

'Private Investigation Services in the Netherlands – A Broadening of the Law?'

Summary

Introduction

On behalf of the Ministry of Justice, the Police Academy of the Netherlands, together with ES&E Interim, conducted a research into private investigation services that are not obliged to obtain a permit under the Law on Private Security and Investigation Bureaus (Wet op de particuliere beveiliging en recherchebureaus, WPBR). Company security departments and related sectors such as insurance expertise bureaus, trade information and collection agencies, and information *brokers* were surveyed with regard to their numbers and the nature and extent of their activities. The central problem definition of the research project was as follows:

What is the (estimated) number, the nature and extent of the (activities of) companies, company departments and other private organizations involved in investigative work that are outside the domain of judicial investigations, as well as of investigation bureaus that limit their inquiries to irregularities concerning goods and as such remain outside the jurisdiction of the WPBR? To what extent can they be brought under the WPBR and what are the possible consequences for them?

Legal/technical matters were not the subject of this research.

Research methods

In order to answer the research questions, data was collected by means of studying documents and open sources, conducting forty interviews, organizing an experts meeting and attending special meetings of the various business communities. A complicating factor in this was the broadness of the definition of 'investigative activities'. The WPBR defines this as "the collection and analysis of data". This, however, is so general that the researchers propose a more specific definition: "*the collection and analysis of data regarding one or more natural persons in the context of fact finding in legal matters of a private, administrative or penal nature*". The research was limited to companies, company departments and other private organizations that conducted such investigative activities on a regular basis. The WPBR further restricts itself to activities on behalf of a third party, conducted with a profit motive.

The research brought to light large differences in the work methods employed in the diverse sectors, as well as in the manner in which such activities were regulated either through specific laws or self-regulation.

Banks

Company security in banking companies is organized in various ways and is increasingly integrated in primary business processes. A large bank annually conducts many hundreds of investigations, primarily of files and registers and mainly aimed at the integrity of their own personnel. A considerable amount of the investigative work in the banking sector is in fulfillment of legal obligations. Research methods used are subject to protocols and supervised. The results of major investigations are reported to strategic management levels. Banks operate a mutual fraud alert system based on a name index system. External investigators are hired on a regular basis. A wide interpretation of the WPBR regarding what constitutes investigative activities would bring about half of all activities in the organizations under the law, which would constitute a disproportionately extra administrative burden with relatively meager effects on the protection of civil liberties. A more restricted interpretation, however, is likely to improve the protection of constitutional rights when it reinforces supervision of the most sensitive (covert)

investigative processes. Existing control mechanisms can easily be adapted to become 'WPBR-compatible'. For the banking community, the 'Nederlandse Vereniging van Banken' is the representative organization.

Insurance companies

Nearly all of the approximately 200 insurance companies have an investigation department of some kind, varying size and organizational structure. One large company, for instance, reported to execute about 1,500 annual investigations, mainly on the screening of new personnel and the acceptance of customers and their claims. Specific legislation also brings about investigative work. For the most part this consists of examining dossiers and files, with some additional interviewing and surveillance work. Much work is farmed out to private detective offices and expert bureaus, with whom cooperation is often structural and intensive. Usually, investigators work according to protocols and professional codes, externally supervised by a complaints board.

A strict interpretation of the WPBR would bring nearly all employees of insurance companies under this legal regime. This would constitute a substantial administrative burden with relatively little extra value for the protection of constitutional rights. A more limited application of WPBR on investigative departments only would serve the protection of such rights. The 'Verbond voor Verzekeraars' serves as the main representative body for the insurance community.

Investigative departments in other companies

The investigative departments of other companies and organizations differ greatly in nature, size, specific activities and mode of organization. There are indications that nearly every company with a security department (mostly for uniformed surveillance of personnel and customers/visitors), which number around 200, also carries out investigations on a regular basis. The size of investigation departments varies between one and several dozen staffers, the number of investigations from a few to 1,500 or more each year. Some companies limit such investigations to their own employees, others also investigate customers or third parties when the need arises. Almost every method and means of investigation can be deployed, depending on budget, experience and company needs. Some of the investigative work is carried out by third party private investigators, mostly from detective bureaus. Companies claim to carry out investigations under guidelines that differ little from the regulatory regime of the WPBR.

