Confidential/Registered

Date

Nov 19, 2019

Topic

Decision on objection

Our reference

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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, with the grounds supplemented by letter dated 5 March 2019. The objection is directed against the decision of the AP of December 3, 2018 (reference xxx), whereby the AP accepts the request of your client, objector, dated March 24, 2017 for enforcement action. The decision of December 3 2018 is hereinafter 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 healthcare (hereinafter: Akwa GGZ) have processed personal health data within the meaning of Article 4, parts 1 and 15, of the General Data Protection Regulation (GDPR). SBG has insufficient data it received anonymised, so that the risk of indirect traceability was insufficiently identified

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

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

grounds for exceptions as included in Article 9, second paragraph, of the GDPR that prohibit the transfer of data

processing health. As a result, for SBG, on the basis of

Article 9(1) of the GDPR was prohibited from sharing the dataset containing personal health data

processing and for Akwa GGZ to take over a depleted dataset from SBG. The AP will only

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

legal entity no longer exists.

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1 Introduction

1. Your client, the objector, requested the AP to take enforcement action on March 24, 2017

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

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

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

personal data by SBG, as these data are processed without the consent of the

patient. The objector requested 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

database of SBG.

2. After the objector gave notice of default to the AP 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. Given 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 rejected the enforcement request of complainant rejected.

3. An objection was lodged on 10 January 2019 against the rejection of the enforcement request. During the objection procedure, the investigation in response to the enforcement request has been completed. In the Report as a result of an investigation of data processing SBG (hereinafter: the investigation report), finally adopted on July 26, 2019, it has been concluded that SBG personal data about health has processed within the meaning of Article 4, parts 1 and 15, of the GDPR, or – before the GDPR of was applicable - within the meaning of Article 2, opening words and under a, of the Wbp. SBG has data that they received insufficiently anonymised, which increases the risk of indirect traceability in insufficiently removed. SBG could not rely on one of the following for the processing legal grounds for exception that would prohibit the processing of health data can cancel. This means that for SBG, pursuant to Article 9(1) of the 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 announce an intention to enforce, addressed to both SBG and Akwa GGZ, containing a processing ban.

4. This decision on objection concerns both the grounds of the objection against the decision of 3 December 2018 and the views of SBG and Akwa GGZ on the intention to enforce and the investigation report that forms the basis of the intention to enforce.

2. Course of the procedure

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

6. By letter dated 25 August 2017, SBG responded to the request of the AP for information.

7. In a letter dated November 16, 2018, the objector filed a notice of default with the AP for failing to do so on time decide on the request.

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8. By decision of December 3, 2018, the AP granted the request to maintain the objection

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

9. By letter dated 10 January 2019, the objector lodged a pro forma objection to the primary

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

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

of the AP's request for information.

11. On May 21, 2019, the AP adopted a preliminary 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

informed 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 investigation report.

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

with regard to the content of the investigation report.

15. On July 3, 2019, the AP held a hearing. In addition, the objector such as the applicant

to 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 present. A report was made of the hearing,

which you will find attached as Appendix 1.

16. The view expressed by the lawyers of SBG and Akwa GGZ during the

hearing, the AP has given reason to adjust the investigation report. By letter of 26 July

In 2019, your then 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

receive. The lawyer of the objector was also given the opportunity to

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

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

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

19. By 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, including 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, when the GDPR had not yet entered into force.
The full reconsideration of the primary decision under Article 7:11 of the Awb will take place on the basis of the facts as they arise at the time of reconsideration (ex nunc review). This means that in connection with the application of the GDPR from 25 May 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(1) and 15 of the GDPR. SBG has data it received insufficiently anonymised, which means that the risk of indirect traceability is insufficient

was taken away. SBG and Akwa GGZ cannot rely on one of the following for processing:

legal grounds for exception that would prohibit the processing of health data

can cancel. This means that for SBG, pursuant to Article 9(1) of the GDPR

was prohibited from processing the dataset containing personal data about health and for

Akwa GGZ to take over a depleted dataset from SBG. The AP will only provide an enforcement

impose a measure on Akwa GGZ in the form of a reprimand, because SBG as a legal person cannot

more exists.

