rely on an exceptional ground in the assessed situation professions as included in Article 9, second paragraph, of the GDPR. This means that the processing of personal data about health by means of a dataset taken over from SBG a violates the prohibition of Article 9(1) of the GDPR. Although Akwa GGZ uses the depleted dataset has now completely destroyed, the AP reprimands Akwa GGZ for the violation committed on

pursuant to Article 58, second paragraph, preamble and under b, of the GDPR.

The decision to impose a reprimand is further substantiated below. The relevant facts and circumstances on which the reprimand is based are described in paragraph 1. In paragraph 2 the legal framework is described. In paragraph 3 the assessment is made and the violation established. Section 4 describes the reprimand. Finally, it is indicated how Akwa GGZ can appeal oppose this rebuke.

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1.

Facts and circumstances

1. Akwa GGZ supports mental health care (GGZ) in the (further) development and implementation of quality standards, quality indicators and measuring instruments. Akwa GGZ also provides exchange between relevant parties about the proceeds of this. It is included as a foundation in the register of the Chamber of Commerce and registered under Chamber of Commerce number 71887741.1 The main establishment is located in Utrecht, Museumlaan 7.

2. Following a request for enforcement, the DPA has conducted an investigation into the processing of personal data by SBG. In summary, it is from the research forward has come to the conclusion that the data that SBG (via ZorgTTP) has received from healthcare providers is a processing of health data within the meaning of Article 4, preamble and under 15, of the GDPR. Because SBG does not can invoke one of the statutory grounds for exception that prohibits the disclosure of health data processing, it is therefore prohibited for SBG to, pursuant to Article 9, first paragraph, of the GDPR to process the dataset containing data about health.

3. At the beginning of 2019, SBG transferred a dataset to Akwa GGZ, consisting of 19 data categories per

patient instead of the 25 original data categories per patient provided to SBG.2

The management by Akwa GGZ of this dataset also constitutes a processing of health data in

within the meaning of Article 4, preamble and under 15, of the GDPR. Because Akwa GGZ cannot rely on one of the following:

the legal grounds for exception to the processing ban with regard to health data,

it is prohibited for Akwa GGZ to use the dataset containing:

processing health data.

4. With regard to the processing of these personal data, Akwa GGZ must be qualified as

controller within the meaning of Article 4(7) of the GDPR, because Akwa GGZ as

legal person determines the purpose and means of the processing of personal data. Already out

the fact that Akwa GGZ informed the AP in a letter dated 28 May 2019 that the depleted dataset in

quarantined and informed the AP in a letter dated August 8, 2019 that the impoverished

dataset has been definitively destroyed, it appears that Akwa GGZ is ultimately responsible for the policy pursued with

related to the depleted dataset it manages and thus the purpose and resources for the

processing of the personal data.

2.

Legal framework

5. Article 4, preamble and under 15, of the GDPR states that health data is personal data that

relating to the physical or mental health of a natural person, including data

on health services provided that provide information about his health status.

This concerns all data relating to the state of health of a data subject and which

provide information about past, present and future physical or mental health status

future.3 The concept of “health” should be interpreted broadly. Even the mere fact that someone is sick

1 See the Chamber of Commerce website: https://www.kvk.nl/orderstraat/product-kiezen/?kvknummer=71887741.

2 See also p. 12, 13 and 25 of the final version of the Report following an investigation into data processing SBG.

3 Recital 35 of the GDPR.

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is a given about health, although that fact in itself says nothing about the nature of the

condition.4

6. Health data qualify under the GDPR as so-called 'special categories of'

personal data'. The processing of such data is prohibited pursuant to Article 9(1) of the

GDPR prohibited. However, there are exceptions to this prohibition. These are stated in the second paragraph of Article 9 of

the GDPR. These exceptions do not apply directly on the basis of the GDPR, but leave room for

It is up to the Member States to elaborate on this ground for exception. That's in the Netherlands -

in general terms - happened in the Implementation Act General Data Protection Regulation

(UAVG).

7. As explained by the AP in the decision on the objection under paragraphs 45 to 49,

Akwa GGZ does not invoke Article 9, second paragraph, part h of the GDPR jo. Article 30(3)(a)

of the UAVG. SBG or Akwa GGZ cannot invoke one of the other general rules either

grounds for exception, as included in Article 9, second paragraph, of the GDPR, read in conjunction with the

Articles 22 to 30 of the UAVG.

