Confidential/Registered

Date

November 19, 2019

Subject

Decision on objection

Our reference

Contact

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Your letter from

March 5, 2019

Dear Mr Wildeboer,

You will hereby receive the decision of the Dutch Data Protection Authority (AP) on the objection of 10 January 2019, supplemented with the grounds by letter dated 5 March 2019. The objection is directed against the decision of the DPA dated December 3, 2018 (reference xxx), whereby the DPA accepted the request of your client, objector, dated March 24, 2017 to take enforcement action. The decision of December 3 2018 is hereafter referred to as the primary decision.

In this decision on your notice of objection, your objections are partially upheld. Both foundation Benchmark GGZ (hereinafter: SBG) as the Alliance for Quality in Mental Health Care (hereinafter: Akwa GGZ) have processed personal data about health within the meaning of Article 4, parts 1 and 15, of the General Data Protection Regulation (GDPR). SBG has insufficient information that it received anonymised, so that the risk of indirect traceability was insufficient

taken away. At the beginning of 2019, SBG transferred data to Akwa through an 'impoverished dataset'

mental health care. SBG and Akwa GGZ cannot rely on any of the statutory provisions for the processing

grounds for exception as included in Article 9, paragraph 2, of the AVG, which prohibit data

about health could lift. As a result, it is for SBG based on

Article 9, paragraph 1, GDPR was prohibited to use the dataset containing personal data about health

and for Akwa GGZ to take over an impoverished dataset from SBG. The AP will only have one

impose an enforcement measure on Akwa GGZ in the form of a reprimand, because SBG as

legal entity no longer exists.

Annex(es) 3

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1 Introduction

1. On March 24, 2017, your client, the objector, requested the AP to take enforcement action

towards SBG. The objector requested the AP on the basis of the Protection Act at the time

personal data (Wbp) and the Medical Treatment Contracts Act (WGBO)

to take enforcement action against the unlawful collection and processing of special

personal data by SBG, as this data is processed without the consent of the

patient. The objector requested the suspension of the processing of the data by SBG and

believes that the AP should supervise the immediate destruction of the data as stored in the

SBG database.

2. After the objector gave the AP notice of default on November 16, 2018, the AP on 3

December 2018, a primary decision was taken on the enforcement request. In the primary decision

the circumstance that SBG is transferred to Akwa GGZ is discussed. Considering the fact

that the investigation into SBG has not yet been completed, there was no possibility for the AP at that time

to take enforcement action against SBG. For that reason, the AP has accepted the enforcement request from objector rejected.

3. An objection was lodged against the rejection of the enforcement request on 10 January 2019. During the objection procedure, the investigation into the enforcement request has been completed. In the Report as a result of an investigation into data processing by SBG (hereinafter: the investigation report), definitively established on July 26, 2019, it has been concluded that SBG personal data about health has processed within the meaning of article 4, part 1 and 15, of the AVG, or - before the AVG of was applicable - within the meaning of Article 2, preamble and under a, of the Wbp. SBG has data that it received insufficiently anonymised, which increases the risk of indirect traceability insufficient amount was removed. SBG could not rely on any of the processing criteria legal grounds for exception that would prohibit the processing of health data can lift. As a result, for SBG, pursuant to Article 9, paragraph 1, GDPR was prohibited from processing the dataset containing personal data about health. The findings from the investigation report have prompted the AP to issue a to issue an enforcement intention, addressed to both SBG and Akwa GGZ, including a processing ban.

4. This decision on the objection concerns both the grounds of the objection against the decision of 3 December 2018 as on the views of SBG and Akwa GGZ on the intention to enforce and the investigation report on which the intention to enforce is based.

2. Course of the procedure

5. On March 24, 2017, the objector submitted a request for enforcement to the AP.

6. In a letter dated 25 August 2017, SBG responded to the request from the AP for information.

7. By letter dated 16 November 2018, the objector has given the AP notice of default due to the failure to decide on the request.

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8. By decision of December 3, 2018, the DPA has requested enforcement from the objector

rejected because the investigation into SBG had not yet been completed.

9. By letter dated 10 January 2019, the objector pro forma objected to the primary

decision of the AP. The grounds of the objection were supplemented by letter dated 5 March 2019.

10. In a letter dated 16 January 2019, SBG and Akwa GGZ responded separately in response to

of the AP's request for information.

11. On May 21, 2019, the AP adopted a provisional version of the investigation report.

12. By letter dated 28 May 2019, received by the AP on 3 June 2019, Akwa GGZ informed the AP

notified that the depleted dataset has been quarantined.

13. On May 29, 2019, an intention to enforce against both SBG and Akwa GGZ was issued to

following the research report.

14. On June 27, 2019 and on June 28, 2019, the AP received an opinion from SBG and from Akwa GGZ

with regard to the content of the research report.

15. On July 3, 2019, the AP held a hearing. The objectors and applicants were included

for enforcement, your colleague at the time mr. H.W. Dekker as a lawyer and xxx as an expert

present. On behalf of SBG and Akwa GGZ, mr. M.C.L. Rooke and mr. O.F.A.W. van Haperen as

lawyers and xxx as director of Akwa GGZ. A record of the hearing was made,

which you will find enclosed as Appendix 1.

16. The view as put forward by the lawyers of SBG and Akwa GGZ during the

hearing, the AP has given cause to adjust the investigation report. By letter dated 26 July

In 2019, your former office mate, Mr. Dekker, as the objector's lawyer, as well as the

lawyers of SBG and Akwa GGZ (a copy of) the amended final investigation report

received. The lawyer of the objector has also been given the opportunity to file a

to provide a substantive response to the investigation report and the case within a period of three weeks related documents.