5. The research

22. Following your client's enforcement request, the AP has started an investigation into the

working method of SBG with regard to the processing of personal data and is this processing

tested against relevant legislation and regulations. SBG makes data from the healthcare sector measurable so that there is

can be benchmarked in the GGZ with the aim of maintaining and improving the quality of care

improve. To this end, mental health care providers have patients fill out questionnaires, after which this Routine

Outcome Monitoring (ROM) data is supplied to the ZorgTTP foundation. The data supplied

consist of 29 mandatory data categories per patient. These 29 mandatory data categories

are pseudonymized on location at the GGZ provider by four of the 29 data categories

to hash.1 After ZorgTTP has applied encryption to these four data categories, SBG . receives

this processed data.2 At the beginning of 2019, SBG transferred an 'impoverished dataset' to Akwa GGZ. This one

dataset consists of 19 data categories per patient instead of the original 25

data categories per patient supplied to SBG.3

1 Hashing is a scrambling or mutation of data using a mathematical function, also known as hashing.

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. So a hash function only works one way.

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

Hash functions are not necessarily secret and accessible and usable by everyone.

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

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

searched and the corresponding input.

2 See also p. 8 to 11 of the final version of the Report following an investigation into data processing SBG.

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

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

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

GDPR, or - before the GDPR came into effect - within the meaning of Article 2, opening words and under a, of the

Wbp. SBG did not sufficiently anonymise data it received, increasing the risk of

indirect traceability was insufficiently removed. SBG could stand for this

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

second paragraph of the GDPR which could affect the ban on the processing of health data

to cancel. As a result, it is prohibited for SBG pursuant to 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, section 7,

of the GDPR. The findings of the investigation report have prompted the AP to

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

containing a prohibition on processing pursuant to Article 58, second paragraph, opening words and under f, of the

GDPR.

Position of the objector 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 13 August 2019, the representative of the objector has expressed his position with regard to the

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

is an interested party and that the request for enforcement by the AP must therefore be admissible

declared. Objector endorses the conclusions of the AP 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 on

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

apply Article 58, second paragraph, preamble and under g, of the GDPR, i.e. the deletion of the

personal data.

SBG's position on the investigation report and the intention to enforce

25. According to SBG, the investigation report was drawn up without due care and the conclusions that

the AP withdraws not be borne 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. These data processing activities do not involve direct or

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

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

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

resources. SBG also cannot be qualified as an independent controller

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

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

processed data supplied for the purpose of benchmark reports.

26. In the hypothetical situation, according to SBG, that personal data does exist, SBG

then set out in the opinion on the basis on which a healthcare provider as

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

controller and SBG as processor can rely. In front of

data processing activity 1, namely the forwarding 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) jo. Article 9, second paragraph, part i GDPR (reasons of public interest on

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 on intra-

institution level, at which the healthcare provider can invoke Article 6, paragraph 1, sub b (implementation

of agreement) and c GDPR jo. Article 9, second paragraph, part h in conjunction with Article 30, third

paragraph, opening words and under a UAVG (processing when providing healthcare or social security)

services or treatments or the management of health care systems and services). At the

second level, the extra institution benchmarking with ROM information, the healthcare provider can

base on Article 6, first paragraph, sub c GDPR and potentially sub b jo. Article 9, second paragraph, part h in

in conjunction with article 30, paragraph 3, opening words and sub a of the UAVG. The third data processing activity

consists of offering the digital safe for scientific research. Thereby

the healthcare provider can invoke Article 6(1)(b) of the GDPR jo. Article 9, second paragraph,

part h GDPR. Data processing activity 4 constitutes maintaining the Argus record,

whereby, according to SBG, the healthcare provider can rely on Article 6, first paragraph, sub c GDPR, jo. article

9, second paragraph, part i of the 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 enforcement request, 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 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 a joint controller. This concerns it processing of ROM information by SBG at intra- or extra institution level. For this data processing activity, the processing ban must be imposed on the healthcare provider.

