

Registered and by fax

[CONFIDENTIAL]

Authority for Personal Data

[CONFIDENTIAL]

Date

[CONFIDENTIAL]

Topic

Charge under penalty

Our reference

[CONFIDENTIAL]

Contact

[CONFIDENTIAL]

Your feature

[CONFIDENTIAL]

Dear [CONFIDENTIAL],

Below you will find the decision of the AP to impose an order subject to periodic penalty payments, which you as authorized representative of Theodoor Gilissen Bank (TGB). This decision is part of the further decision of the Dutch Data Protection Authority (AP) on the objection that [APPLICANT] filed against the decision of the AP of 7 September 2016, reference [CONFIDENTIAL] (primary decision).

1 Introduction

1. [APPLICANT] submitted a request to TGB on the basis of Article 35 of the Protection Act personal data (Wbp). In it he asked for:

-an overview of the personal data relating to [APPLICANT] that are collected by TGB incorporated;

-a copy of chat messages exchanged between [APPLICANT] and his account manager at TGB -

[CONFIDENTIAL] – in an investor chat room [CONFIDENTIAL];

-a copy of an internal instruction from the head of the Internal Audit Service of TGB about the
make arrangements with [APPLICANT].

2. The request was rejected by TGB. [APPLICANT] subsequently requested the AP to take enforcement action
steps.

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2. Course of the procedure

3. By letter dated 11 August 2016, received on 15 August 2016, [APPLICANT] requested
enforcement filed with the AP.

4. By primary decision of September 7, 2016, the AP decided on the enforcement request and
request rejected.

5. By letter dated September 30, 2016, received on October 3, 2016, Mr [APPLICANT] sent a
filed an appeal against the decision of 7 September 2016.

6. Given the opportunity to do so, TGB has provided a written explanation.

7. A hearing was held on 14 December 2016. A report was made of the hearing.

8. By decision on the objection of 27 January 2017, the AP revoked the primary decision and instead
decision made a new decision. The AP has received the enforcement request that concerns not providing
of an overview and additional information as referred to in Article 35, second paragraph, of the Wbp assigned
and has also made it known that it intends to impose an order subject to periodic penalty payments on TGB.

9. In a separate letter dated January 27, 2017, the AP sent TGB an intention to impose an order
sent under duress.

10. TGB and [APPLICANT] have submitted further documents.

11. A hearing was held on 16 February 2017 in response to the intention. Of this

hearing, a report has been made. This is attached as Annex 1 to this Decree.

12. TGB and [APPLICANT] have submitted further documents.

3. Part I of the decision on objection: decision of 27 January 2017

13. The objection lodged by [APPLICANT] against the primary decision was declared well-founded by the decision

on objection of 27 January 2017 with reference [CONFIDENTIAL] (appendix 2). The AP has ruled that

TGB violates Article 35 of the Wbp, because it does not provide at least an overview accompanied by additional

has provided information of the personal data it has processed about [APPLICANT]. The AP has

the enforcement request that concerns not providing an overview and additional information if

referred to in Article 35, second paragraph, of the Wbp. The AP has TGB and [APPLICANT]

subsequently made known simultaneously with the declaration of the objection that it intends to

to impose an order subject to periodic penalty payments, meaning that TGB will provide the following information to Mr

[APPLICANT] must provide:

(1) a complete overview in comprehensible form of the data subject concerning personal data;

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(2) a description of the purpose or purposes of the processing;

(3) the categories of data to which the processing relates;

(4) the recipients or categories of recipients as well as

(5) the available information on the origin of the data.

4. Part II of the decision on objection: follow-up to the intention to impose the order

14. TGB has put forward a view on the intention to impose an order under

penalty. TGB argues in this that the AP must renege on its intention to impose an order under

to impose coercion. In that context, TGB first of all argues that the [APPLICANT] abused the right of inspection. In the event that this view is not followed, TGB argues that Article 35 of the Wbp does not provide a right to a copy of documents and that it is not obliged to carry out internal analyzes and the record of deliberation to [APPLICANT]. It further argues that the provision of an overview of personal data relating to [APPLICANT] a disproportionate effort from TGB.