17. In a letter dated 8 August 2019, Akwa GGZ informed the AP that the depleted dataset has been definitively destroyed.

18. In a letter dated 13 August 2019, Mr. Dekker, on behalf of your client, provided a substantive response to the amended final investigation report and the documents relating to the case.

19. In a letter dated 29 August 2019, the lawyers of SBG and Akwa GGZ submitted a substantive response given on the amended final investigation report and the documents relating to the case.
They also submitted a statement from Info Support B.V. that the depleted database, inclusive backup files, has been permanently deleted.

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Legal framework

20. The relevant legal framework is included as Annex 2 to this Decision. The request for enforcement is submitted by the objector on March 24, 2017, before the GDPR came into force.
The primary decision pursuant to Article 7:11 of the Awb will be completely reconsidered on the basis of the facts as they exist at the time of review (ex nunc review). This means that in connection with the application of the GDPR as of May 25 2018, the assessment of the objection takes place on the basis of the GDPR.

4. Judgment of the AP

21. In the opinion of the AP, both SBG and Akwa GGZ have personal data about health processed within the meaning of Article 4, part 1 and 15, of the GDPR. SBG has data that it received insufficiently anonymised, so that the risk of indirect traceability is insufficient

was taken away. SBG and Akwa GGZ cannot rely on one of the following for the processing
legal grounds for exception that would prohibit the processing of health data
can lift. As a result, for SBG, pursuant to Article 9, paragraph 1, GDPR
was prohibited from processing the dataset containing personal data about health and for
Akwa GGZ to take over an impoverished dataset from SBG. The AP will only be an enforcer
impose a measure on Akwa GGZ in the form of a reprimand, because SBG as a legal entity cannot
more exists.

5. The investigation

22. Following your client's enforcement request, the DPA has launched an investigation into the
method of SBG with regard to the processing of personal data and is this processing
tested against relevant laws and regulations. SBG makes data from the healthcare sector measurable so that
in mental health care can be benchmarked with the aim of maintaining and increasing the quality of care
improve. Mental health care providers have patients complete questionnaires for this purpose, after which this Routine
Outcome Monitoring (ROM) data are supplied to the ZorgTTP foundation. The supplied data
consist of 29 mandatory data categories per patient. These 29 mandatory data categories
are pseudonymised on location at the mental health care provider by four of the 29 data categories
to hash.1 After ZorgTTP has applied encryption to these four categories of data, SBG receives
these processed data.2 At the beginning of 2019, SBG transferred an 'impoverished dataset' to Akwa GGZ. This
dataset consists of 19 data categories per patient instead of the original 25
data categories per patient provided to SBG.3

1 Hashing is a scrambling or mutation of data using a mathematical function known as a hash function.
called function. A hash function has the following properties:

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The result always has the same size regardless of the input.

It is not possible to obtain the input based on the result. A hash function therefore only works in one direction.

The same input always leads to exactly the same result. The smallest change (1-bit) leads to a completely different outcome.

Hash functions are not necessarily secret and accessible and useable for everyone.

It is therefore possible to calculate the output for predictable or frequent inputs. This is a link

between the input and the corresponding output. This is called a link table. In a link table the result can be

searched and the corresponding input.

2 See also p. 8 to 11 inclusive of the final version of the Report as a result of an investigation into data processing by SBG.

3 See also p. 12 and 13 of the final version of the Report as a result of an investigation into data processing by SBG.

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23. The investigation report, finalized on July 26, 2019, concluded that SBG

has processed personal data about health within the meaning of Article 4, parts 1 and 15, of the

AVG, or - before the AVG was applicable - within the meaning of Article 2, preamble and under a, of the

Wbp. SBG has insufficiently anonymised the data it received, which increases the risk of

indirect traceability was insufficiently removed. SBG could handle this one

processing does not rely on one of the legal grounds for exception as referred to in Article 9,

second paragraph, of the AVG that could prohibit the processing of health data

to cancel. As a result, it is prohibited for SBG under Article 9(1) of the GDPR

was to process the dataset containing personal data about health. Both SBG and

Akwa GGZ can be qualified as a controller within the meaning of Article 4, part 7,

of the GDPR. The findings from the investigation report have prompted the AP to decide on 29

to issue an enforcement intention in May 2019, addressed to both SBG and Akwa GGZ,

containing a processing prohibition pursuant to Article 58, paragraph 2, preamble and under f, of the

AVG.

The objector's position with regard to the investigation report and the intention to

enforcement

24. By means of an opinion during the hearing and by means of a written opinion

of August 13, 2019, the representative of the objector has stated the position with regard to the

investigation report and the intention to enforce. The objector argues that she

interested party and that the request for enforcement by the AP must therefore become admissible

declared. The objector endorses the AP's conclusions from the final

investigation report in response to its enforcement request. The enforcement action of the

AP should not only consist of imposing a processing ban on SBG and Akwa GGZ

pursuant to Article 58, second paragraph, opening words and under f, of the GDPR, but in addition the AP

apply Article 58, second paragraph, opening lines and under g, of the GDPR, being the deletion of the

personal data.

