Autoriteit
Consument & Markt

2014 ACM Procedure for the inspection of digital data

The Netherlands Authority for Consumers and Markets;

Considering Sections 5:17 and 5:20 of the Dutch General Administrative Law Act (Awb), Sections 51 and 89 of the Dutch Competition Act (Mw), Section 70, paragraph 4, first sentence of the Dutch Railway Act, Section 48, paragraph 4, final sentence of the Dutch Drinking Water Act, Section 11.14a, paragraph 1, second sentence of the Dutch Aviation Act, and Section 2.4, paragraph 2 of the Dutch Act on Enforcement of Consumer Protection (Whc);

Given the desire for a detailed interpretation of the power to demand an inspection of digital data, and of the power to copy these data when carrying out the enforcement of compliance with the laws it enforces;

Decides:

Article 1 Definitions

In this decision, the following definitions shall apply:

1 Completion of an investigation: the final completion of the decision-making process following an investigation or, if so applicable, the final completion of the investigation that is required for follow-up checks as announced at the time of the final completion of the decision-making process following an investigation;
2 Awb: the Dutch General Administrative Law Act (in Dutch: *Algemene wet bestuursrecht*);
3 Individual involved: the individual that is the object when the powers laid down in Section 5:17 of the Awb are exercised;
4 Within-scope: any data that, given their nature and/or contents, may reasonably fall within the objective and subject of the investigation;
5 Within-scope data set: a data set with data that have been designated as within-scope before the '2014 ACM Procedure regarding the legal professional privilege of lawyers' and the below Article 2.3, paragraph 2 have been applied;
6 Data set: a set of data;
7 Data: digital data;
8 Hash value: a verifiable, mathematical calculation based on the contents of a digital file;
9 Moment of making available for perusal: the moment at which documents or data are made available for perusal within the meaning of Section 5:49, paragraph 1 of the Awb;

10 Investigation data set: a data set with data that have been designated as within-scope after the '2014 ACM Procedure regarding the legal professional privilege of lawyers' and the below Article 2.3, paragraph 2 have been applied;
11 Enforcement official: an individual that is appointed as such under the 'Decision on appointing ACM enforcement officials';
12 To secure: the transfer of data by an enforcement official to a data carrier of an enforcement official.

Safeguards when exercising the power to demand inspection of data under Section 5:17 of the Awb

Article 2.1 Safeguards in the realization of the secured data set

1 When demanding the inspection of, securing and selecting data, the enforcement official focuses on the objective and subject of the investigation;
2 The provision under paragraph 1 means that the act of selecting data that are connected to an individual/official or their helpers, only takes place if that individual/official is suspected to have been involved in the objective and subject of the investigation;
3 Prior to the exercise of his power under Section 5:17 of the Awb, the enforcement official hands over to the individual involved a description of the objective and subject of the investigation;
4 The enforcement official hands over to the individual involved the names of the individuals/officials whose involvement in the objective and subject of the investigation is suspected, or the names of their helper(s), before securing or taking along data belonging to these individuals/officials under Section 5:17, paragraph 3 of the Awb;
5 Once the data have been secured, the enforcement official hands over to the individual involved an overview of the data in the secure data set, including the relevant hash values.

Article 2.2 Safeguards in the realization of the within-scope data set

1 Until the data set that the enforcement official has demanded to be inspected or until the secured data set has been selected in such a manner that it can be designated as within-scope, the enforcement official will not examine the data longer than necessary in order for him to determine whether the data are within-scope;
2 When data are to be examined for the purpose of determining whether the data are a within-scope data set, the enforcement official gives the individual involved the opportunity to be present during this examination;

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

3 No later than the moment of making them available for perusal, the enforcement official hands over to the individual an overview of the data that is included in the within-scope data set, and of the manner in which the within-scope data set was realized.

Article 2.3 Safeguards in the realization of the investigation data set

1 If it can be reasonably expected that the within-scope data set may contain data that can be designated as non-business, the enforcement official gives the individual involved the opportunity to indicate, in writing and supported with reasons, what data in the within-scope data set can be designated as non-business within the meaning of Section 5:17, paragraph 1 of the Awb;
2 The enforcement official verifies this claim. Insofar the enforcement official accepts the claim, the data will not be included in the investigation data set.