15. TGB's arguments are discussed below.

16. The legal framework is attached as Annex 3 to this Decree.

Abuse of law

-argument TGB

17. TGB states first and foremost that it has been established that [APPLICANT] abuses the right of access. To this end, TGB to the judgment of the District Court of The Hague of 2 February 2017 in case no. C/09/516394 / HA RK 16-400 (the verdict). With that judgment, the court rejected the [APPLICANT]'s request for TGB on the basis of Article 46 of the Wbp to still grant his request as referred to in Article 35 of the Wbp to point. To this end, the court considered that the [APPLICANT]'s request does not comply with the objectives of the Wbp, because it has not been made plausible that [APPLICANT] is concerned about the correctness and wants to verify the lawfulness of the processing of his personal data. This makes [APPLICANT] abuse of the right of access, as stated in the judgment. TGB argues that the AP is determination of the court that there is abuse of rights is bound. To this end, TGB argues that the court has established the legal relationship between [APPLICANT] and TGB pursuant to Article 46 of the Wbp determined, to the effect that [APPLICANT] in this case cannot invoke the right of inspection under the Wbp due. In any case, the AP must be very cautious when assessing whether [APPLICANT] may make use of the right of inspection, argues TGB. TGB has to substantiate this position referred to the parliamentary history of the Enforcement Act consumer protection, which expresses that responsibility for acting with due care in consumer matters rests with the consumer and the service provider, so that in the cases

in which they can come to a solution themselves, enforcement action by the Consumer Authority

(currently: Authority for Consumers and Markets) has not been designated.

TGB for violation of the ne bis in idem principle, because granting the enforcement request in

Another explanation of the consequences of the judgment for the enforcement procedure leads, according to

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Furthermore, TGB argues that another decision by the AP leads to a violation of the trias politica,

combination with the imposition of an order subject to periodic penalty payments leads to the same legal action being taken twice

is used. At the hearing on February 16, 2017, TGB clarified that its objection

it is particularly appropriate that in both proceedings it is requested to carry out on pain of a penalty the obligation to submit documents.

from which it follows that the AP, as part of the administrative power, determines the legal relationship to be followed by the judiciary. Moreover, according to TGB, a different decision leads to a violation of the principle of legal certainty, trust and due care. TGB can rely on it

that the decision of the court is binding on the administrative body charged with supervising the implementation of the Wbp, argues TGB.

it acts contrary to a legal obligation and thus commits an unlawful act in principle.

Finally, TGB argues that if the AP does not consider itself bound by the judgment of the court,

18. Also irrespective of the decision of the court, TGB argues that [APPLICANT] abuses the

right of inspection. According to TGB it is established that [APPLICANT] uses the right of access for a purpose other than checking whether his personal data have been processed correctly and lawfully: according to TGB,

[APPLICANT] use the data (exclusively) as evidence in a civil court

liability proceedings against TGB. However, the right of access is intended to enable a data subject to check whether his personal data has been processed correctly and lawfully with reference to recital 41 to Directive 95/46 (the Directive). Now the [APPLICANT]

If this is not the case, he abuses the right of inspection, according to TGB. In support, TGB points to a judgment of the ECtHR of 4 January 2007, NJ 2007, 475 (Smith), from which, in its view, it follows that if the right of access is not used for the purpose for which it was granted, the request for access is out of reach of the privacy regulations. Furthermore, TGB has referred to a judgment of the Court of Justice of 17 July 2014, ECLI:EU:C:2014:2081, from which it follows that, when assessing a

According to TGB, the request for access must check whether the purpose of that request is consistent with the purpose of the Wbp.