SBG's position with regard to the investigation report and the intention to enforce

25. According to SBG, the investigation report was drawn up carelessly and the conclusions cannot be drawn

the AP draws are not supported by the contents of the investigative report. The AP makes

insufficient distinction between the four different data processing activities carried out by

SBG are performed. In these data processing activities there is no direct or

indirectly traceable data to a person. The AP fits the Breyer judgment in the investigation report

of the Court of Justice of the EU (CJEU)4 incorrectly, because the traceability of the data to a

person is not or only possible for SBG with a disproportionate use of money, manpower or

resources. SBG cannot be qualified as an independent controller either

within the meaning of Article 4, part 7, of the GDPR, because SBG itself does not define the frameworks within which it

operates

has established. SBG does qualify as a processor that processes the

data supplied is processed for benchmark reports.

26. In the hypothetical situation, according to SBG, that personal data is involved, SBG subsequently set out in the opinion on the basis on which a healthcare provider should act as

4 CJEU judgment of 19 October 2016, Patrick Breyer v. Bundesrepublik Deutschland, C-582/14, ECLI:EU:C:2016:779.

controller and SBG as processor can invoke. For data processing activity 1, namely the onward delivery by SBG of the legally required performance indicators ("measuring instruments") on behalf of the affiliated healthcare providers Zorginstituut Nederland, the healthcare provider can invoke article 6, first paragraph, sub c AVG (legal obligation) yo. Article 9, second paragraph, part i GDPR (reasons of public interest op the field of public health). The data processing activity 2 consists of two levels.

The first level is the processing of ROM information by SBG to benchmark against intra-institution level, at which the healthcare provider can invoke Article 6, first paragraph, under b (implementation of agreement) and c AVG jo. Article 9, second paragraph, part h in conjunction with Article 30, third paragraph, preamble and under a UAVG (processing when providing health care or social services or treatments or managing healthcare systems and services). At the second level, additional setting benchmarking with ROM information, the healthcare provider can do based on article 6, first paragraph, sub c AVG and potentially sub b jo. Article 9(2)(h) in coherence with article 30, third paragraph, opening lines and sub a UAVG. The third data processing activity consists of offering the digital safe for scientific research. Thereby can the healthcare provider invoke article 6, first paragraph, sub b AVG jo. article 9, paragraph 2, part h GDPR. Data processing activity 4 constitutes Argus record keeping, whereby the healthcare provider can, according to SBG, invoke Article 6, first paragraph, sub c AVG jo. article 9, second paragraph, part i GDPR (the processing is necessary for reasons of public interest on the

field of public health). SBG is of the opinion that the objector has been declared inadmissible
should have been included in its request for enforcement, because SBG does not process personal data.

27. With regard to the intention to enforce, SBG is of the opinion that this is based on a
incomplete and careless research report and that SBG does not process any personal data. These four
data processing activities take place in accordance with the (U)AVG, whereby SBG
is a processor. Not SBG, but a (a delegation of) patients from mental health care, healthcare providers and
health insurers jointly determine the type of data, the method of supply and the purpose and means
of the data processing activities. Only in respect of one data processing activity
SBG may be considered joint controller. This is about it
processing of ROM information by SBG at intra or extra institution level. For this
data processing activity, the processing prohibition must be imposed on the healthcare provider.
The AP should also refrain from enforcement action because it is disproportionate in relation to
the interests to be served by this, now that SBG no longer has the data and because SBG already
has been dissolved. There is a definitive processing ban for those that have already been discontinued
data processing activities that can no longer be resumed by SBG. It was better
if the AP had imposed a reprimand or an order subject to periodic penalty payments, pursuant to art. 58,
second paragraph, sub b, of the AVG.

Akwa GGZ's position with regard to the investigation report and the intention to enforce

28. Now that Akwa GGZ has meanwhile destroyed the impoverished dataset obtained from SBG and, insofar as it
Akwa GGZ is concerned, the study only relates to the impoverished persons taken over from SBG
dataset, according to Akwa GGZ there is no longer any relevance to discuss the content
research report. With regard to the intention to enforce, including a
processing ban, Akwa GGZ is of the opinion that this prohibition is insufficiently clear and specific.
The intended processing ban can only relate to the depleted dataset, but

Akwa GGZ has definitively destroyed the impoverished dataset including backup files. Because of this enforcement action is so disproportionate in relation to the interests to be served by it, that of action in this specific situation should be refrained from.

Judgment of the AP per component

29. In the following, the AP will discuss the various relevant parts with regard to the objection procedure.

Health data

30. An important point of dispute in this objection procedure is the question whether the data that SBG (via ZorgTTP) has received from healthcare providers is a processing of personal data about health the meaning of article 4, part 1 and 15, of the GDPR. The applicant for enforcement on the one hand and SBG and Akwa GGZ on the other hand agree that the data cannot lead to direct identification of a person. The applicant for enforcement endorses the conclusions of the investigation report of the AP, namely that the data processed by SBG and Akwa GGZ are insufficiently anonymised as a result of which it concerns indirectly traceable personal data about health. SBG argues that the data processing activities are not indirect to a natural person traceable health data. According to SBG, the AP fits the judgment in the investigation report Breyer of the CJEU incorrectly, because the traceability of the data to a person pre SBG is not possible or only possible with a disproportionate use of money, manpower or resources.

31. Article 4(1) of the GDPR defines “personal data” as “any information about a identified or identifiable natural person (“the data subject”); becomes identifiable considered a natural person who can be directly or indirectly identified, in particular by means of an identifier such as a name, an identification number, location data, an online identifier or one or more elements characteristic of the physical, physiological, genetic, psychological, economic, cultural or social identity of that natural person”.

Article 4(15) of the GDPR defines “health data” as “personal data that

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

data on health services provided that provide information about his state of health

will be given'.

