



2014 ACM Procedure regarding the legal professional privilege of lawyers

The Netherlands Authority for Consumers and Markets;

considering Sections 5:17 and 5:20, paragraph 1 of the 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);

Decides:

Article 1 Definitions

In this decision, the following definitions shall apply:

- 1 ACM: the Netherlands Authority for Consumers and Markets as referred to in Section 2, paragraph 1 of the Establishment Act on the Netherlands Authority for Consumers and Markets;
- 2 ACM organization: the organization of the staff as referred to in in Section 5, paragraph 1 of the Establishment Act on the Netherlands Authority for Consumers and Markets;
- 3 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;
- 4 Awb: the Dutch General Administrative Law Act (in Dutch: *Algemene wet bestuursrecht*);
- 5 Individual involved: the individual that is the object when the power laid down in Section 5:17 of the Awb is exercised;
- 6 Data: analog or digital data;
- 7 Enforcement official: an individual that is appointed as such under the Decision on appointing ACM enforcement officials;
- 8 To secure: the transfer of data by an enforcement official to a data carrier of an enforcement official.



Article 2 Legal Professional Privilege officer (LPP officer)

1. The ACM organization has one or several LPP officer(s), which oversee(s) the exercise of the right to privileged correspondence with lawyers.
2. LPP officers carry out the duties assigned to them under this procedure independently, and account for these activities to ACM directly, without going more deeply into their considerations at a substantive level.
3. LPP officers are not involved nor will be involved in the investigation in relation to which they have examined data or documents, or in any other investigation the data or documents (or parts thereof) from the former investigation are used.

Article 3 Data for which the enforcement official sees reasons for immediate inspection

1. When inspection of data is demanded under Section 5:17, paragraph 1 of the Awb, the individual involved may indicate that it contains (or also contains) privileged correspondence.
2. In that case, the enforcement official verifies whether the data claimed to be privileged by the individual involved are indeed privileged by taking a cursory look at the data.
3. If an enforcement official has taken a cursory look at the data claimed to be privileged, and indeed designates them as privileged, he puts the data aside. If the enforcement official is not convinced of the privileged nature of the data claimed as such, yet the individual involved persists in his claim, the enforcement official takes the data with him in a sealed envelope.
4. If the individual involved makes a plausible case that taking a cursory look at the data might already compromise the privileged nature of the data claimed as such, the enforcement official takes the data with him in a sealed envelope without inspecting the data.
5. The enforcement official hands over the sealed envelope, as referred to in the third or fourth paragraph, to the LPP officer for verification of the privileged nature of the data claimed as such.
6. The LPP officer gives the individual involved the opportunity to indicate, in writing and supported with reasons, what data (or parts thereof) that has been submitted to the LPP officer is privileged in his opinion. Article 5 subsequently applies.



Article 4 Data for which the enforcement official sees no reasons for immediate inspection

1. An enforcement official may see reasons to demand inspection of the data under Section 5:17 of the Awb without having inspected them at the time when the data was demanded and secured.
2. Insofar the individual involved indicates at the time when the data was demanded and secured that data as referred to in the first paragraph also contains privileged correspondence, the enforcement official gives the individual involved the opportunity to be present at the offices of ACM when these data are inspected. In that case, Article 3 similarly applies.
3. Insofar the individual involved indicates at the time when the data was demanded and secured that the data as referred to in the first or second paragraphs also contains privileged correspondence, and the enforcement official plans to inspect these data without the individual involved being present, the enforcement official hands over the data, without inspecting the data, to the LPP officer for verification of the claim made by the individual involved.
4. If a situation as described in paragraph 3 occurs, the LPP officer gives the individual involved the opportunity to indicate, in writing and supported with reasons, what data is privileged. Article 5 subsequently applies.
5. If an enforcement official finds potentially privileged data in an investigation data set within the meaning of Article 2.3 of the 2014 ACM Procedure for the inspection of digital data that has not been claimed as such by the individual involved, he will put these data aside, and hands these data over to the LPP officer.

Procedure of the LPP officer

Article 5.1 Verification of the claim(s)

The LPP officer assesses the privileged nature of the data claimed as such by the individual involved, taking into account the reasons put forward by him.