-position [APPLICANT]

19. [APPLICANT] takes the position that an administrative enforcement procedure – otherwise

than TGB argues – can coexist with civil proceedings. In that context, [APPLICANT]

indicates that the AP is authorized to proceed with enforcement independently of the request of [APPLICANT]. Furthermore

[APPLICANT] has indicated that an appeal has been lodged against the judgment of the court. ten

finally, [APPLICANT] referred to a judgment of the District Court of Central Netherlands, in which this

court in a similar case – in which another applicant invokes Article 46 of the

Wbp wanted to obtain an overview of personal data processed by TGB – came to the conclusion

that there is no abuse of rights.

-judgment court

20. The relevant considerations from the court's judgment are as follows:

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3.9 Various civil proceedings are (or have been) pending between the parties, in which [APPLICANT]

TGB accuses of having failed imputably in the fulfillment of its obligations

towards [APPLICANT]. It has been argued without dispute by TGB that [APPLICANT]

has already attempted to obtain requested documents through civil proceedings, including

invoking Articles 22, 85 and 843a DCCP. and that the parties also initiate summary proceedings

before the preliminary relief judge of the Amsterdam District Court. In all procedures

the request rejected.

3.10 The court is of the opinion that the present request of [APPLICANT] does not comply with

the objective of the Wbp. It has become sufficiently plausible that [APPLICANT] with his

request is not intended to question the correctness and lawfulness of the processing of

to clear his personal data. From the documents submitted and the oral

treatment it became apparent that [APPLICANT] made the request for the purpose of filing documents

to get hands that he wants as evidence in the underlying proceedings against TGB

to use. This is abundantly clear from [APPLICANT]'s additional request in which he

requests, among other things, to be provided with all documentation showing that TGB on

or actually closed positions of [APPLICANT] about 19 September 2008.

[APPLICANT] thereby abuses his right of access as referred to in Article 35 Wbp.

-review AP

21. The AP comes to the following assessment.

22. Contrary to what TGB argues, the AP considers that it is not bound by the determination of the

legal relationship between [APPLICANT] and TGB by the court. To this end, the AP points out the following.

It follows from the Code of Civil Procedure (Rv) that in an unassailable judgment:

decisions about a legal relationship in dispute between the parties have binding force, see article 236,

first member, Rv. The AP itself is not a party to the dispute in which the judgment was rendered. Only TGB and

After all, the [APPLICANT] is a party to the dispute before the court. Therefore, the decision of the

court for the AP does not have binding force. In addition, [APPLICANT] has appeal

instituted against the judgment of the court, so that there is no question of an unchallengeable ruling that has been given *res judicata*. In view of the foregoing, the AP rejects TGB's conclusion that the AP acts unlawfully if it does not consider itself bound by the judgment.

23. In the opinion of the AP, there is also no reason to conclude that, in view of the judgment, the AP should be restrained. In this context, the AP considers that it has been designated as the competent administrative body that supervises the processing of personal data in accordance with the determined pursuant to the law (Article 51(1) of the Wbp). In addition, the AP, in view of the public interest served by enforcement, is in principle bound in the event of a violation to take enforcement action.¹ In that context, the AP has its own responsibility in supervising compliance with the Wbp, and for that reason too there is no obligation for it to comply with the judgment to be restrained. In addition, the Wbp system is characterized by a differentiated

¹ ABRvS June 30, 2004, ECLI:NL:RVS:2004:AP4683.

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system of enforcement (and legal protection), in which the civil and administrative avenues coexistence.² In view of the legal system, both procedures can coexist: the law leaves room for the existence of proceedings before a civil court on the basis of Article 46 of the Wbp in addition to administrative enforcement by the AP. In view of this, the AP – apart from the question of how this is done in the consumer law is regulated – not the conservative attitude advocated by TGB.