The AP should also refrain from taking 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 is dissolved. There is a definitive ban on processing for already 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 a penalty, on the basis of art. 58, second paragraph, sub b, of the GDPR.

Position of Akwa GGZ with regard to the investigation report and the intention to enforce

28. Now that Akwa GGZ has now destroyed the impoverished dataset obtained from SBG and, insofar as it Akwa GGZ, the investigation only relates to the impoverished who were taken over from SBG dataset, according to Akwa GGZ there is no longer any relevance to discuss the content of the research report. With regard to the intention to enforce, including a processing ban, Akwa GGZ is of the opinion that this ban is insufficiently clear and specific.

The proposed processing ban can only relate to the depleted dataset, but

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Akwa GGZ has definitively destroyed the depleted dataset, including backup files. Because of this,

enforcement action so disproportionate in relation to the interests to be served thereby, that of

action in this concrete situation should be dispensed with.

Judgment of the AP per part

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 collected by SBG (via ZorgTTP)

from healthcare providers is a processing of personal data about health in

within the meaning of Article 4(1) and 15 of the GDPR. Enforcement applicant 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

in the data processing activities there is no question of indirectly to a natural person

traceable health data. According to SBG, the AP fits the judgment in the investigation report

Breyer of the CJEU incorrectly admits, because the traceability of the data to a person is

SBG is not possible or is 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"); if becomes identifiable

considered a natural person who can be identified, directly or indirectly, in particular by

using an identifier such as a name, an identification number, location data, an online

identifier or of 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 with which information about his health status

will be given'.

32. In the Breyer judgment, the CJEU made it clear that for the question of whether a fact such as

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

the data subject can be identified, is held by one and the same person.5 A piece of information can

however, do not qualify as personal data if the identification of the data subject is

is prohibited by law or is impracticable in practice, for example because – in view of the required time,

costs and manpower - requires an excessive effort, so that the risk of identification in

reality seems insignificant.6

33. The research report analyzed 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 ECJ judgment of 19 October 2016, Patrick Breyer t. Bundesrepublik Deutschland, C-582/14, ECLI:EU:C:2016:779,

paragraph 43.

6 ECJ judgment of 19 October 2016, Patrick Breyer t. Bundesrepublik Deutschland, C-582/14, ECLI:EU:C:2016:779, para. 46.

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

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

start and end date of the care process. The dataset of SBG exists per record when received

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

attributes.

34. It appears from the investigation report of the AP that SBG does not use any form of

randomization techniques, when SBG receives the dataset. This means that there are no

technique is applied whereby the data is sufficiently at random, i.e. random or indefinite, making it no longer possible to trace them back to a specific person.7 Well applies SBG generalization to certain categories of data from the dataset, thereby prevent a data subject from being individualized by merging the data subject with a number of other persons. For example, the date of birth is not stored in the dataset, but the year of birth. However, there are 25 data categories, which still allows for individualization based on data such as the location of the healthcare provider, gender, start and end dates of the treatment, etc.8

35. With regard to four data categories, namely the citizen service number (BSN), link number, DBC route number and Care trajectory number 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 citizen service number, link number, DBC trajectory number and Care trajectory number are always the same. In other words, a unique BSN, matching number, DBC trajectory number and Care trajectory number, will be added after the pseudonymization process Ensure TTP, always lead to the same pseudonymised values. This makes it possible for SBG to send new data to the same pseudonymised citizen service number (BSN), link number, DBC route number and To be able to continue to link the care trajectory number.9 The data transferred to Akwa GGZ contain 19 attributes, including three pseudonymized attributes.

