

Tweede Evaluatie Wet afgeschermdde getuigen

Dr. mr. S. Brinkhoff
Mr. J.W. Mensink

Colofon

© 2018 Wetenschappelijk Onderzoek- en Afdeling Extern Wetenschappelijke Betrekkingen (EWB).

Auteursrechten voorbehouden.

Kenmerk 2896/2164908

6 december 2017

Niets uit dit rapport mag warden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotokopie, microfilm, digitale verwerking of anderszins, zonder voorafgaande schriftelijke toestemming van het WODC.

Summary

The reason for the research Second Evaluation of the Shielded Witnesses Act is the commitment made by the Minister of Security and Justice in October 2012 to the First Chamber to evaluate this Act again after five years. The present research aims to gain insight into the application of and experiences with the shielded-witnesses scheme in the period April 2012-April 2017. The research is based on two research methods: desk research and interviews. The desk research, consisting of studying the relevant parliamentary documents, literature and case law, was done in order to map the legal framework of the Act on protected witnesses and to go into the provision of relevant criminal information via an official message by the Central Intelligence Service AIVD the Military Intelligence and Security Service MIVD to the Public Prosecutor. This research method also serves as a means to unearth criminal cases in which the shielded-witnesses scheme played a part and, related, get insight into the criminal cases in which the official message has played a role in the period April 2012-April 2017. From examination of the jurisprudence, searches on rechtspraak.nl and by questioning a number of respondents, it appears that the official message played a part in 20 criminal cases in the period mentioned. Of these criminal cases, we have selected five which we describe in more detail in this study. With the selection of these criminal cases we aim to give a picture of the use of official messages in criminal cases, the review of this information source and the role of the shielded-witnesses scheme in this whole. In addition to the desk research in the period March-August 2018 we conducted in total 13 interviews with respondents from the practice. These are face-to-face interviews that have taken an average of one hour to complete. The interviews were recorded and these recordings have been processed as verbatim as possible. These research findings were then encoded and on this basis we have made an analysis. Within this framework we have spoken with a wide range of relevant actors from practice, ranging from the National Public Prosecutor for Terrorism (hereinafter: the Public Prosecutor) to the Rotterdam examining magistrate, and from an employee of the AIVD to lawyers who have to deal with this matter.

Before we consider the outcome of this research, we briefly look at the way the AIVD and the MIVD provide information to it to the Public Prosecutor. First of all it has to be determined that these services are not in charge of tracing criminal offences. However, during the course of their duties they may encounter criminally relevant information. The law makes it possible in Article 66 of the Act on the Intelligence and Security Services 2017 (Wiv 2017) that such information will be provided to the Public Prosecutor by an official message. With regard to the confidentiality pursuant to Article 23 jo Article 135 Wiv 2017, the official message is always drafted in such a way that the information in it is not traceable to its source contained in the internal file on which it is based. The information in an official message may be difficult to review for the parties in the criminal proceedings. The Shielded Witnesses Act was created by the legislator to enable a review of the information contained in the official message

SUMMARY

and its background. The idea of the legislator is that by application of Article 187d CCP or the shielded-witnesses scheme of Article 226 m-226s CCP, the involved staff of the AIVD can, in the privacy of the Cabinet of the examining magistrate, explain the information in the message in more detail. The idea is that more context can thus be given on the background of the official message, so that, among other things, the reliability of the official message can be determined more easily. Such a hearing may also serve to check the lawfulness of the manner in which the information contained in the official message is obtained. Looking at the text of the law, both Article 187d CCP and Article 226 m-226s CCP explicitly aim at hearing witnesses. On the basis of the legal history, however, these legal provisions also implicitly give room to the examining magistrate to look at the internal documents of the AIVD and the MIVD in order to check the reliability and lawfulness of the acquisition of the information contained in the official message.

The Application of the Shielded Witnesses Act

This study, and also the first evaluative research into this Act, has yielded that in the years that this legal provision exists, hearing of shielded witnesses did not take place. The question then arises why this scheme has not been applied to date. The interviews and the desk research show that the respondents provide four reasons for this: 1) the drawing up of the AIVD, 2) the preparation of the defense, 3) the role of the official message in criminal cases, and 4) other compensation of the defense. We will elaborate these successively.