Article 5.2 Claim(s) of the individual involved is/are accepted

If and insofar the LPP officer believes the claim to be valid, he informs the individual involved of his conclusions in writing. The LPP officer does not hand over the relevant data to the enforcement official.

Article 5.3 Claim(s) of the individual involved is/are not accepted (at first)

1. If and insofar the LPP officer is not convinced of the validity of the claim, he informs the individual involved of his conclusions in writing, supported with reasons. The LPP officer gives the individual involved the opportunity to explain his claim in further detail, in writing.
2. If the LPP officer, after this more detailed explanation, believes the claim to be valid, he will act in accordance with Article 5.2.
3. If the LPP officer, even after this more detailed explanation, is still not convinced of the validity of the claim, he informs the individual involved of his conclusions in writing, supported with reasons. In this notice, the LPP officer indicates that he will hand over the data in question to the enforcement official after 10 working days.

Article 6 Reusing, handing over to third parties, and storing correspondence

1. The correspondence exchanged between the individual involved and the LPP officer will not be reused in another investigation nor will it be handed over to a third party other than the individual involved;
2. The LPP officer destroys the correspondence exchanged between him and the individual involved. The destruction of the correspondence exchanged between the individual involved and the LPP follows but does not exceed the retention period as referred to in Article 2.6 of the 2014 ACM Procedure for the inspection of digital data.

Article 7 Supporting services for the LPP officer

From the moment the individual involved has indicated what data contain privileged correspondence, the supporting forensic IT activities concerning these data will be carried out exclusively by an enforcement official that is not involved or will not be involved in the relevant investigation, or in any other investigation the data (or parts thereof) from the former



investigation are used.

Article 8 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.

Article 9 Official title

This decision's official title is "2014 ACM Procedure regarding the legal professional privilege of lawyers." Its Dutch equivalent is 'ACM Werkwijze geheimhoudingsprivilege advocaat 2014.' This decision and its explanatory notes will be published in the Dutch Government Gazette.

The Hague, February 6, 2014,

The Netherlands Authority for Consumers and Markets,

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EXPLANATORY NOTES

Introduction

The purpose of the '2014 ACM Procedure regarding the legal professional privilege of lawyers' (hereafter: the procedure) is to give individuals involved insight into how the right to privileged correspondence between lawyers (whether or not employed) and their clients is implemented in practice by the ACM organization. The procedure applies to all duties of ACM. This means that the procedure applies to the enforcement of compliance with regulations ACM enforces, as well as to other duties of ACM such as industry-specific regulation.

The procedure applies to the exercise of the power to demand inspection of data under Section 5:17 of the Awb. This procedure may similarly apply if the power to demand inspection of data under Section 5:16 of the Awb is exercised.

This procedure seeks to strike a balance between, on the one hand, ACM's need for inspecting data as soon as possible, and, on the other hand, the individual involved's need for having ACM put aside in the investigation his correspondence with his lawyer(s) that was exchanged confidentially. From a practical point of view, too, it is important for both the individual involved as well as for ACM to have a clear procedure, published in advance. Finding a solution outside the courtroom is thus stimulated, and any costs and time associated with legal procedures are avoided as much as possible.

The procedure explains that, insofar the individual involved so wishes, certain data, with regard to which the individual involved has succeeded in making a plausible case that it is privileged data, is exclusively given to an LPP officer to verify whether it indeed is privileged data.

ACM considers documents privileged regardless of the question what regulation these data are related to. In other situations, existing jurisprudence is followed with regard to the material scope of the right to privileged correspondence. The procedure applies to correspondence with a lawyer insofar this correspondence is not in the lawyer's possession. The procedure does not apply to correspondence with other individuals with legal professional privilege than lawyers.

The ACM organization has taken the necessary measures (technical and non-technical) to guarantee compliance with the safeguards mentioned in this procedure. For example, the ACM organization has a closed network, which cannot be accessed by ACM enforcement officials, where correspondence with the LPP officer is stored, as well as the data that is given to the



LPP officer for assessment.

Notes per article

Article 2

Partly in light of Article 2, paragraph 3, ACM aims to have as few LPP officers as possible.

Article 2, paragraph 3

Although an ACM LPP officer, given his official employment with ACM, is not completely independent of ACM, he has been given explicit instructions to carry out his duties independently.