36. The AP establishes on the basis of the research report that SBG on the pseudonymised dataset has taken insufficient technical safeguards to sufficiently mitigate the risks of traceability extent, so that it cannot be qualified as an anonymous dataset.10

In view of the detailed nature and amount of data provided by SBG or Akwa GGZ about one patient is processed, (the risk of) indirect conversion to multiple parties and on the basis of public sources is unavoidable and therefore it is not possible to speak of an anonymous dataset.11 The mere fact that four categories of data become both the hash function and encryption applied and that its 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 impair traceability

is prohibited by law or impracticable in practice.

7 See also p. 17 and 18 of the final version of the Report following an investigation of data processing SBG.

8 See also p. 18 of the final version of the Report following an investigation of data processing SBG.

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

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

11 See also p. 18 of the final version of the Report following an investigation of data processing SBG.

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37. The AP has objected to what SBG or Akwa GGZ have argued in the objection procedure
did not give rise to a reconsideration of the investigation report and the information contained therein
conclusions. SBG argues that the relevant question is whether a 'motivated intruder', having regard to his
knowledge and available resources such as time, money and manpower, is reasonably able to
identify natural persons from the SBG dataset. Quite apart from the fact that the
'motivated intruder' test comes from UK's protection of privacy 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
Health, Welfare and Sport as the audit reports of external organizations believe that
the SBG dataset does not contain any personal data. That others think that this is not the case
of the processing of personal data is not relevant because it is ultimately up to the DPA, 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 may not be indirectly identifying. In the opinion of the AP, as
set out in the investigation report and in this decision on the objection, in the case of SBG and
Akwa GGZ no question.

38. The AP thus establishes that the dataset of SBG and the depleted dataset of Akwa GGZ
personal data within the meaning of Article 4(1) of the GDPR. Now the dataset that SBG (via
ZorgTTP) and the depleted data set that Akwa GGZ manages also includes the name of the healthcare provider,
include the start and end date of a care process 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. Next, SBG submits in its submission that it cannot be classified as
controller within the meaning of Article 4(7) of the GDPR, but that SBG
be considered a processor within the meaning of Article 4(8) of the GDPR. Not SBG,
but (a delegation of) patients from mental healthcare, healthcare providers and healthcare insurers jointly
determined the type of data, the method of supply and the purpose and means of the
data processing activities. The applicant for enforcement agrees with the conclusions of the
research report from 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 person which, alone or jointly with others, determines the purposes and means of the processing of
determines personal data. Pursuant to Article 4(8) of the GDPR, the processor is
qualified as the legal person acting on behalf of the controller
processing personal data.

41. It appears from the investigation report and the information submitted by SBG that SBG made several
conditions and protocols. For example, healthcare providers must supply their data to SBG
according to the manner prescribed by SBG in a data protocol. In the data protocol are
the nature and specifications of the raw data, the level to which the raw data relates, the manner and

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the time of delivery and the minimum required dates. In a draft prepared by SBG

quality document lays down which quality requirements the healthcare provider must meet. er

For example, audits are performed 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 but also 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 determines that SBG itself prescribes in the data protocol what kind of data is on which data must be provided by the 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, management including 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 healthcare patients, care providers and health insurers can influence the policy pursued, does not change this because SBG as a legal person is ultimately responsible for the policy pursued with regard to the data set it holds and the purpose and means of the processing of the personal data.

43. Akwa GGZ has taken over a so-called depleted dataset from SBG, which contains 19 . per person attributes instead of the 25 attributes as processed by SBG per data subject. Already from the fact that Akwa GGZ informed the AP in a letter dated 28 May 2019 that the depleted dataset in quarantined and by letter dated August 8, 2019 that the depleted dataset is final

destroyed, it appears that Akwa GGZ is ultimately responsible for the policy pursued with regard to the depleted dataset it manages and with it the purpose and means of processing of the personal data.