Article 2.4 Safeguard in the realization of the secured data set, the within-scope data set and the investigation data set

The '2014 ACM Procedure regarding the legal professional privilege of lawyers' explains how the enforcement official deals with the right of privileged correspondence between lawyers and the individual(s) involved when realizing the secured data set, the within-scope data set, and the investigation data set.

Article 2.5 Safeguard in the inclusion of data in the file

The enforcement official explains on what basis he makes data from the investigation data set available for perusal under Section 5:49, paragraph 1 of the Awb. This will be done as soon as possible, but no later than the moment of making the data available for perusal. This will not happen if the choice for making data available for perusal is based on a substantive assessment of the data.

Article 2.6 Safeguards in reusing, provision to third parties, and storage of data

1 Data that have been included in the investigation data set may be reused in another investigation, and may be provided to third parties;
2 Data that have been included in the secured data set that have not been included in the investigation data set cannot be reused in another investigation nor be provided to third parties;

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

3 The enforcement official draws up a report of official acts if data are reused or are provided to third parties in accordance with the first paragraph. In this report of official acts, the enforcement official indicates from which secured data set the data in question come from;
4 Data that are included in the secured data set, the within-scope data set, and the investigation data set, and which have not been included in the file, will be stored until no later than the completion of the investigation;
5 Data that are included in the file are stored in accordance with the Dutch 1995 Public Records Act.

Article 3 Final provision

This decision replaces all previous procedures for the inspection of data of the Board of the Netherlands Competition Authority, the Commission of the Netherlands Independent Post and Telecommunication Authority, and the Netherlands Consumer Authority.

Article 4 Official title

This decision's official title is '2014 ACM Procedure for the inspection of digital data.' Its Dutch equivalent is *'ACM Werkwijze voor onderzoek in digitale gegevens 2014.´*

Article 5 Date of entry into force

This decision takes effect from the first day after the publication date of the Dutch Government Gazette in which this decision is published.

This decision will be published in the Dutch Government Gazette.

The Hague, February 6, 2014,

The Netherlands Authority for Consumers and Markets,

Chris Fonteijn

Henk Don

Anita Vegter

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

Autoriteit
Consument & Markt

EXPLANATORY NOTES

Scope and assumptions

The 2014 Procedure for the inspection of digital data (hereafter: procedure) applies to the enforcement of compliance with the laws that the Netherlands Authority for Consumers and Markets (ACM) enforces.

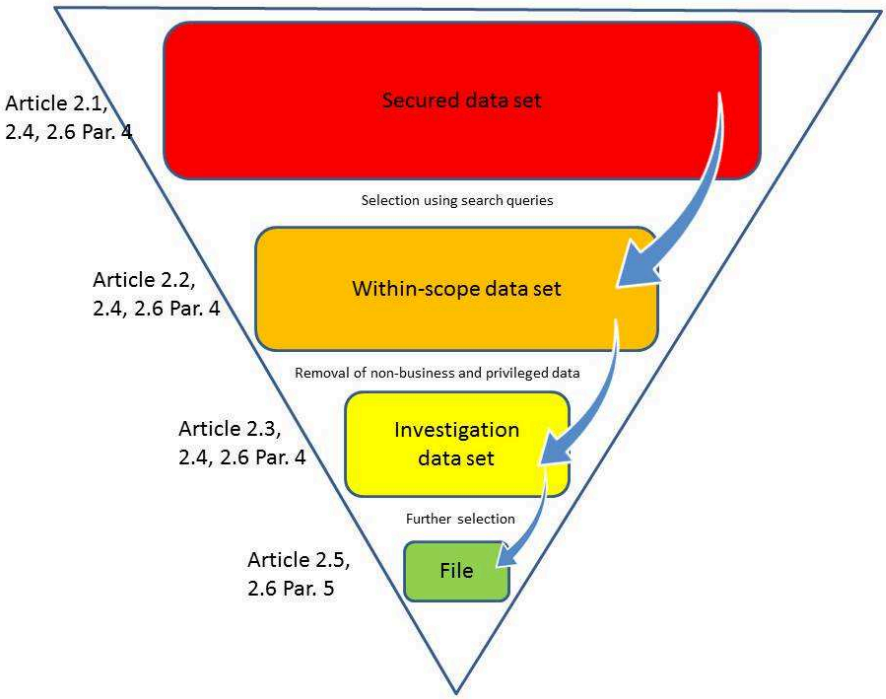
This procedure gives a detailed interpretation of the power to demand an inspection of data under Section 5:17 of the Awb, insofar it concerns digital data.