Respondents view the possible consequences of a widening of the reach of the WPBR in various ways. Some mention better protection and especially an increased equality of all parties in the field of private investigation. The eventual acceptance of new legislation will be served by stimulating a certain consensus over its usefulness and need. Also, an interest in self-regulation has been repeatedly voiced. Extension of the WPBR without more effective supervision and enforcement will be met with resistance. There is no representative organization for companies with an investigative department, other than the general employers organization VNO/NCW.

Information brokers

Information brokers operate in a young and poorly organized area without a truly representative body, where hardly anyone can imagine that the WPBR could ever become relevant to their work. Investigative activities according to the given definition are carried out, but these do not constitute the mainstay of operations. There are indications that certain players in this market are not too concerned about professional and ethical working standards. Before deciding whether to bring *information brokers* under the WPBR regime, it is advisable to conduct wider and more extensive research, because the current research has only succeeded in sketching the contours. The Platform Informatiemanagement as a representative body only has a limited number of members within this business sector.

Trade information bureaus

Trade information bureaus and collection agencies roughly share a common market and show a substantial overlap in goals and methods. Companies in this sector collect and process personal data in large quantities. Although their public image is somewhat unfavorable, those companies that were interviewed appear to operate in a responsible manner. It is, however, obvious that information of dubious origin is being processed in this business domain. Respondents recognize certain benefits from bringing the sector under the WPBR regime, mainly because competitors peddling illicit data are expected to be banned from operating. Part of the sector, mainly collection agencies but also B2B trade information bureaus, claims that it will never have to come under WPBR rules because it does not process personal data other than those found in open sources, such as the records of the Chamber of Commerce. Certain elements of the WPBR meet with objections, such as the rules governing the storage of data gathered during investigations for later use. Such data constitutes the main source of income? of information agencies, while their clients only agree to provide such data for the duration of a specific investigation. Companies doing business in this sector are represented by several bodies.

Expert bureaus

The expert sector consists of individuals and companies (or company elements) that aim to establish the nature and extent of incidents where damage has occurred, sometimes followed by establishing legal responsibility. Such experts have traditionally been employed or hired on a fee basis by insurance companies. Increasingly, though, other organizations that were not insured but seek to gain insight in certain aspects of incidents have become clients as well. The experts sector is transparent and becoming increasingly well-organized. A number of parties are busy working to stimulate professionalism and self-regulation and have organized external representation.

There is little support for widening the WPBR's area of responsibility to include the expert sector, firstly because the activities of an expert are not considered to be investigative work in a strict sense. Respondents fail to see a problem that would be solved by introducing the WPBR to their business, while the extra administrative burden would not be appreciated. Furthermore, it is claimed that self-regulation in this sector has already attained everything that the WPBR could contribute. Some support could be expected for the limited application of the WPBR, reduced to cover only the 'real' investigative activities where personal data is involved. This would primarily have an influence on the fact-finding investigations that insurance companies themselves carry out. Most of the independent bureaus already consider themselves to come under the WPBR; they hold a ministerial permit and operate accordingly. In short, respondents in this sector press for a more specific definition of what constitutes 'investigative activities' and also demand a more professional supervision and enforcement of WPBR regulations.

Activities

Research question # 1 aimed at determining the number of relevant bureaus and departments operating in the Netherlands. The entire field that was surveyed in this research contained some 500 to 1,000 company investigative departments and investigative bureaus. Question # 2 was about the number of detective agencies that restricted themselves to only dealing with goods and therefore operate without a permit. Such bureaus were no longer found. Question # 3 pertained to the nature and dimensions of activities within the various organizations. The activities of both investigation departments and bureaus strictly speaking all come under a wide WPBR definition of investigative activities. Nevertheless, the actual activities are so divergent that a distinction in three categories is useful, with the cause or background of the specific investigation being the distinguishing element.

The following categories can be recognized:

1. Investigations following suspicion of irregularities, in order to establish truth: 'classic' investigative work and fact finding (establishing cause);
2. Investigations serving cautious enterprising and compliance with legal obligations, such as in Customer Due Diligence and preserving integrity;
3. *Intelligence* investigations into individuals, as in tracing crucial information to enable effective (re)actions.