44. On this basis, the AP qualifies both SBG and Akwa GGZ as a controller within the meaning of Article 4(7) of the GDPR because SBG and Akwa GGZ are legal entities, alone or together with others, determine 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, section 7, of the GDPR. According to SBG and Akwa GGZ, the controller is the care provider. In the opinion, SBG has put forward that, in the event that 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, preamble and under a, of the UAVG with regard to the ROM information to benchmark at intra-institutional level. Furthermore, the healthcare provider for benchmarking extra institution with ROM information also base on Article 9, second paragraph, part h, of the GDPR in conjunction with Article 30, third paragraph, preamble and under sub a, of the UAVG.

12 See also p. 20 and 21 of the final version of the Report following an investigation into data processing SBG.

46. The AP established in marginal 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 GDPR. Pursuant to Article 9(1) of the GDPR, it is in principle prohibited to categories of personal data, including health data. This ban is

not applicable if SBG or Akwa GGZ can rely on a legal

ground for exception from Article 9, second paragraph, of the GDPR jo. Articles 22 to 30 of the

UAVG. The option provided in Article 9, second paragraph, part h of the GDPR is limited by

Article 9, third paragraph, of the GDPR.13

47. The Dutch legislator has given substance to the provisions laid down in Article 9, second paragraph, part h of the

AVG yo. Article 9, third paragraph, of the GDPR, the possibility offered by means of Article 30, third paragraph,

of the UAVG. SBG relies in particular on Article 30(3)(a) of the UAVG.

This provision is addressed to care providers, institutions or health care facilities or

social services. The Explanatory Memorandum to the UAVG explains: 'This

means that health data should not only be processed by hospitals and

other medical institutions, but also by organizations in the field of social

services insofar as proper treatment of the data subject necessitates this, or

when it is necessary for the management of the relevant institution or facility. At

think of care homes and youth care institutions. Furthermore, this provision allows

individual care providers who do not work at the aforementioned institutions, but, for example, a

self-employed practice, processing health data.'14

48. According to the AP, it does not appear from the legal text and the parliamentary history that SBG has an appeal

comes to article 30, paragraph 3, sub a of the UAVG. SBG and – insofar as relevant – Akwa GGZ are covered

namely not among the specified standard addressees of Article 30(3)(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 terms of treatment effect and customer satisfaction. With that, they are not

health 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 cannot therefore

invoke Article 9, second paragraph, part h of the GDPR jo. Article 30, paragraph 3, sub a of the UAVG.

SBG and Akwa GGZ cannot invoke one of the other general rules either

grounds for exception within the meaning of Article 9(2) of the GDPR.

49. On the basis of the above, the AP finds that neither SBG nor Akwa GGZ can 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 ban on processing special products

categories of personal data, as included in Article 9(1) of the GDPR.

Processing Basis

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

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

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

42.

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

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of personal data on the basis of Article 9, first paragraph, of the GDPR, 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. It appears from the letter of 12 July 2019 from the lawyers of SBG to the AP that on 1 April 2019 a

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

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

personal data. In the opinion of the AP, having an impoverished dataset in its possession comes,

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

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

Please 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 in conflict with Article 4:14, paragraph 3, 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 does not in any way indicate what the findings of the AP have been. the AP
should have shared the information from SBG with the objector as the applicant for enforcement.

3. The decision is inadequately motivated and therefore in violation of Article 3:46 of the Awb. From the
decision it is not clear why the AP refrains from any form of enforcement.

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

7. Assessment of the objection

The unreasonably long decision period is in conflict with Article 4:14, paragraph 3, of the Awb

53. You argue that the unreasonably long decision period on your client's request for enforcement is contrary to
is in accordance with Article 4:14, third paragraph, of the Awb. According to you, conducting an investigation suspends the
decision period
not on.