This procedure explains what safeguards ACM observes when inspecting digital data. This procedure also provides individuals involved a number of verification tools to check whether these safeguards have been observed.

ACM seeks to be as transparent as possible towards individuals involved, taking into consideration the investigation interests.

When exercising the power as referred to in Section 5:17 of the Awb, ACM will, at all times, take into account the provisions of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the general principles of sound administration, and the principle of proportionality as laid down in Section 5:13 of the Awb.

The procedure is graphically illustrated below:



Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

Further information about the procedure

When exercising the power as referred to in Section 5:17 of the Awb in an investigation, the enforcement official will, where necessary, give a detailed explanation of ACM's interpretation of its inspection of digital data.

Best practices

The enforcement official conducts the inspection of digital data in accordance with common best practices as laid down in officially recognized international standards on forensic IT, and with best practices developed by ACM. An example of a best practice is the storage of the secured data set at the offices of ACM for the duration as indicated in Article 2.6 of this procedure. The reason is that, only with the secured data set, it can be demonstrated that the data come from the individual involved, and also that the secured data set is needed if it turns out that further investigation is necessary. The enforcement official only uses software and products that are standard in the industry, insofar this is possible.

Explanatory notes per article

Article 1: definitions:

Completion of an investigation

Examples of when investigations are completed, are:

- The expiration of any objection or appeal period in which an objection or appeal can be filed against a decision, or, if an objection or appeal has been filed, a final decision has been issued on that objection or appeal;
- Announced follow-up checks as part of, for example, an order subject to periodic penalty payments or a commitment have taken place, and do not give any reasons for further investigation;
- An investigation has not resulted in a decision, because it has been concluded that there are not enough reasons to continue the investigation.

The hash value

The purpose of calculating a hash value is safeguarding a file's integrity. Any change to a file will result in a different hash value.

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

Article 2.1, second paragraph: data belonging to individuals/officials

If the selection of data is connected to an individual/official or their helpers, the following provision applies.

Data that belong to individuals/officials or helpers include, for example, email accounts and/or all files on file servers for which such individuals/officials have read/write permissions.

Article 2.2, paragraph 3: Realization of the within-scope data set

This provision usually entails that the search queries that have been used are provided immediately to the individual involved after a data search has been conducted, and that the individual involved also receives the reasons for using the search queries at the moment of granting the inspection.

Article 2.3: non-business data

Depending on which statutory provision is enforced, the within-scope data set may, given its nature, contain data that cannot be reasonably designated as business information. In such a case, ACM does not offer the opportunity as referred to in Article 2.3.

Article 2.5: Inclusion of data in the file

One example of the manner on the basis of which a choice is made with regard to the inclusion of data from the investigation data set in the file is taking a random sample in accordance with scientific standards. In accordance with Article 2.5, the individual involved will be given insight into the way the random sample was taken, as well as into the results. The results of the random sample consist of the data from the investigation data set that are to be included in the file based on the random sample.

Article 2.5 does not apply if the choice was made based on a substantive assessment of the data. An example would be if the contents of the data were inspected individually, whether or not searches have been conducted using search queries. In that situation, insight into how the choice was made must be given in the statement of objections. After all, the statement of objections describes the violation.

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl

In addition, Article 2.5 does not apply either if all data from the investigation data set are made available for inspection under Section 5:49, paragraph 1 of the Awb. After all, in that situation, there is no choice based on which data from the investigation data set have been made available for inspection.

Article 2.6: Reusing, provision to third parties, and storage of data

If data are reused in another investigation, these data are then included in the other investigation and are thus stored until no later than the completion of that other investigation.

Once the retention period mentioned in this article has expired, the enforcement official destroys the data.

Muzenstraat 41 | 2511 WB Den Haag
Postbus 16326 | 2500 BH Den Haag
T 070 722 20 00 | F 070 722 23 55
info @acm.nl | www.acm.nl | www.consuwijzer.nl