32. In the Breyer judgment, the CJEU explicitly stated that for the question whether a piece of data is

'personal data' can be qualified, it is not required that all information on the basis of which

the data subject can be identified, belongs to one and the same person.5 A piece of data can

however, cannot be qualified as personal data if the identification of the data subject is

is prohibited by law or is impracticable in practice, for example because, given the time required,

costs and manpower- an excessive effort is required, so that the danger of identification in

reality seems insignificant.6

33. In the research report, all steps of the data delivery process of the

patient up to and including the processing of the relevant data by SBG and the related

5 CJEU judgment of 19 October 2016, Patrick Breyer v. Bundesrepublik Deutschland, C-582/14, ECLI:EU:C:2016:779,

paragraph 43.

6 Judgment of the ECJ of 19 October 2016, Patrick Breyer v. Bundesrepublik Deutschland, C-582/14, ECLI:EU:C:2016:779,

paragraph 46.

involved parties. The research report shows that the healthcare providers are obliged to 29

provide categories of data, such as gender, year of birth, name of the healthcare provider and the

start and end date of the care process. The SBG dataset exists per record upon receipt

(related to one data subject / patient) from four hashed attributes and 25 pseudonymised

attributes.

34. The investigation report of the AP shows that SBG does not use any form of
randomization techniques, at the time SBG receives the dataset. This means that there are none
technique is applied so that the data is sufficiently random, i.e. random or
indefinite, making it no longer possible to trace them back to a specific person.7 Well
SBG applies generalization to certain data categories from the dataset, resulting in
avoid individualizing a data subject by merging the data subject with
a number of other persons. For example, the date of birth is not stored in the dataset, but it is
year of birth. However, there are 25 data categories, so individualization is still possible
based on data such as the location of the healthcare provider, gender, start and end date
of the treatment, etc.8

35. With regard to four data categories, namely the BSN, link number, DBC trajectory number and
Zorgtrajectnummer, SBG applies a pseudonymization method that is a combination of a
hash function and encryption. It is true that only ZorgTTP has a key, but this key remains
equal, so that the results of this pseudonymization process per unique BSN, link number,
DBC trajectory number and Care trajectory number are always the same. In other words, a unique BSN,
coupling number, DBC trajectory number and Care trajectory number, will be added after the pseudonymization process
ZorgTTP, always lead to the same pseudonymised values. This makes it possible for SBG
to add new data to the same pseudonymised BSN, link number, DBC trajectory number and
To be able to continue to link the care pathway number.9 Containing the data transferred to Akwa GGZ
19 attributes, including three pseudonymized attributes.

36. The AP establishes on the basis of the research report that SBG based on the pseudonymised dataset
has taken insufficient technical safeguards to adequately mitigate the risks of traceability
extent, so that it cannot be qualified as an anonymous dataset.10
Considering the detailed nature and amount of data provided by SBG or Akwa GGZ about one
patient is processed, (the risk of) indirect tracing at multiple parties and on the basis of
public sources cannot be prevented and it is therefore impossible to speak of an anonymous one

dataset.11 The mere fact that four categories of data becomes both the hash function and encryption

applied and that the secret key is known to a trusted third party, namely ZorgTTP,

who does not share it with SBG, Akwa GGZ or any other party, does not make it traceable

prohibited by law or impracticable in practice.

7 See also p. 17 and 18 of the final version of the Report as a result of an investigation into data processing by SBG.

8 See also p. 18 of the final version of the Report in response to the SBG data processing investigation.

9 See also p. 19 of the final version of the Report following the SBG data processing investigation.

10 See also p. 19 of the final version of the Report following the SBG data processing investigation.

11 See also p. 18 of the final version of the Report in response to the SBG data processing investigation.

37. The AP has objected to what SBG or Akwa GGZ have put forward in the objection procedure.

no reason to reconsider the research report and the conclusions drawn therein

conclusions. SBG argues that the relevant question is whether a 'motivated intruder', given his

knowledge and available resources such as time, money and manpower, is reasonably able to

identify natural persons from the SBG dataset. Apart from the fact that the

'motivated intruder' test comes from the UK's protection regulator

personal data and as such has no legal force in the Netherlands, the AP deems it plausible

that a motivated intruder who has access to SBG's database can proceed to indirect

identification, based on data from various healthcare providers. Both the Minister of

Public Health, Welfare and Sport as the audit reports of external organizations believe that

the SBG dataset does not contain any personal data. That others believe that this is not the case

of the processing of personal data is irrelevant because it is ultimately up to the AP, the

independent supervisor in this area, which independently assesses whether there is

personal data. Finally, SBG refers to a letter from the Protection Board
Personal Data (CBP) from 2009. One of the conditions for adequate anonymization is that the
processed data must not be indirectly identifying. In the opinion of the AP, such as
set out in the investigation report and in this decision on the objection, is in the case of SBG and
Akwa GGZ is out of the question.

38. The AP thus concludes that the dataset of SBG and the depleted dataset of Akwa GGZ
are personal data within the meaning of Article 4(1) of the GDPR. Now the dataset that SBG (via
ZorgTTP) and the impoverished dataset that Akwa GGZ manages also processes the name of the healthcare provider,
include the start and end date of a care pathway as well as the Primary diagnosis code, contains the
SBG dataset also includes health data within the meaning of Article 4(15) of the GDPR.

