

Registered and by fax

[CONFIDENTIAL]

Authority for Personal Data

[CONFIDENTIAL]

Date

[CONFIDENTIAL]

Subject

Load under duress

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) will be sent. This decision is part of the further decision-making of the Dutch Data Protection Authority (AP) on the objection that [APPLICANT] has filed against the decision of the AP of September 7, 2016, reference [CONFIDENTIAL] (primary decision).

1 Introduction

1. [APPLICANT] has submitted a request to TGB pursuant to Article 35 of the Protection Act

personal data (Wbp). He has asked for:

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

incorporated;

- a transcript 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 te
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 of August 11, 2016, received on August 15, 2016, [APPLICANT] has requested
enforcement submitted to the AP.

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

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

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

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

8. In a decision on an objection dated 27 January 2017, the AP revoked the primary decision and instead
decision made a new decision. The AP has the enforcement request that pertains to non-disclosure
of an overview and additional information as referred to in Article 35, second paragraph, of the Wbp
and has also announced that it intends to impose an order subject to periodic penalty payments on TGB.

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

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

11. On 16 February 2017, a hearing was held in response to the intention. Of this

hearing has been recorded. This is attached to this decision as Annex 1.

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

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

13. The objection against the primary decision made by [APPLICANT] has been declared well-founded by the decision on the 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 include 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 regarding the failure to provide an overview and additional information as referred to in Article 35, second paragraph, of the Wbp. The AP has TGB and [APPLICANT] then, simultaneously with the declaration of well-founded objection, announced its intention 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 an intelligible form of the data subject's 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

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

4. Part II of the decision on the 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 backtrack from its intention to impose a burden

to impose coercion. In that context, TGB first of all argues that [APPLICANT] abuse of the right of access. In case that point of view is not followed, TGB argues that Article 35 of the Wbp does not confer a right to copies of documents and that it is not obliged to provide internal analyzes and the to submit a record of the deliberation to [APPLICANT]. She further argues that the provision of an overview of personal data relating to [APPLICANT] is disproportionate requires effort from TGB.

15. TGB's arguments are discussed below.

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

Abuse of law

-argue TGB

17. TGB states first and foremost that it has been established that [APPLICANT] is abusing the right of inspection. TGB points to this

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 ruled against [APPLICANT]'s request for TGB

on the basis of article 46 of the Wbp to still order his request as referred to in article 35 of the Wbp

to point. To this end, the court has considered that [APPLICANT]'s request does not meet the requirements

objectives of the Wpb, because it has not been made plausible that [APPLICANT] believes the correctness and wants to ascertain the lawfulness of the processing of his personal data. With that makes

[APPLICANT] misuse of the right of inspection, as stated in the judgment. TGB argues that the AP at the

determination of the court that there has been an abuse of law is bound. TGB argues that

the court has established the legal relationship between [APPLICANT] and TGB pursuant to Article 46 of the Wbp

to the effect that [APPLICANT] does not invoke the right of inspection under the Wbp in this case

due. In any case, the AP must adopt a very restrained attitude when assessing whether

[APPLICANT] may make use of the right of inspection, argues TGB. TGB has substantiated this

this point of view refers to the parliamentary history of the Enforcement Act

consumer protection, which expresses the responsibility for

Acting carefully in consumer matters lies 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 the enforcement request was granted in

A different explanation of the consequences of the judgment for the enforcement procedure leads according to

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

in combination with the imposition of an order subject to periodic penalty payments, this leads to the same legal process being taken twice

is used. At the hearing of 16 February 2017, TGB clarified that its objection was over

is mainly due to the fact that in both proceedings it is requested that execution be carried out under penalty of a penalty indicate the obligation to submit documents.

from which it follows that the AP as part of the administrative power establishing the legal relationship

to be followed by the judiciary. Moreover, according to TGB, any other decision would lead to a violation

of the principles of legal certainty, confidence 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 thereby in principle commits an unlawful act.

Finally, TGB argues that if the DPA does not consider itself bound by the court's verdict,

18. Also apart from the court's ruling, TGB argues that [APPLICANT] abuses the

right of inspection. According to TGB, it has been established that [APPLICANT] uses the right of inspection for a purpose other than

checking whether his personal data has been processed correctly and lawfully: according to TGB will

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

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, TGB

with reference to recital 41 to Directive 95/46 (the Directive). Now the [APPLICANT]

is not for that reason, 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 it follows, according to her, that if the

right of access is not used for the purpose for which it was granted, the request for access is beyond the scope

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

inspection request must check whether the purpose of that request is in line with the purpose of the Wbp, according to TGB.

position [APPLICANT]

19. [APPLICANT] takes the position that an administrative law enforcement procedure - different

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

indicates that the DPA is authorized to proceed with enforcement independently of [APPLICANT]'s request. 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 Central Netherlands District Court, in which this

court in a similar case – in which another applicant invoked 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 law.

court verdict

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

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3.9 Various civil proceedings are or have been pending between the parties, in which [APPLICANT] TGB accuses imputably of having failed to fulfill its obligations towards [APPLICANT]. It has been argued without contradiction by TGB that [APPLICANT] currently has already tried to request the requested documents through civil proceedings, among other things with an appeal to Articles 22, 85 and 843a Rv. and that the parties will also file summary proceedings before the preliminary relief judge of the District Court of Amsterdam. In all procedures rejected the request.