24. In view of the foregoing, the AP sees reason to independently investigate whether [APPLICANT] abuse exercise his right of access. In doing so, it will take into account the conclusions of the court in its judgment, by explicitly assessing whether – and if not why not – the AP supports the conclusions of the court shares. Contrary to what TGB argues, this is not in conflict with the *Trias Politica*, the legal certainty,

principle of trust or due care. Because the court's judgment was not rendered in a procedure to which the AP is a party, the AP is not bound by the decisions in that judgment as above has already been explained. From the point of view of due care, that judgment must be taken into account kept, which the AP does in this way. There is no further question of aroused confidence by the AP, now that it is necessary that commitments attributable to the administrative body have been made. such a commitment has not been made. A decision in a court judgment to which the AP is not a party is further not attributable to the AP.

25. Nor is there any reason to conclude that enforcement action by the AP in this case is contrary would come up with the ne bis in idem principle (or, the AP adds, the una via principle). Both principles are only applicable if there is a 'criminal charge' as referred to in Article 6, first paragraph, of the ECHR. Only if the first procedure extends to 'determination of a criminal charge', a second prosecution of the same offense is not permitted.³ Now the imposition of a charge under penalty payment is a sanction aimed at restoring the legal situation, there is no question of a criminal charge, so the principles do not apply.

26. When assessing whether [APPLICANT] is abusing the right of access, the following applies: interest. As the AP has stated in the decision on the objection of 27 January 2017 (under marginal 21) there is a misuse of rights if a power is exercised for no other purpose than to harm another or for a purpose other than that for which it was granted or in case one, in taking into account the disproportion between the interest in the exercise and the interest thereby is harmed, could not reasonably have been exercised (Article 3:13, second paragraph, of the Civil Code).

27. In addition, the decision on the objection of 27 January 2017 states that the Wbp gives everyone the right freely and at reasonable intervals to contact the responsible person with the request to state whether personal data concerning him are being processed and that the interest in such

2 See in this context the explanatory memorandum to the Wbp, Parliamentary Papers II 1997/98, 25892, no. 3, p. 25-26.

3 Cf. the conclusion of AG Spronken of 22 December 2015, ECLI:NL:PHR:2015:2675, RvdW 2016/322.

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request is presupposed by the Wbp (also under marginal 21 of that decision).⁴

28. The presupposition of the interest in invoking the right of access does not mean that the motive by which a data subject invokes the right of access is not relevant: in line with the judgment of the Den Bosch Court of 16 January 2006, NJF 2006, 91 (Dexia), the AP is of the opinion that, partly in view of the argument of TGB that there is abuse of rights, it must be examined whether the request in agreement has been made with the purpose of Article 35 of the Wbp. This also ties in with the TGB cited Smith judgment.

29. The purpose of Article 35 of the Wbp is to give the data subject ([APPLICANT]) the opportunity to to check whether and, if so, which personal data concerning him are processed by the person responsible (TGB) processed, and whether the representation of his personal data in the processing of TGB is correct, for the purpose or the purposes of the processing are complete and relevant and whether TGB collects its personal data processed in accordance with legal regulations.⁵

30. [APPLICANT] stated at the hearing on 16 February 2017 that with his request on pursuant to Article 35 of the Wbp, the aim is to find out to whom the TGB is concerned made personal data available. He further substantiated this by stating that TGB in the civil liability proceedings that [APPLICANT] is pending against TGB made, has stated that there is a [CONFIDENTIAL]. With his appeal to the right of access, [APPLICANT] [CONFIDENTIAL], he states. This purpose is consistent with the purpose of Article 35 of the Wbp. The AP sees no reason to doubt the statements of [APPLICANT]. The statement by TGB that [APPLICANT] has received documents in the past in which his personal data and has never made a correction request as a result thereof, is that

framework is not enough. Regardless of whether the statement is true, it is consistent with the purpose of Article 35 of the Wbp to find out to whom TGB has provided which personal data. The statement by TGB's representative at the hearing that no information was provided to others, barring the supervisory authority, is insufficient in that context: Article 35, second paragraph, of the Wbp states namely the right to obtain at least an overview with additional information. In view of the foregoing, the AP sees no reason to come to the conclusion that [APPLICANT] abuses his right of access.

