

Confidential/Registered

Date

November 19, 2019

Subject

Imposition of reprimand

Our reference

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Dear Mr Van Haperen, dear Mr Rooke,

The Dutch Data Protection Authority (AP) has found that the Alliance has quality in the mental

healthcare (hereinafter: Akwa GGZ) has processed personal data about health. This

processing has taken place by taking over a so-called depleted dataset

of the Benchmark GGZ Foundation (hereinafter: SBG). The processing of health data is based on

Article 9, first paragraph, of the General Data Protection Regulation (GDPR) prohibited, unless Akwa

GGZ itself as controller on an exception as included in Article 9,

second paragraph of the GDPR.

In the opinion of the AP, Akwa GGZ cannot rely on an exception in the situation assessed

professions as included in Article 9, second paragraph, of the AVG. This means that the processing of

personal data about health by means of a dataset acquired from SBG a

violates the prohibition of Article 9, first paragraph, of the GDPR. Although Akwa GGZ the impoverished dataset

has now been completely destroyed, the AP reprimands Akwa GGZ for the violation committed on

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

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

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1.

Facts and circumstances

1. Akwa GGZ supports mental health care (GGZ) in the (further) development and implementation of quality standards, quality indicators and measuring instruments. Akwa GGZ also provides care exchange between relevant parties about the proceeds thereof. It is included in the foundation as a foundation register of the Chamber of Commerce and registered under Chamber of Commerce number 71887741.1 The head office is located in Utrecht, Museumlaan 7.
2. In response to a request for enforcement, the AP has conducted an investigation into the processing of personal data by SBG. In summary, the research is moving forward has come to the conclusion that the data that SBG (via ZorgTTP) has received from healthcare providers is a processing of health data within the meaning of Article 4, preamble and under 15, of the GDPR. Because SBG doesn't can invoke one of the statutory grounds for exception, which is the prohibition on health data to be processed, it is therefore prohibited for SBG, pursuant to Article 9, paragraph 1, of the GDPR to process the dataset containing health data.
3. At the beginning of 2019, SBG transferred a dataset to Akwa GGZ, consisting of 19 data categories per patient instead of the 25 original data categories per patient provided to SBG.2

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

the meaning of Article 4, preamble and under 15, of the GDPR. Because Akwa GGZ cannot rely on one of them the legal grounds for exceptions to the processing ban with regard to health data, is it prohibited for Akwa GGZ to use the dataset containing processing health data.

4. With regard to the processing of this personal data, Akwa GGZ must be qualified as controller within the meaning of Article 4, part 7, of the GDPR, because Akwa GGZ as legal person determines the purposes and means of the processing of personal data. Already out the fact that Akwa GGZ informed the AP by letter of 28 May 2019 that the impoverished dataset in placed in quarantine and informed the AP by letter dated August 8, 2019 that the impoverished data set has been definitively destroyed, it appears that Akwa GGZ is ultimately responsible for the policy pursued regarding the impoverished dataset it manages and therefore the purpose and means for the processing of personal data.

2.

Legal framework

5. Article 4, preamble and under 15, of the GDPR stipulates that health data are personal data related to the physical or mental health of a natural person, including data about health services provided that provide information about his state of health.

This concerns all data that relate to the health status of a person involved and that provide information about past, present and present physical or mental health status

future.³ The concept of “health” should be understood in a broad sense. Also the mere fact that someone is sick

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

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

3 Recital 35 of the GDPR.

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is a fact about health, although that fact in itself says nothing about the nature of the condition.⁴

6. Data about health qualify under the GDPR as so-called 'special categories of personal data'. The processing of such data is prohibited under Article 9, first paragraph, of the GDPR prohibited. However, there are exceptions to this prohibition. They are listed in the second paragraph of Article 9 of the GDPR. These exceptions do not apply directly on the basis of the GDPR, but leave room It is up to the Member States to further define this ground for exception. That's in the Netherlands - in general terms - happened in the General Data Protection Regulation Implementation Act (UAVG).

7. As explained by the AP in the decision on the objection under marginal numbers 45 to 49, Akwa GGZ does not invoke article 9, second paragraph, part h of the AVG jo. Article 30, third paragraph, under a of the UAVG. SBG or Akwa GGZ cannot rely on any of the other general conditions either grounds for exception, as included in Article 9, second paragraph, of the AVG, read in conjunction with the Articles 22 to 30 of the UAVG.

3.

Violation finding

8. The depleted data set as transferred by SBG to Akwa GGZ constitutes a processing of data about health within the meaning of Article 4, preamble and under 15, of the GDPR. The AP concludes that Akwa GGZ cannot rely on one of the exceptions to the processing prohibition of special personal data, as included in Article 9, second paragraph, of the GDPR.

9. In a letter dated 29 May 2019, the AP informed Akwa GGZ of its intention to enforce. The AP then informed Akwa GGZ that it intended to, in view of the reasons stated in the Report violations detected from the SBG data processing investigation (hereinafter: investigation report), to make use of its power, pursuant to Article 58, paragraph 2, preamble and under f, of the

AVG to impose a definitive ban on processing Akwa GGZ.

4.

Reprimand

10. In a letter dated 29 May 2019, the AP informed Akwa GGZ of its intention to enforce. The AP then informed Akwa GGZ that it intended to, in view of the investigation report established violations, to make use of its power under Article 58, second paragraph, preamble and under f, of the AVG to impose a definitive prohibition of processing on Akwa GGZ.

11. The AP chooses not to impose a definitive processing ban on Akwa GGZ on the basis of Article 58, second paragraph, opening words and under f, of the AVG but to give Akwa GGZ a reprimand on the basis of Article 58, second paragraph, opening lines and under b, of the GDPR. Based on this, the AP has the authority to reprimand the controller when processing infringes the provisions of the GDPR is made.

12. Akwa GGZ has, after taking note of the conclusions of the AP in the investigation report as shared by the AP with Akwa GGZ by letter dated May 21, 2019, the decision was made to 4 Parliamentary Papers II 1997/98, 25892, 3, p. 109.

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quarantine dataset. This was communicated to the AP by letter dated May 28, 2019, by the AP received on June 3, 2019. On May 29, 2019, an enforcement intention was filed against both SBG and Akwa GGZ issued in response to the research report. By letter dated August 8, 2019, Akwa

GGZ informed the AP that the depleted dataset has been definitively destroyed. By letter dated 29 August

In 2019, the lawyers of Akwa GGZ submitted a statement from Info Support B.V. that the

depleted database, including backup files, are permanently deleted. Violation of provisions

by or pursuant to the GDPR has therefore been definitively terminated. In short, the data processing activities of

Akwa GGZ, which were the subject of an investigation by the AP, have already been discontinued by Akwa GGZ.

13. According to established case law of the Administrative Jurisdiction Division of the Council of State, one applies duty of principle to enforce, which means that in the event of a violation of a legal regulation is in principle obliged to act against this, because of the public interest that enforcement is served.⁵ Only in two cases can the administrative body refrain from enforcement action, namely if there is a concrete prospect of legalization or if enforcement action is disproportionate proportion to the interests to be served. An administrative body may act on its own initiative or upon request to take enforcement action.

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

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

Yours faithfully,

Authority for Personal Data,

Mr. A. Wolfsen

Chair

Remedies Clause

If you do not agree with this decision, you can within six weeks of 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 operation of this decision.

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