First of all, the arrangement of AIVD and the MIVD, which is founded in the legal duty of confidentiality, is one reason why the shielded-witnesses scheme is not applied. The *Piranha*-case has made this clear. Without the cooperation of the AIVD and the MIVD a shielded witness hearing cannot take place. The question now is whether in future criminal cases the legal duty of confidentiality will make a shielded witness hearing impossible. The interviews show a double image on this issue. On the one hand, it is indicated that it is not to be expected that the AIVD will have its own employees be heard as witnesses in criminal proceedings and that hearing a human source, an informant or an agent, is not open to discussion at all. On the other hand, respondents indicate that a shielded witness hearing may in the future surely be within the bounds of possibilities. In that case it must concern an important criminal case, in which the role of the official message is decisive.

The desk research and the interviews show a second reason why the shielded-witnesses scheme has not been applied to date: the attitude of the defense. The defense in criminal cases, with the exception of the *Piranha*-case, to date does not request the application of the scheme. It turns out that there are multiple reasons why the defense does not do so. The idea exists that the AIVD will not contribute to such a hearing at all. Moreover, a shielded witness hearing will not yield more information due to the duty of confidentiality to which the witness is bound, and the thought even prevails that such a hearing will result in more incriminating information. Having regard to the

general fact that witness requests in criminal cases often come from the defense, and that it occurs to a (much) lesser extent that a prosecutor or magistrate proceeds to this *ex officio*, the lack of requests to hear shielded witnesses is a major reason that the shielded-witness scheme is not applied.

A third reason why the shielded-witnesses scheme is not applied, is related to the role the official message plays in criminal cases. The official message in many criminal cases only has the function to start a criminal investigation, and serves to legitimize the use of coercion and investigation methods. In other words, the official message enables the police and the Public Prosecutor to gather evidence independently. The desk research shows that when information in a criminal case is only used as starting information, the criminal judge generally does not, or only to a limited extent, provide room to examine the reliability and/or the legality of obtaining that information. The picture when reviewing the background of the official message is no different. This fact, combined with the fact that the defense also does not request to hear shielded witnesses, is a major reason why the shielded-witnesses scheme is not applied.

The fact that other types of compensation take place for the defense, is a final reason why the shielded-witnesses scheme is not applied. This compensation often induces the examining magistrate to find the content of the official message sufficiently testable and may even induce him to use the official message as proof. This compensation or other means of review [verification] of the official message takes place first of all by the national Public Prosecutor when drafting the official message. He reviews the contents of the official message in the making by comparing it with the underlying internal file of the AIVD and the MIVD. Article 66 section 3 Wiv 2017 grants the national Public Prosecutor this power. The national Public Prosecutor at this stage can also persuade the intelligence and security services that supporting documents, such as a phone number or part of a tapped phone call, be provided to further substantiate the official message. The interviews show that these services are not opposed to this in all cases. When supporting documents are submitted, the official message is better testable in criminal proceedings and the defense is thus (somewhat) compensated for the use of this anonymous source of information.

There are a number of ways of compensation in the criminal proceedings in which the official message plays a role, for example by hearing the head of the AIVD and/or the national Public Prosecutor. The existence of much other evidence that supports the content of the official message, can also be seen as a form of compensation. Especially if there has been a possibility during the criminal trial to discuss other evidence by hearing witnesses or otherwise. From the desk research and conducted interviews follows that this latter situation may cause the official message to even be used as evidence in criminal cases. Although these forms of compensation in the defense may be regarded as insufficient, this may cause the magistrate to find that the information from the official message proved sufficiently testable *without* applying the shielded-witnesses scheme. Interesting in this context is also that from the desk research and conducted interviews follows that the official message may have been found sufficiently testable at the time that there is a lot of other evidence to support the content of the

SUMMARY

official message. Especially this aspect sometimes induces a magistrate to use the official message as evidence. The fact that there is much evidence that supports the official message can also be regarded as a form of compensation for the defense. Especially if there has been a possibility during the criminal trial that other evidence was discussed by hearing witnesses or otherwise.

The Value and Usefulness of the Shielded Witnesses Act

Having regard to the fact that the shielded-witnesses scheme has not been applied as yet, and the fact that there are plenty of reasons why this scheme does not apply, the question can be raised how valuable this scheme is. It follows from the interviews that the shielded-witnesses scheme can indeed be valuable and useful in a criminal case. In that case it does have to concern a combination of three aspects: 1) it must be an interesting criminal case in which 2) the investigation has produced only limited additional incriminating information about the suspect, and 3) the official message therefore plays a crucial role in the evidence. The review of the official message by a shielded-witness hearing may in such a case be necessary. This occurs especially when the defense pleads on the basis of the reliability of the official message or the legality of its acquisition. The fact that such a combination of factors will occur only sporadically, does not diminish the value of the scheme, as follows from the interviews. We will go further into the usefulness of the scheme below, when we will deal with the possible options for improving the shielded-witnesses scheme.