31. Even if – as the court found plausible in its judgment – [APPLICANT] with his appeal on Article 35 of the Wbp (also) aims to use the obtained documents in a civil proceedings against TGB, there is no ground for the conclusion that [APPLICANT] abuse exercise the right of inspection. As the Den Bosch Court of Appeal also concluded in the Dexia case, the mere circumstance that a data subject with the data once obtained also subsequently sends another person purpose, for example by using it in a possible civil procedure,

4 Cf. in this context also the judgment of the Administrative Jurisdiction Division of 30 November 2011, ECLI:NL:RVS:2011:BU6383, consideration 2.4.3.

5 Cf. also the judgment of the Den Bosch Court of Appeal of 16 January 2006, NJF 2006, 91 (Dexia), consideration 4.6.3.

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insufficient to assume abuse of rights.⁶ The AP also takes into account that TGB has not and that, moreover, it has not been shown that this aim is unlawful.

32. The judgment of the Court of Justice of 17 July 2014 to which TGB refers does not lead to a different conclusion. Insofar as TGB infers from this judgment that [APPLICANT] with his request for access only to:

may have the purpose of checking the correctness of the processing of his personal data, TGB misunderstands that the Directive and the Wbp do not prevent data once obtained for another purpose – for example, civil proceedings – are used. As noted above, that data is not enough to presume abuse of rights.

33. In view of the foregoing, the AP – unlike the court in its judgment – comes to the conclusion that [APPLICANT] does not abuse his right of access. TGB's argument fails.

Right to a copy of documents

34. TGB argues that Article 35 of the Wbp does not confer a right to copies of documents. The AP understands this argue in such a way that an order subject to periodic penalty payments cannot in any case serve to provide copies of documents containing personal data of [APPLICANT]. To this end, TGB points to the the aforementioned judgment of the Court of Justice of 17 July 2014.

35. If personal data are processed, the controller must, pursuant to Article 35, second paragraph, of the Wbp to provide the following information within four weeks:

- (1) a complete overview in comprehensible form of the data subject concerning personal data;
- (2) a description of the purpose or purposes of the processing;
- (3) the categories of data to which the processing relates;
- (4) the recipients or categories of recipients as well as
- (5) the available information on the origin of the data.

36. The AP has already taken the position with TGB in the decision on the objection of 27 January 2017 that the right of access is fulfilled when a complete overview in comprehensible form of this personal data is provided, see marginal numbers 25-27.7 Only if not with an overview If the objective of the right of access can be met, the [APPLICANT] can claim a copy, the AP concluded.

37. TGB further argues that it is not required to undertake internal analyzes and the recording of deliberations [APPLICANT], except insofar as it contains personal data. Like the AP under marginal 31 of the decision of 27 January 2017, [APPLICANT] cannot simply

claim copies. Now that TGB does not yet have an overview and additional information provided as explained above, it is not yet possible to verify whether the overview and the additional information the objectives of the right of access are adequately met. To the ask whether [APPLICANT] is entitled to copies of the chat messages and the internal instruction comes the AP 6 Judgment of the Den Bosch Court of Appeal of 16 January 2006, NJF 2006, 91 (Dexia), recital 4.6.3.

7 See also ABRvS 4 March 2015, ECLI:NL:RVS:2015:612, r.o. 5.1 and ABRvS 20 January 2016, ECLI:NL:RVS:2016:85, r.o. 3.3.

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therefore not allowed.

Exceptional situation Article 43 of the Wbp

38. TGB argues that Article 35 of the Wbp must be disapplied, because a exceptional situation as referred to in Article 43, opening words and under e, of the Wbp. In that context TGB argues that providing an overview of [APPLICANT]-related personal data requires an extraordinary effort on the part of TGB. To this end, TGB points out that it and [APPLICANT] conducted business between 2004 and 2009. [CONFIDENTIAL]. Providing a overview of his personal data, given that size, such an extraordinary effort and administrative burden, that TGB's rights and freedoms are affected.