54. A request for enforcement is an application for a decision. Pursuant to Section 4:13,
first paragraph, of the Awb, a decision must be made within the statutory regulation
specified period or, in the absence of such a period, a reasonable period after receipt of the
application. Pursuant to Article 4:13, second paragraph, of the Awb, the reasonable period within which a
decision must be given fixed at eight weeks, unless a notification as referred to in
Article 4:14, third paragraph, of the Awb has been done. Article 4:14, paragraph 3, of the Awb provides that the
administrative authority, if the decision cannot be given within a period of eight weeks,

must communicate this to the applicant, stating a reasonable period within which the

decision can be anticipated.

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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 of 30 May 2017, the

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 the outcome. A notice of default from the

AP, submitted by letter dated April 18, 2018, was subsequently withdrawn by your client. Subsequently,

your client, by letter dated November 16, 2018, has again given notice of default to 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 poorly motivated why the AP refrains from any form of enforcement.

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

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

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

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

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

relevant facts and the interests to be weighed. In the event of a request for enforcement, the

administrative body has an obligation to investigate.15 In a letter dated 1 May 2017, the AP ordered your client to be the

applicant

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

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

2019. Akwa GGZ also responded to a request for information in a letter dated 16 January 2019

by the AP.

58. The AP is of the opinion that, by means of requests for information to both your client and to SBG and

Akwa GGZ, has fulfilled the obligation of the administrative authority to investigate in the event of 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 as an administrative body is conducting an investigation

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 the basis of the decision can be provided to the parties, which in the remainder of the

procedure has also taken place. Because Article 3:2 of the Awb concerns the preparation of the decision by

the administrative body, the AP will consider your ground for objection, insofar as it relates to the content of the decision, in the

assess the following marginal numbers.

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

59. You argue that the primary decision is inadequately motivated and is therefore contrary to Article

3:46 of the General Administrative Law Act. It is argued in the notice of objection that it is not clear from the decision what

the AP's research findings and why the AP waives any form of

enforcement.

15 Decision of the Administrative Jurisdiction Division of the Council of State, 17 September 2008,

ECLI:NL:RVS:2008:BF1006.

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60. Pursuant to Section 3:46 of the Awb, a decision must be based on a sound statement of reasons. The

sound motivation refers on the one hand to the aspect of the correct determination of the facts, on the other hand the decision must be based on the established facts. In the primary decision, the AP explained that the assets and liabilities of SBG will be transferred to Akwa GGZ and that the database of SBG is reduced to a set of statistical data that is used at Akwa GGZ brought in. The AP has also put forward that these new facts and circumstances necessitate further investigation, especially in order 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 be established, there was for the AP at that time no possibility to take enforcement action against SBG. That's why rejected the enforcement investigation while simultaneously announcing that the investigation into the lawfulness of SBG's data processing operations continued. In the opinion of the AP the primary decision thus satisfies the motivation requirement as included in Section 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 AP has failed to apply to your client's request for enforcement comply with the principle of enforcement. According to you, the AP wrongly failed to: to take enforcement action and this was not explained in more detail in the primary decision.

62. According to settled case law of the Administrative Jurisdiction Division of the Council of State, a principle obligation to enforce, which means that the competent administrative authority in the event of of a violation of a statutory provision is in principle obliged to take action against this, because of the public interest served by enforcement.16 Only in two cases is it possible administrative body refrain from taking enforcement action, i.e. if there is a concrete prospect of legalization or if enforcement action is disproportionate in relation to the interests to be served thereby. A The administrative body can 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

established a research report which concluded that both SBG and Akwa GGZ

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

in violation of the prohibition to process such data as referred to in Article 9, first paragraph, of the

GDPR. This research report has been amended and definitively adopted on July 26, 2019. On May 29, 2019,

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

findings from the research report. The AP establishes that with your request for enforcement, it does not

has failed to apply the principle obligation of enforcement, now that it is based on

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

enforcement, which now results in a reprimand being imposed on

Akwa GGZ.