Controller

39. Subsequently, SBG argues in its opinion that it cannot be qualified as
controller within the meaning of Article 4, part 7, of the GDPR, but that SBG
must be regarded as a processor within the meaning of Article 4(8) of the GDPR. Not SBG,
but (a delegation of) patients from mental health care, care providers and health insurers together
determined the type of data, the method of supply and the purpose and means of the
data processing activities. The applicant for enforcement endorses the conclusions of the
research report of the AP, namely that SBG should be qualified as
controller within the meaning of Article 4(7) of the GDPR.

40. In Article 4(7) of the GDPR, the controller is qualified as the
legal entity that, alone or jointly with others, has the purposes and means of the processing
establishes personal data. Pursuant to Article 4, part 8, of the GDPR, the processor
qualified as the legal person acting on behalf of the controller
processes personal data.

41. It appears from the investigation report and the information submitted by SBG that SBG has various
conditions and protocols. For example, healthcare providers must provide their data to SBG

in accordance with the manner prescribed by SBG in a data protocol. Being in the data protocol
the nature and specifications of the raw data, the level to which the raw data relates, the manner and

the time of delivery and the minimum required data. In a drafted by SBG
The quality document specifies which quality requirements the healthcare provider must meet. There
For example, audits are carried out on the quality of information security, privacy and the
services. The management of SBG is also ultimately responsible for the information security
policies that apply to SBG's internal environment as well as to the exchange of
data with organizations and individuals.12

42. Although it appears from the above that healthcare providers are responsible for the correct delivery of the data, the AP finds that SBG itself prescribes in the data protocol which type of data to which must be provided by healthcare providers. The quality document also shows that SBG carries out audits and that the management of SBG is ultimately responsible for the information security policy. The AP thus establishes that SBG is responsible for the provision, the management including the quality and security aspects and the correct analysis of the information that SBG receives from healthcare providers and health insurers. That SBG in her has built in internal governance checks and balances so that parties from the field, such as mental health patients, care providers and health insurers can influence the policy pursued, does not change this because SBG, as a legal entity, is ultimately responsible for the policy pursued with regard to the dataset it manages and the purposes and means of the processing of the personal data.

43. Akwa GGZ has taken over a so-called impoverished dataset from SBG, which contains 19 per person contains attributes instead of the 25 attributes as processed by SBG per data subject. Already out of it

fact that Akwa GGZ informed the AP by letter of 28 May 2019 that the impoverished dataset in quarantine has been placed and by letter dated August 8, 2019 that the impoverished dataset is final destroyed, it appears that Akwa GGZ is ultimately responsible for the policy pursued with regard to the impoverished dataset it manages and thus the purpose and means of processing of the personal data.

44. Based on this, the AP qualifies both SBG and Akwa GGZ as a controller within the meaning of Article 4, part 7, of the GDPR because SBG and Akwa GGZ as a legal person, alone or determines, together with others, the purposes and means of the processing of personal data.

Applicability of grounds for exception to the ban on processing special personal data

45. SBG and Akwa GGZ dispute that they process personal data about health and hereby processing can be regarded as a controller within the meaning of Article 4(7) of the GDPR. According to SBG and Akwa GGZ, the controller is the healthcare provider. In the view, SBG has put forward that, in the event of the processing of personal data about health, the healthcare provider can invoke article 9, second paragraph, part h of the GDPR in conjunction with Article 30, third paragraph, opening words and under a, of the UAVG with regard to the ROM information for benchmarking at the intra-institution level. Furthermore, the healthcare provider for additional institution benchmarking with ROM information also rely on Article 9, second paragraph, under h, of the GDPR in conjunction with Article 30, third paragraph, opening words and under sub a of the UAVG.

12 See also pp. 20 and 21 of the final version of the Report as a result of an investigation into data processing by SBG.

46. The AP has determined in marginal number 38 that the dataset of SBG and the depleted dataset of Akwa GGZ contains personal data about health within the meaning of Article 4, parts 1 and 15, of the

AVG. Pursuant to Article 9, paragraph 1, of the GDPR, it is in principle prohibited to use special categories of personal data, including health data. This prohibition is not applicable if SBG or Akwa GGZ can rely on a statutory ground for exception from Article 9, paragraph 2, of the GDPR jo. Articles 22 to 30 of the UAVG. The option given in Article 9, second paragraph, part h of the GDPR is limited by Article 9, third paragraph, of the GDPR.13

47. The Dutch legislature has given substance to the provisions of Article 9(2)(h) of the AVG yo. Article 9, third paragraph, of the GDPR, possibility offered by means of Article 30, third paragraph, of the UAVG. SBG invokes in particular article 30, third paragraph, under a of the UAVG. This provision is aimed at care providers, health care institutions or facilities or social services. The Explanatory Memorandum to the UAVG explains: 'This means that health data may not only be processed by hospitals and other medical institutions, but also by social institutions services insofar as proper treatment of the data subject makes this necessary or when it is necessary for the management of the institution or facility in question. At think of nursing homes and agencies for youth care. Furthermore, this provision allows that individual care providers who do not work at the aforementioned institutions, but for example a practice independent practice, process health data."14

48. According to the AP, it does not appear from the legislative text and parliamentary history that SBG has an appeal pertains to Article 30, third paragraph, sub a of the UAVG. SBG and – insofar as relevant – Akwa GGZ are covered namely not among the aforementioned standard addressees of Article 30, third paragraph, under a of the UAVG. SBG or Akwa GGZ is or has been a foundation that wants mental health institutions to be independent and reliable benchmarking in the field of treatment effect and customer satisfaction. With that they are none healthcare or social services institutions. The processing by SBG and Akwa GGZ is also not necessary for proper treatment of those involved or for management of the relevant institution or facility. SBG or Akwa GGZ are therefore unable to act

relying on Article 9, second paragraph, part h of the GDPR jo. Article 30, third paragraph, sub a of the UAVG.