39. In its decision on the objection of 17 January 2017, the AP substantiated that and why the appeal of TGB on Article 43, opening words and under e, of the Wbp fails (under marginal numbers 28 and 29). For brevity the AP refers to it. What TGB put forward at the hearing about the minimum importance of the information [CONFIDENTIAL], does not lead to a different conclusion. The starting point is that it it is decisive that the data subject is, as a rule, with regard to the personal data processed about him/her

is entitled to knowledge with regard to 'the same' as what the person responsible has about him

stores/processed.⁸ It is not up to TGB to assess whether that information is important for

[APPLICANT] or not.

Conclusion: violation Wbp

40. In view of what has been set out in the decision on the objection of 27 January 2017 and the foregoing, the

AP concluded that now TGB has no overview and additional information to [APPLICANT]

strengthened about the processing of the personal data of [APPLICANT], TGB acts contrary to

Article 35, second paragraph, of the Wbp.

41. TGB further argues in this context that in view of the court's judgment it is in any case not possible to

maintained that there was an obvious violation of the Wbp. TGB hereby misunderstands that the question of whether

[APPLICANT] abuses his right of access - which question is denied by the AP

answered – is independent of the question of whether the Wbp is being violated. Now it is further established that there is

a violation of the Wbp, the AP does not get to discuss the argument of TGB that is not

the prioritization criteria from the Policy Rules for Enforcement by the Dutch DPA (Government Gazette 31 January 2011, no.

1916), also compare the explanation of this policy in the decision on objection of 27 January 2017, under

edge number 13.

Principle obligation to enforce; choice for order subject to penalty

42. From Article 65 of the Wbp, viewed in conjunction with Article 5:32(1) of the General Act

administrative law (Awb) follows that the AP is authorized to impose an order subject to a penalty in the event of violation

of Article 35, second paragraph, of the Wbp.

⁸ Cf. also the conclusion of the AG in the judgment of the Supreme Court of 29 June 2007, ECLI:NL:PHR:2007:AZ4663, under

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43. Pursuant to Article 5:2, first paragraph, under b, of the Awb, the order subject to a penalty is aimed at terminating of the detected violation and the prevention of repetition.

44. In view of the public interest served by enforcement, the AP will, in the event of violation of a must, as a rule, exercise its enforcement powers. special circumstances in which enforcement action should be waived do not arise in front of.

5. Order subject to penalty and beneficiary period

45. The AP imposes the following burden on TGB:

TGB must provide [APPLICANT] with the following information:

- (1) a complete overview in comprehensible form of the data subject concerning personal data;
- (2) a description of the purpose or purposes of the processing;
- (3) the categories of data to which the processing relates;
- (4) the recipients or categories of recipients as well as
- (5) the available information on the origin of the data.

46. In view of what TGB has put forward about the effort involved in drawing up a overview is involved and the size of the number of documents containing personal data [APPLICANT], the AP attaches to this charge a grace period of two months which ends on July 11, 2017.

47. If TGB does not meet the burden before the end of the beneficiary period, it forfeits a penalty. The AP sets the amount of this penalty at an amount of € 12,000.00 for each week that the load is not (fully) carried out, up to a maximum of € 60,000.00.

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6. For the information of the parties

48. The decision on the objection of 27 January 2017 with reference [CONFIDENTIAL], the present decision to the imposition of the order subject to a penalty and the decision of today on [APPLICANT] (annex 4) together the decision of the AP on the objection of [APPLICANT]. An appeal against this decision is possible at: the court.

Yours faithfully,

Authority Personal Data,

[WG]

mr. A. Wolfsen

Chair

Remedies

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 your place of business or residence falls. You must provide a copy of this decision. Submitting a notice of appeal does not suspend the effect of this decision.

If immediate urgency, in view of the interests involved, so requires, you can also request make a preliminary injunction to the preliminary relief judge of this court.

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