3.10 The court is of the opinion that the present request of [APPLICANT] does not comply the objective of the Wbp. It has become sufficiently plausible that [APPLICANT] with his request is not intended to invalidate the correctness and lawfulness of the processing to verify his personal data. From the documents submitted and the oral processing has shown that [APPLICANT] has made the request with the aim of submitting documents to get hands that he wants as evidence in the underlying proceedings against TGB to use. This is abundantly clear from the additional request of [APPLICANT] in which he requests, among other things, to be provided with all documentation showing that TGB op or actually closed positions of [APPLICANT] around September 19, 2008.

[APPLICANT] thus abuses his right of inspection as referred to in Article 35 of the Wbp.
rating AP

21. The AP comes to the following assessment.

22. Contrary to what TGB argues, the AP is of the opinion 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 this is contained in an unassailable judgment decisions on a legal relationship in dispute between the parties have binding force, see Article 236, first member, Rev. The AP itself is not a party to the dispute in which judgment has been rendered. Only TGB and After all, [APPLICANT] are a party to the dispute before the court. Therefore, the decision of the

court has no binding force for the AP. In addition, [APPLICANT] has an appeal brought against the verdict of the court, so that there is no unassailable verdict that has acquired 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 the AP, in view of the judgment must be restrained. In this context, the AP considers that it has been designated as the competent authority administrative body that supervises the processing of personal data in accordance with the by and stipulated by law (Article 51, first paragraph, 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 therefore there is also no obligation for it to comply with the judgment to be restrained. In addition, the Wbp system is characterized by a differentiated

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

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system of enforcement (and legal protection), in which the civil law and the administrative law path coexist.² Given the legal system, both procedures can coexist: the law leave room for the existence of proceedings before the civil court on the basis of Article 46 of the Wbp in addition to administrative law enforcement by the AP. In view of this, the AP – regardless of how that fits into the consumer law is regulated – not the reticent attitude advocated by TGB.

24. In view of the foregoing, the AP sees reason to independently investigate whether [APPLICANT] is abusing it exercise his right of access. In doing so, it will take into account the conclusions of the court in his verdict, by explicitly assessing whether – and if not, why not – the AP accepts the court's conclusions

shares. Contrary to what TGB argues, this is not contrary to the Trias Politica, the legal certainty, principle of confidence or due care. Because the verdict of the court has not been rendered in a procedure to which the AP is a party, the AP is not bound by the decisions in that judgment as before has already been explained. From the point of view of due diligence, this judgment must be taken into account kept, which the AP does in this way. There is no question of confidence generated by the AP, now that this requires that commitments attributable to the administrative body have been made. One such promise has not been made. A decision in a court judgment to which the AP is not a party is not attributable to the AP.

25. There is also no reason to conclude that enforcement action by the AP is in conflict in this case would come with the ne bis in idem principle (or, the AP adds, the una via principle). Both principles only apply 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', applies that a second prosecution of the same offense is not allowed.³ Now the imposition of a charge under penalty is a sanction aimed at restoring the lawful situation, this is not the case a criminal charge, so the principles do not apply.

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

27. The decision on objection of 27 January 2017 also states that the Wbp gives everyone the right agrees to turn freely and at reasonable intervals to the responsible party with the request to state whether personal data relating to him are being processed and that the interest in such

² In this context, see the explanatory memorandum to the Wbp, Parliamentary Documents 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 number 21 of that decree).⁴

28. The presupposition of the interest in invoking the right of inspection does not imply that the motive

by which a data subject invokes the right of inspection is irrelevant: in line with the judgment of the

Den Bosch Court of Appeal 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 an abuse of law, it must be investigated whether the request in

agreement has been made with the purpose of Article 35 of the Wbp. This is also in line with the TGB

Smith judgment cited.

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 will be processed by the controller (TGB).

processed, and whether the representation of his personal data in TGB's processing is correct, for the purpose or

the purposes of the processing are complete and relevant and whether TGB enters its personal data

processed in accordance with legal requirements.⁵

30. At the hearing on February 16, 2017, [APPLICANT] stated that with his request on

Pursuant to Article 35 of the Wbp, the purpose is to find out to whom TGB which concerns him

made personal data available. He further substantiated this by stating that

TGB in the civil liability proceedings brought by [APPLICANT] against TGB

made, has stated that there is a [CONFIDENTIAL]. With his appeal to the right of inspection wishes

[APPLICANT] [CONFIDENTIAL], he says. 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

TGB's statement that [APPLICANT] has received documents in the past in which his contains personal data and has never made a request for correction as a result, is in that frame is not enough. Regardless of whether the statement is correct, it is in line 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 data was provided to others, apart from the supervisor, is insufficient in that context: Article 35, second paragraph, of the Wbp provides namely the right to obtain at least an overview with additional information. Considering it the AP sees no reason to conclude that [APPLICANT] abuses his right of access.