SBG and Akwa GGZ cannot invoke any of the other general terms either

grounds for exception within the meaning of Article 9, second paragraph, of the GDPR.

49. Based on the above, the AP concludes that both SBG and Akwa GGZ cannot appeal

on one of the general grounds for exception as included in Article 9, second paragraph, of the GDPR.

As a result, both SBG and Akwa GGZ have the general processing ban on special

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

Processing basis

50. Now that SBG and Akwa GGZ cannot rely on one of the general exceptions such as

included in Article 9, second paragraph, of the GDPR on the prohibition of processing of special categories

13 See also: Explanatory Memorandum on the UAVG Implementation Act, Parliamentary Documents II 2017/18, 34 851, no. 3,

p. 42.

14 Explanatory Memorandum UAVG Implementation Act, Parliamentary Documents II 2017/18, 34 851, no. 3, p. 112.

Date

November 19, 2019

Our reference

of personal data pursuant to Article 9, paragraph 1, of the AVG, the AP is also not entitled to a

assessment of the basis for the processing of personal data as referred to in Article 6,

first paragraph of the GDPR.

Sanction

51. The letter of 12 July 2019 from the lawyers of SBG to the AP shows that on 1 April 2019 a

dissolution decision has been taken with regard to SBG. In the opinion of the AP, it is imposing

of a sanction to SBG superfluous, now that SBG has been dissolved and no longer has the

personal data. In the opinion of the AP, having an impoverished dataset,

taken over from SBG by Akwa GGZ, eligible for a reprimand under section 58,

second paragraph, preamble and under b, of the AVG. For a substantiation of this decision, the AP refers

refer to appendix 3, which contains the reprimand.

6. Grounds for the objection

52. In the following, the AP will discuss the grounds of objection, as submitted to the AP by letter

of 5 March 2019. The notice of objection consists of the following grounds:

1. The unreasonably long decision period is contrary to Article 4:14, third paragraph, of the General Act

administrative law (Awb). In this provision, the reasonable term is set at eight weeks. Doing

investigation does not suspend the decision period.

2. The careless decision-making by the AP is contrary to Article 3:2 of the Awb. The primary

decision in no way reflects what the AP's findings have been. The AP

should have shared the information from SBG with the objector as the applicant for enforcement.

3. The decision is inadequately substantiated and is therefore contrary to Article 3:46 of the Awb. From the

decision does not make it clear why the AP is refraining from any form of enforcement.

4. The AP has failed to apply the duty of principle with this request for enforcement

to enforcement.

7. Assessment of the objection

The unreasonably long decision period is contrary to Section 4:14(3) of the Awb

53. You argue that the unreasonably long decision period on your client's request for enforcement is contrary

is with article 4:14, third paragraph, of the Awb. In your opinion, conducting an investigation suspends the decision period

not on.

54. A request for enforcement is a request to make a decision. Pursuant to Section 4:13,

paragraph 1 of the Awb, a decision must be made within the statutory period

specified period or, in the absence of such a period, a reasonable period after receipt of the

application. Pursuant to Section 4:13(2) of the Awb, the reasonable term within which a

decision must be given at eight weeks, unless a notification as referred to in

Article 4:14, third paragraph, of the Awb has been done. Article 4:14, third paragraph, of the Awb stipulates that the

administrative authority, if the decision cannot be made within a period of eight weeks,

must inform the applicant of this, stating a reasonable period within which the

decision can be expected.

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55. The request for enforcement was submitted to the AP by your client on March 24, 2017. By letter of 1 May

In 2017, the AP asked your client for further substantiation. By letter dated May 30, 2017, Mr

AP informed that an investigation is being launched at SBG, but that this investigation would take some time

and your client would be informed of its outcomes. A notice of default from the

AP, filed by letter dated April 18, 2018, was subsequently withdrawn by your client. Then has

your client, by letter dated November 16, 2018, once again served notice of default on the AP. The AP notes that the

decision period on the request for enforcement has been unreasonably long.

The careless decision-making by the AP is contrary to Article 3:2 of the Awb

56. You argue that the careless decision-making by the AP is contrary to Article 3:2 of the Awb. In

the primary decision is too sparsely motivated why the AP refrains from any form of enforcement.

The decision also in no way reflects the AP's research findings

been. Finally, you argue on behalf of your client that the DPA already has the information obtained from SBG

during the investigation should have shared with the objector as the applicant for enforcement.

57. Article 3:2 of the Awb contains a partial codification of the principle of due care and carries

the administrative authority, when preparing the decision, to gather the necessary knowledge about the

relevant facts and the interests to be weighed. In case of a request for enforcement rests on the

administrative body has an obligation to investigate.15 By letter dated 1 May 2017, the AP has your client as the applicant

requested further information until enforcement. In response to requests made by the AP for

information, SBG has provided information by letter of 25 August 2017 and by letter of 16 January

2019. Akwa GGZ also responded to a request for information by letter dated 16 January 2019
by the AP.

58. The AP is of the opinion that, by means of information requests to both your client and SBG and
Akwa GGZ, has fulfilled the duty of investigation resting on the administrative body in a
request for enforcement. In the opinion of the AP it does not follow from Article 3:2 of the Awb that the
applicant for enforcement, already during the phase that the AP conducts an investigation as an administrative body
to possible violations of the GDPR by SBG or Akwa GGZ, the requested information in the
within the framework of that investigation with your client as the applicant for enforcement so that they have the opportunity
is required to respond to it. The ability to respond to requested information does
in the opinion of the AP if a decision is made and the investigation report that
on which the decision is based can be provided to the parties, which in the remainder of the
procedure has also been done. Because Article 3:2 of the Awb pertains to the preparation of the decision
the administrative body, the AP will include your ground for objection insofar as it relates to the content of the decision
evaluate the following marginal numbers.