Question # 4 was about the kinds and numbers of investigations, the methods that are applied and the client organizations. Varieties and numbers of investigations have already been addressed (and are further detailed in the report itself). The investigative methods that have been found can be divided into five categories:

- a. open sources investigations;
- b. investigations in the company's own data files;
- c. interviewing;
- d. surveillance, including observation, monitoring communications and physical and digital searches in lockers and personal computers;
- e. forensic -technical investigations.

The basis for investigating lies usually in establishing fact about irregularities that may take on the form or behavior that becomes relevant in the context of criminal law, improper conduct under civil law or infringements on the rights of others. Respondents find it hard to come up with a watertight definition, but more or less agree on 'real' investigative work involving the establishing of truth in suspicions of irregularities that (can) bring about damages, and for which investigations are carried out that can affect the privacy of natural persons.

Company investigative departments typically have their own company's strategic management as their sole 'client', while expert bureaus often work for a limited number of third parties such as insurance companies or risk carriers in the private and public sectors. Information *brokers* and trade information bureaus normally work for a wide group of entrepreneurial or institutional customers. Cooperation with the police or other government enforcement agencies (question # 5) remains limited to the 'classic' investigatory activities. In the context of compliance, such cooperation takes on the form of providing information upon request. It was established (question # 6) that organizations that especially engage in 'classic investigative work' make more or less regular use of private investigations bureaus.

The organization and positioning of the various departments and bureaus (question # 7) shows wide divergence. Banks often have their 'classic' investigative work carried out by a special Investigations or Security department, with insurance companies showing a similar image. In other companies the situation varies according to the nature of their *core business*. Fact finding investigations within the companies that were approached for this research were carried out by a dedicated unit, while Customer Due Diligence, integrity investigations and the like would sometimes be part of the primary business process and in other instances be tasked to specialized departments. Intelligence investigations show a wide spectrum of activities, usually related to the *core business* of a company.

The personnel actually carrying out the 'classic' investigative activities (question # 8) and their superiors usually have a background in law enforcement. Investigations in the second category, executed from a dedicated investigations department within a company, are again typically carried out by employees with a law enforcement background. Information *brokers* primarily have a background in information science or knowledge management.

To enable some form of comparison, the Integrity Bureau of the municipality of Amsterdam (BIA) was portrayed (question # 9). In its nature and purpose, BIA can be

compared to internal investigations or integrity departments within large companies, although the number of investigations is comparatively lower.

Application of the WPBR

The WPBR legislation with its accompanying regulations was originally designed for 'classic' security and investigative work, and as such can relatively easily be applied to organizations that engage in such activities (question # 10). Applying it to investigations in the context of compliance, due diligence and intelligence is quite another matter. The nature of the specific activities, the organizational setting in which they are carried out and the culture of the organizations that engage in them differ substantially from the situation for which the WPBR was originally designed. Finally, research question # 11 inquired about the foreseeable effects of widening the WPBR's reach to include in-company investigative departments. Many respondents in this sector warn against the effects of introducing the WPBR into the sphere of compliance and intelligence investigations. According to them this would bring an "unacceptable heavy burden" upon the organizations in question. Also, many respondents remain unconvinced of the benefits and necessity of widening the WPBR's reach in such a way, and the question has been raised whether the WPBR is the most appropriate instrument to defend individuals from illegitimate intrusions of their privacy by covert investigative activities of non-governmental third parties. A system of supervised self-regulation could in the end be more effective.

Conclusions

The research results indicate that support from the business sector for widening the reach of the WPBR is limited. If a wide interpretation of the WPBR would be applied, substantial parts of the day-to-day activities within banking and insurance companies would have to be regulated. Those involved maintain that the consequences in the form of an extra administrative burden would be most undesirable.

The organization of activities, but also the structure of in-company investigative departments, expert bureaus, *information brokers* and trade information bureaus show a great variety. A distinction can be made between 'classic' investigative work, investigative activities in the context of compliance and due diligence, and intelligence-related investigations. Only the first category fits in well with the activities for which the WPBR was originally designed.

There are good reasons for reconsidering 'carrying out investigative activities for third parties' and 'working with a profit motive' as distinguishing criteria. In the end, these activities can be identical and, thus, their consequences for civil liberties.