Possible Options for Improving the Shielded Witnesses Act

The question now is whether the shielded-witnesses scheme should actually be adapted to enable the competence mentioned. First, it should be noted in this connection that the legislator already had this, although not explicitly evident from the text of the law, in mind during the genesis of the law. For the explanatory memorandum shows that the examining magistrate can, on the basis of Article 226q CCP, take note of all information associated with the official message. As with the application of Article 187d CCP, the scope of the shielded-witnesses scheme is such that the examining magistrate could also read the internal file of the AIVD and the MIVD belonging to the official message. Despite the foregoing it could be recommended to lay down the power to inspect more explicitly in the text of the law, so that it is obvious for the parties to the proceedings that it exists.

Apart from the above, it is good to go deeper into this option for improving the shielded-witnesses scheme. For example, suppose that in a future criminal case the need for an effective review of the official message occurs, the examining magistrate should, just like the national Public Prosecutor ex Article 66 section 3 Wiv 2017, be able to read the internal file at the office of the intelligence and security service. The focus of the examining magistrate will then most likely be formed by the contents of

the plea by the defense about the reliability of the official message or the legality of the acquisition of the information contained therein. First, it must be indicated in this connection that the AISS 2017 has provisions that allow an examining magistrate to review internal documents of the AIVD or the MIVD. Thus the administrative judge can be asked to examine, in an administrative procedure pursuant to Article 137 Wiv 2017, if there are serious grounds that he is the only one allowed to consult the internal documents obtained from the AIVD or the MIVD. On the basis of Article 138 Wiv 2017 the civil judge may be obliged to assess whether keeping documents from the AIVD or the MIVD a secret is justified. In this context a judge therefore gets access to internal documents of the intelligence and security services. Although the proposed inspecting competence of an examining magistrate in criminal cases contains corresponding aspects, it is supposed to be much wider than the provisions of Article 137 and 138 Wiv 2017. For the complete internal file that is at the base of an official message is consulted. In relation to the powers of inspection it should also be noted that there are already examples of such a review in the criminal law practice. In some cases the judge, after a plea to that end by the defense, was allowed access to the internal file of the police intelligence unit TCI (Team Criminal Information). In those cases the plea of the defense has been refuted over and over, because no irregularity was found. The examining magistrate always laid that finding down in a police report. These examples show that perusal of an internal file by the examining magistrate may be a useful tool to review the background of anonymous information.

Although the power to inspect of an examining magistrate can be an effective means possible, we will also give some comment here. First, it should be considered that also in the case of perusal of the internal file of the AIVD or the MIVD, it is the intelligence and security service which retains control over the extent of the internal file that is inspected by the examining magistrate. It is therefore not to be taken for granted that the examining magistrate, by definition, gets access to *all* relevant documents. Also, the defense *itself* does not get access to the content and scope of the internal file because of this right of access. They will have to rely on the accuracy of the findings of the examining magistrate who, given the nature of this matter, will only be able to report on his findings to a limited degree in the records. Thirdly, the question is how the examining magistrate should act if he finds a reliability or legality problem after the exercise of the right of access. How can the examining magistrate report this in the records without damaging the duty of confidentiality which also applies for him? Should he report the parties to the proceedings that no use should be made of the official message in the criminal process? And what will be the result for the criminal case in which the official message is a crucial link in the construction of proof?

In short, on the basis of the above it appears sufficiently that a power to inspect of the examining magistrate entails all sorts of questions and complications which should be discussed, for example in a parliamentary debate. The choice to be made goes beyond the scope of this research. However, we believe that, as several respondents also indicated, there should be a possibility to effectively to review the background of the official message in criminal cases. For the fact remains that the official message is an anonymous source of information, the background of which is shrouded in mist for

SUMMARY

litigants. From, *inter alia*, rules on a fair trial laid down in Article 6 ECHR, situations are conceivable in which this mist should be lifted. Both the shielded witnesses hearing and the legal possibility for access of the examining magistrate can be a tool for this, but both may entail limitations and complications as a result of which the effectiveness may be less great. In our view, the legal possibilities should be clear in any case; as for the power to inspect profit is still to be gained by clarifying the text of the law, so that in a specific case the parties in the proceedings can take the complicated middle ground between the well-founded interests of the defense in Article 6 ECHR and the interests of the intelligence and security services. That this is a far from easy exercise has become evident on the basis of this research.