The inadequate motivation of the decision is contrary to Article 3:46 of the Awb

59. You argue that the primary decision is inadequately reasoned and is therefore contrary to Article
3:46 of the Awb. The appeal argues that it is not clear from the decision what
the research findings of the AP have been and why the AP is refraining from any kind of
enforcement.

15 Judgment of the Administrative Jurisdiction Division of the Council of State, 17 September 2008,
ECLI:NL:RVS:2008:BF1006.

60. Pursuant to Section 3:46 of the Awb, a decision must be based on proper motivation. The

proper reasoning refers on the one hand to the aspect of the correct determination of the facts, on the other hand the decision taken must be based on the established facts. In the primary decision has explained to the AP that the assets and liabilities of SBG will be transferred to Akwa GGZ and that at the same time the SBG database is reduced to a set of statistical data that is used by Akwa GGZ brought in. The AP has also put forward that these new facts and circumstances will affect the AP necessary to conduct further investigation, precisely also to do justice to the principle of due care, as included in Article 3:2 of the Awb. Because the investigation at the time of the primary decision had not yet been completed and therefore no violation of the GDPR could yet be established, there was no possibility for the AP to take enforcement action against SBG at that time. Therefore became rejected the enforcement investigation while simultaneously announcing that the investigation into the legality of SBG's data processing was continued. In the opinion of the AP does the primary decision therefore meet the motivation requirement as included in Article 3:46 of the Awb.

The AP has failed to apply the principle duty of enforcement in this request for enforcement

61. You argue that the DPA failed to apply your client's request for enforcement indicate the duty of principle to enforce. According to you, the AP wrongly failed to to take enforcement action and this is not further explained in the primary decision.

62. According to settled case law of the Administrative Jurisdiction Division of the Council of State, one applies duty of principle to enforce, which means that the competent administrative authority in the event of determination of a violation of a statutory provision is in principle obliged to act against this, because of the public interest served by enforcement.16 It is only possible in two cases administrative body refrain from taking enforcement action, namely if there is a concrete prospect of legalization or if enforcement action is disproportionate to the interests to be served by it. A administrative body may take enforcement action on its own initiative or on request.

63. At the time of the primary decision, enforcement was not possible because the investigation had not yet been completed completed and no violation of the GDPR could be identified. On May 21, 2019, the AP issued a

investigation report, the conclusion of which is that both SBG and Akwa GGZ

have processed personal data about health within the meaning of Article 4, parts 1 and 15, GDPR,

in violation of the prohibition to process such data as referred to in Article 9(1) of the

AVG. This research report has been amended and finalized on July 26, 2019. On May 29, 2019,

issued an enforcement intention to both SBG and Akwa GGZ in response to the

findings from the research report. The AP has established that it does not respond to your request for enforcement

has failed to apply the duty of principle to enforce, now that it is on the basis of

the enforcement request and shortly after adoption of the investigation report an intention to

enforcement, which now results in a reprimand being imposed on

Akwa GGZ.

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

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Conclusion

64. Pursuant to Section 7:11(1) of the Awb, the DPA reconsidered the contested decision to

reason for the objections raised. During this review, the AP assessed whether it was justified

has decided to deny your request for enforcement. In view of the foregoing, the AP comes to

the conclusion that your objection is well founded. The AP therefore sees reason to 3

December 2018 (attribute xxx), and make a new decision instead.

Part II of the decision on objection: today's decision to impose a reprimand

65. Instead of the primary decision of 3 December 2018 revoked by today's decision, the DPA has

today's decision imposed a reprimand on Akwa GGZ. This is appended to this Decree as Annex 3.

66. To inform the parties, the AP notes the following. The present decision and the decision

from today to the imposition of a reprimand together form the AP's decision on the objection of

objector. Interested parties may appeal against this decision on objection to the

court.

8. Reimbursement of litigation costs

67. In the supplementary notice of objection dated 5 March 2019, you submitted a request for reimbursement of the costs incurred by your client in connection with the handling of the objection. Pursuant to article 7:15, second paragraph, of the Awb, the costs are only reimbursed insofar as the contested decision is revoked due to unlawfulness attributable to the administrative authority. The contested decision however, is not revoked because of an unlawful act on the part of the AP, but because of a change of circumstances, namely a completed investigation resulting in a research report. This investigation was at the time of the decision of 3 December 2018 not yet completed, as a result of which the AP has rightly ruled that the enforcement request on that was not eligible for allocation at this time. There is an allowance for legal costs therefore no reason.

9. Operative part

The Dutch Data Protection Authority:

declares the objection well-founded;

-

- revokes the decision of 3 December 2018 with reference xxx;

- takes the following decision instead:

- grants the enforcement request and submits it to Akwa GGZ in a separate decision that is part of it a reprimand of this decision as referred to in Article 58(2)(b) of the GDPR;

- rejects the request for reimbursement of legal costs on appeal.

I sent a copy of this decision to the authorized representatives of both SBG and Akwa GGZ.