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

Conclusion

64. Pursuant to Article 7:11, first paragraph, of the Awb, the AP reconsidered the contested decision according to

as a result of the objections raised. In this reconsideration, the AP has assessed whether it is justified

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

the conclusion that your objection is justified. The AP therefore sees reason to change the primary decision of 3

December 2018 (characteristic xxx), to revoke and take a new decision instead.

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

65. Instead of the primary decision of December 3, 2018, revoked by decision of today, the AP has

decision of today imposed a reprimand on Akwa GGZ. This is attached as Annex 3 to this Decree.

66. For the information of the parties, the AP also notes the following. The present decision and the decision

from today to impose a reprimand together form the decision of the AP on the objection of

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

court.

8. Compensation for litigation costs

67. In the supplementary notice of objection of 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 will only be reimbursed insofar as the contested decision is revoked for unlawfulness attributable to the administrative authority. The contested decision is, however, not revoked because of an illegality 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 December 3, 2018 has not yet been completed, as a result of which the AP has rightly ruled that the enforcement request was currently ineligible for allocation. For a legal fee, there is therefore no reason.

9. dictum

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:

- allocates the enforcement request and submits it to Akwa GGZ in a separate decision that is part a reprimand of this decision as referred to in Article 58, second paragraph, under b, of the GDPR;

- rejects the request for reimbursement of legal costs in objection.

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

Yours faithfully,

Authority Personal Data,

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

mr. H.J.H.L. shorts

Director of Legal Affairs and Legislative Advice (wnd.)

Remedies Clause

If you do not agree with this decision, you can return it within six weeks of the date of dispatch of the decision to submit a notice of appeal to the court pursuant to the General Administrative Law Act (sector administrative law) in the district in which you are domiciled. You must provide a copy of this decision to send along. Submitting a notice of appeal does not suspend the effect of this decision.

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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 has rightly decided to reject your GDPR complaint in the primary decision. The In principle, reconsideration takes place with due observance of all facts and circumstances as stated on the the time of the reconsideration.

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”); considered identifiable is a natural person who can directly or indirectly be identified, in particular by means of an identifier such as a name, a

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

are 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 this additional data is kept separately and technical and

organizational measures are taken to ensure that the personal data is not

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

processing of personal data; when the objectives and resources for this

processing is established 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 status;

Article 9 GDPR

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

ideological beliefs, or evidence of 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 a person's sexual behavior or sexual

orientation are prohibited.

2. Paragraph 1 does 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 provides that

the prohibition referred to in paragraph 1 cannot be lifted by the person concerned;

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, the provision of

health care or social services or treatments or the management of health care systems and

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

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agreement with a healthcare 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 ensuring

high standards of quality and safety of healthcare and pharmaceuticals or

medical devices, under Union 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, first paragraph, of the Regulation, the processing of personal data from which

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 health data, or data with

regarding a person's sexual behavior or sexual orientation is prohibited.

2. In accordance with Article 9, second paragraph, under a, c, d, e and f, of the Regulation, the prohibition on

special categories of personal data do not apply if:

a. the data subject has given explicit permission for the processing of those personal data

for one or more specified 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 unable to give his/her consent

to give;

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

profit motive operating in the political, philosophical, religious or trade union field, in the

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

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

maintain regular contact with it for its purposes, and do not disclose the personal data without the

consent of the data subjects is provided outside that body;

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

created; or

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

or when courts act within the scope of their jurisdiction.

Article 30 UAVG

3. In view of Article 9, second paragraph, under h, of the Regulation, the prohibition to disclose information about

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

a. care providers, institutions or facilities for health care 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 Health Insurance Act

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

healthcare providers and healthcare insurers jointly or by the Quality Advisory Committee

professional standard or measuring instrument is included.

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

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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 has been provided.

3. The Zorginstituut adopts a professional standard proposed in accordance with the first paragraph or

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

the second member.

Article 66d Health Insurance Act

1. The Zorginstituut is responsible for collecting, merging 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 care providers the referred to in the second paragraph

provide such information.