31. Even if – as the court considered 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 basis for the conclusion that [APPLICANT] abuse makes the right of access. As the Court of Den Bosch also concluded in the Dexia case, the sole circumstance that a data subject with the data once obtained can then also be used by another 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, recital 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 law.⁶ The AP also takes into account that TGB has not and that it has also not been shown that this purpose 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 deduces from this judgment that [APPLICANT] with his request for access only to purpose may be to check the correctness of the processing of his personal data, TGB fails to recognize that the Directive and the Wbp do not prevent data once obtained from being used for another purpose – for example a civil procedure – can be used. As noted above, that is not enough data to assume abuse of law.

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

Right to copies of documents

34. TGB argues that Article 35 of the Wbp does not provide a right to a copy of documents. The AP understands this argue in such a way that an order subject to periodic penalty payments cannot in any event extend to the provision of copies of documents containing personal data of [APPLICANT]. To this end, TGB refers to it 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 an intelligible form of the data subject's 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
- (5) the available information about the origin of the data.

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

37. TGB also argues that it is not obliged to provide internal analyzes and the recording of deliberations to

[APPLICANT], except insofar as it contains personal data. Like the AP below

marginal number 31 of the decision of 27 January 2017, [APPLICANT] cannot simply

claim copies. However, now that TGB does not yet have an overview and additional information

provided as explained above, it is not yet possible to determine 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 to the AP

6 Judgment of the Den Bosch Court of Appeal of 16 January 2006, NJF 2006, 91 (Dexia), consideration 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, l.r.

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therefore not allowed.

Exceptional situation Article 43 of the Wbp

38. TGB argues that Article 35 of the Wbp should not be applied because a

state of emergency as referred to in Article 43, preamble and under e, of the Wbp occurs. In that context

TGB argues that providing an overview of [APPLICANT] related

personal data requires an extraordinary effort from TGB. To this end, TGB points out that it and

[APPLICANT] conducted business between 2004 and 2009. [CONFIDENTIAL]. Providing a

an overview of his personal data would, given that size, require such an extraordinary effort and

administrative burden, that TGB is affected in its rights and freedoms.

39. In its decision on the objection of January 17, 2017, the AP has justified that and why the appeal of

TGB on Article 43, preamble 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 what is decisive is that the data subject, as a rule, with regard to the personal data processed about him has a claim to knowledge with regard to 'the same' as that which the controller has about him stores/processes.⁸ It is not up to TGB to assess whether that information is important for [APPLICANT] or not.

Conclusion: Wbp violation

40. In view of what has been set out in the decision on the objection of 27 January 2017 and the foregoing, the AP concludes that now TGB has no overview and additional information to [APPLICANT]. strengthened about the processing of the personal data of [APPLICANT], TGB acts in violation of Article 35, second paragraph, of the Wbp.

41. TGB also argues in this context that in view of the judgment of the court it is in any case impossible maintained that there was an obvious violation of the Wbp. TGB ignores that the question of whether [APPLICANT] abuses his right of inspection – which question is rejected by the AP answered – is separate from the question of whether the Wbp is being violated. It is now further established that this is the case

a violation of the Wbp, the AP does not get to discuss TGB's argument that it is not complied with the prioritization criteria from the Enforcement Policy Rules by the Dutch DPA (Stcrt. 31 January 2011, no. 1916), also compare the explanation of this policy in the decision on objection of 27 January 2017, under margin number 13.

Duty of principle to enforce; choice for burden under penalty

42. From Article 65 of the Wbp, viewed in conjunction with Article 5:32, first paragraph, of the General Act administrative law (Awb) follows that the AP is authorized to impose an order subject to periodic penalty payments in the event of a 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 4.11.

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43. Pursuant to Section 5:2(1)(b) of the Awb, the order subject to periodic penalty payments is aimed at terminating of the observed violation and the prevention of recurrence.

44. In view of the public interest served by enforcement, the AP will, in the event of a violation of a statutory regulation, as a rule, must make use of its enforcement powers. Special circumstances in connection with which enforcement action must be waived do not arise for.

5. Order subject to periodic penalty payments and grace period

45. The AP imposes the following order on TGB:

TGB must provide the following information to [APPLICANT]:

- (1) a complete overview in an intelligible form of the data subject's 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
- (5) the available information about 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 DPA attaches a grace period of two months to this order ends July 11, 2017.

47. If TGB does not pay the order before the end of the beneficiary period, it will forfeit a penalty. The AP sets the amount of this penalty at an amount of € 12,000.00 for each week that the order has not been (fully) executed, 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 imposition of the order subject to periodic penalty payments and today's decision to [APPLICANT] (Appendix 4). together the decision of the AP on the objection of [APPLICANT]. There is an appeal against this decision the court.

Yours faithfully,

Authority for Personal Data,

[WG]

Mr. A. Wolfsen

Chair

Remedies

If you do not agree with this decision, you can within six weeks from the date of sending it decision pursuant to the General Administrative Law Act to file a notice of appeal with the court (sector administrative law) in the district in which your place of business or place of 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 submit a request for make provisional injunction with the provisional relief judge of this court.