Article 3, paragraph 1

If the individual involved believes that the document is privileged (in part or completely), he is not obliged to disclose its entire contents to the enforcement official. By the same token, however, it is not enough if the individual involved merely states that some data are privileged. The individual involved must support such claims by putting forward grounds to the enforcement official that the document is indeed protected by confidentiality (cf. ECJ 18 May 1982, Case 155/79 (*AM & S Europe Limited/Commission*), paragraph 29). The individual involved can indicate and explain, in particular, who the author is, whom the file is for, what the respective positions and duties are of each of them, and the objective with which and the context in which the document was created. That way, the individual involved can explain the context in which the document was found, the way in which it was categorized, or other documents to which it relates (cf. General Court 17 September 2007, joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals and Akcros Chemicals/Commission*), paragraph 80).

Article 3, paragraphs 2 and 3

Before an enforcement official sets aside data, he makes sure that, in light of the justifications put forward by the undertaking, the document in question is indeed confidential. In a lot of situations, it suffices to, in this context, take a cursory look at the document, looking at the general appearance of the document or its headings, the title or any other superficial characteristics (cf. General Court 17 September 2007, joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals and Akcros Chemicals/Commission*), paragraph 81).



Article 3, paragraph 4

The individual involved has the option of denying the enforcement official the inspection (even a superficial inspection) of a document that the individual involved claims to be protected by confidentiality, if he believes that such a superficial inspection is impossible without disclosing the contents of the documents, and if he provides the enforcement official with reasons. This may be particularly the case if the form of the document in question does not clearly indicate its confidential nature (cf. General Court 17 September 2007, joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals and Akcros Chemicals/Commission*), paragraphs 81 and 82). In his report of official acts, the enforcement official indicates what grounds the individual involved put forward for claiming that a superficial inspection would be impossible in this case.

Article 3, paragraph 5

The procedure that ACM explains in this policy rule, where the LPP officer plays a role in the assessment of whether certain data are confidential, is not a mandatory one. If the individual involved, for any reason whatsoever, believes that an assessment by the LPP officer offers too few safeguards, the individual involved is free to start (civil-law) interim injunction proceedings against the inspection (superficial or not) of the document by an enforcement official. In such a case, the enforcement official can leave behind with the individual involved the document in question in a sealed envelope. In that case, the individual involved has 10 working days to have a writ served on the Dutch State. If the individual involved indeed has a writ served on the Dutch State, the enforcement official will, as long as the interim injunction proceeding (and any appeal) takes place, not take note of the data that have been submitted to the court in interim injunction proceedings. If the individual involved, within 10 working days, has no writ served on ACM, the enforcement official will hand over the sealed envelope to the LPP officer. The LPP officer will then open the sealed envelope, and will begin the assessment of the data that are contained in the envelope.

Article 4, paragraph 2

If the enforcement official inspects the demanded and secured data in order to assess whether these data are within-scope, and the individual involved indicates that some of the data concern privileged correspondence, the enforcement official will give the individual involved the opportunity to be present at the offices of ACM when these data are inspected.



Article 4, paragraph 3

If it can be reasonably expected that, when creating the investigation data set, the within-scope data set may contain data that concern privileged correspondence, and the enforcement official is planning to inspect these data without the individual involved being present, the enforcement official will submit these data, without inspecting them, to the LPP officer for assessment of the claim of the individual involved.

Article 5.1 – article 5.3

The individual involved must direct the correspondence explicitly mentioned in these articles exclusively to the LPP officer, and must also clearly indicate that it concerns confidential information.

Article 5.2

In case of digital data, the LPP officer makes sure that the data are not added to the investigation data set within the meaning of Article 2.3 of the 2014 ACM Procedure for the inspection of digital data.

Article 5.3, paragraph 3

The waiting period of 10 working days is meant to offer the individual involved the opportunity to start (civil-law) interim injunction proceedings in order to prevent the LPP officer from handing over the data in question to the enforcement official. If the individual involved indeed has a writ served on the Dutch State, the LPP officer will, as long as the interim injunction proceeding (and any appeal) takes place, not hand over the data that have been submitted to the court in interim injunction proceedings for assessment to the enforcement official. If the individual involved, within 10 working days, has no writ served on ACM, the LPP officer will hand over the data in question.