3.

Detection of violation

8. The depleted data set as transferred by SBG to Akwa GGZ constitutes a processing of data

on health within the meaning of Article 4, opening words and under 15, of the GDPR. In addition, the AP concludes that

Akwa GGZ cannot invoke one of the exceptions to the ban on processing special

personal data, as included in Article 9, second paragraph, of the GDPR.

9. In a letter dated 29 May 2019, the AP announced its intention to enforce it to Akwa GGZ. The

The AP then informed Akwa GGZ that it intended to, in view of the

violations detected from investigation data processing SBG (hereinafter: investigation report),

to make use of its power, pursuant to Article 58, second paragraph, opening words and under f, of the AVG to impose a definitive processing ban on Akwa GGZ.

4.

reprimand

10. In a letter dated 29 May 2019, the AP announced its intention to enforce it to Akwa GGZ. The The AP then informed Akwa GGZ that it intended to, in view of the established violations, to use its power to institute proceedings pursuant to Article 58, second paragraph, preamble and under f, of the GDPR to impose a definitive processing ban on Akwa GGZ.

11. The AP chooses not to impose a definitive processing ban on Akwa GGZ on the basis of Article 58, second paragraph, preamble and under f, of the GDPR but to reprimand Akwa GGZ pursuant to Article 58, second paragraph, preamble and under b, of the GDPR. On this basis, the AP has the power to reprimand the controller when processing infringes provisions of the GDPR is made.

12. Akwa GGZ, after taking note of the conclusions of the AP in the investigation report as shared by the AP with Akwa GGZ in a letter dated May 21, 2019, the decision was made to give the impoverished

4 Parliamentary Papers II 1997/98, 25892, 3, p. 109.

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quarantine the dataset. This was communicated to the AP by letter dated May 28, 2019, by the AP received on June 3, 2019. On May 29, 2019, an intent to enforce against both SBG and Akwa GGZ issued in response to the research report. By letter dated 8 August 2019, Akwa GGZ informed the AP that the depleted data set has been definitively destroyed. By letter of 29 August 2019 the lawyers of Akwa GGZ submitted a statement from Info Support B.V. that the depleted database, including backup files, are permanently deleted. The violation of provisions

by or pursuant to the GDPR has thus been definitively terminated. In short, the data processing activities of Akwa GGZ that were the subject of investigation by the AP have already been discontinued by Akwa GGZ.

13. According to settled case law of the Administrative Jurisdiction Division of the Council of State, a principle obligation to enforce, which means that the competent administrative authority in the event of violation of a statutory provision is in principle obliged to act against this, because of the public interest that is served with enforcement.5 Only in two cases can the administrative authority waive enforcement action, namely if there is a concrete prospect of legalization or if enforcement action is disproportionate in proportion to the interests to be served thereby. An administrative body may of its own accord or upon request take enforcement action.

14. In the opinion of the AP, enforcement action is not disproportionate in relation to the serve interests, because the detected infringement concerns the processing of special personal data of a large number of data subjects. In addition, Akwa GGZ knew when it took over the depleted dataset from SBG, that this processing of special personal data was subject to investigation by the AP. Because the infringement has ended, the infringement occurred in a relatively short period of time between the acquisition of the depleted dataset from early 2019 through August 29, 2019 and Akwa GGZ has quarantined the dataset itself and then definitively destroyed it, the AP will in this case use its power to reprimand Akwa GGZ.

I sent a copy of this decision to the representative of the objector and also to the lawyers from SBG.

Yours faithfully,

Authority Personal Data,

mr. A. Wolfsen

Chair

Remedies Clause

If you do not agree with this decision, you can return it within six weeks of the date of dispatch of the decision to submit a notice of appeal to the court pursuant to the General Administrative Law Act (sector

administrative law) in the district in which you are domiciled. You must provide a copy of this decision to send along. Submitting a notice of appeal does not suspend the effect of this decision.

5 Decision of the Council of State Administrative Jurisdiction Division of 11 January 2017, ECLI:NL:RVS:2017:31.