Yours faithfully,

Authority for Personal Data,

in accordance with the decision taken by the Dutch Data Protection Authority,

mr. H.J.H.L. Short

Director of Legal Affairs and Legislative Advice (acting)

Remedies Clause

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 you live. You must provide a copy of this decision

to send along. Submitting a notice of appeal does not suspend the effect of this decision.

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Legal framework

General

Pursuant to Article 7:11 of the General Administrative Law Act (Awb), the AP assesses on the basis of your

objection whether it rightly decided to reject your AVG complaint in the primary decision. The

reconsideration will in principle take place with due observance of all facts and circumstances as they exist on

the time of the review.

Article 4(1) GDPR

For the purposes of this Regulation:

1) 'personal data' means any information relating to an identified or identifiable natural person

(“the data subject”); is considered identifiable a natural person who can directly or indirectly

be identified, in particular by an identifier such as a name, a

identification number, location data, an online identifier or one or more elements that

characteristic of the physical, physiological, genetic, psychological, economic, cultural or social

identity of that natural person.

5) “pseudonymisation” means the processing of personal data in such a way that the personal data

can no longer be linked to a specific data subject without additional data

be used, provided that this additional data is kept separately and technical and

organizational measures are taken to ensure that the personal data does not touch

be linked to an identified or identifiable natural person;

7) 'controller' means a natural or legal person, a public authority, a

agency or other body which, alone or jointly with others, determines the purpose and means of the

determines the processing of personal data; when the objectives of and the means for this

processing are set out in Union or Member State law, they may specify who

the controller is or according to which criteria it is designated;

15) 'health data' means personal data related to the physical or mental

health of a natural person, including data on health services provided

providing information about his health condition;

Article 9 GDPR

1. Processing of personal data revealing race or ethnic origin, political opinions, religious or

philosophical beliefs, or trade union membership, and processing of

genetic data, biometric data for the purpose of uniquely identifying a person, or

data about health, or data related to someone's sexual behavior or sexual

orientation are prohibited.

2. Paragraph 1 shall not apply where one of the following conditions is met:

a) the data subject has given explicit consent to the processing of those personal data

for one or more specified purposes, except where Union or Member State law so provides

the prohibition referred to in paragraph 1 cannot be lifted by the data subject;

h) the processing is necessary for the purposes of preventive or occupational medicine, for the

assessment of the employee's fitness for work, medical diagnoses, providing

healthcare or social services or treatments or the management of healthcare systems and

services or social systems and services, under Union or Member State law, or under a

agreement with a health professional and subject to the conditions referred to in paragraph 3 and

guarantees;

i) the processing is necessary for reasons of public interest in the field of public health,

such as protection against serious cross-border health hazards or safeguarding

of high standards of quality and safety of health care and medicines or

medical devices, based on Union law or Member State law in which appropriate and specific

measures are included to protect the rights and freedoms of the data subject, in particular

of professional secrecy;

Article 22 UAVG

1. In accordance with Article 9(1) of the Regulation, processing of personal data is from which

race or ethnic origin, political opinions, religious or philosophical beliefs, or the

trade union membership, and processing of genetic data, biometric data

for the purpose of uniquely identifying an individual, or health data, or data containing

relating to a person's sexual conduct or sexual orientation is prohibited.

2. In accordance with Article 9, paragraph 2, subparagraphs a, c, d, e and f, of the Regulation, the prohibition to

processing special categories of personal data does not apply if:

a. the data subject has given explicit consent to the processing of those personal data

for one or more specific purposes;

b. the processing is necessary to protect the vital interests of the data subject or of a

other natural person, if the data subject is physically or legally incapable of giving consent

to give;

c. the processing is carried out by a foundation, an association or another body without

profit motive that is active in the political, philosophical, religious or trade union field, in the

within the framework of its legitimate activities and with appropriate safeguards, provided that the processing is exclusively

relates to members or former members of the body or to persons associated with it

maintain regular contact with her for her purposes, and do not use the personal data without the

consent of the data subjects is given outside that authority;

d. the processing relates to personal data which are manifestly public by the data subject

made; or

e. the processing is necessary for the establishment, exercise or defense of legal claims,

or when courts are acting within their jurisdiction.

Article 30 UAVG

3. In view of Article 9(2)(h) of the Regulation, the prohibition on data about

health to process does not apply if the processing is carried out by:

a. care providers, institutions or facilities for health or social services,

insofar as the processing is necessary for the proper treatment or care of the

the person concerned or the management of the relevant institution or professional practice; (…)

Article 66b Healthcare Insurance Act

1. The Zorginstituut maintains a public register in which, on the recommendation of client organisations,

care providers and health insurers jointly or of the Advisory Committee on Quality

professional standard or a measuring instrument is included.

2. The Zorginstituut establishes a policy rule on the basis of which it is assessed whether a professional

standard can be regarded as a responsible description of the quality of a specific

care process and a measuring instrument can be regarded as a responsible means of measuring whether

good care is provided.

3. The Zorginstitute adopts a professional standard or

measuring instrument in the public register if it does not comply with the policy rule, referred to in

the second member.

Article 66d Healthcare Insurance Act

1. The Zorginstituut is responsible for collecting, combining and making information available

about the quality of care provided:

a. with a view to the right of the client to be able to make a well-considered choice between different

healthcare providers, and

b. for the purpose of supervision by the officials of the State Supervision of Public Health.

2. Healthcare providers are obliged to report the information referred to in the first paragraph on the basis of the

measuring instruments included in the public register in accordance with Article 66b.

3. By regulation of Our Minister, the body is designated where the care providers referred to in the second paragraph

provide the information referred to.