

Report

Investigation into the working methods of the General Intelligence and Security Service

Date: 6 September 2016
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NATURE OF COMPLAINT

On 21 November 2013, the Dutch newspaper *NRC Handelsblad* published an article claiming that, in the period from 2005 to 2010, the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*, AIVD) had spied on politicians from the island of Bonaire in the Caribbean Netherlands, who were negotiating with the Dutch government regarding accession to the Netherlands. The article alleged that these surveillance activities constituted an illegal operation that was concealed from the government of the Netherlands Antilles of that time.

During the period in question, the complainant was a political leader on Bonaire. He filed the following complaint against the AIVD:

In the period from 2005 to 2010, the AIVD spied on politicians on Bonaire (including the complainant) who were negotiating with the Dutch government regarding Bonaire's accession to the Netherlands. According to the complainant, these surveillance activities were unlawful.

FINDINGS

Complainant's view

The complainant was politically active on Bonaire in the period from 1977 to 2010, serving as a minister for a short time. In September 2014, the complainant spoke to his biographer, who drew the complainant's attention to the article in *NRC Handelsblad* of 21 November 2013, and asked whether he too had been the subject of surveillance by the AIVD. The biographer's question prompted the complainant to enquire of the responsible minister whether he (the complainant) had indeed been the subject of surveillance during the period that he was politically active. The handling of this enquiry led to the complainant filing a complaint with the National Ombudsman regarding the working methods of the AIVD.

Handling of complaint by Minister of the Interior and Kingdom Relations

On 9 October 2015, the Minister of the Interior and Kingdom Relations (hereinafter referred to as the "Minister") informed the complainant that his complaint regarding the AIVD had been referred to the Review Committee on the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*, CTIVD) for advice.

Following receipt of the CTIVD's response, the Minister wrote to the complainant on 29 March 2016 informing him as follows:

"The CTIVD has investigated your complaint, for which purpose the CTIVD was given unrestricted access to all relevant documentation. The CTIVD also interviewed all service personnel whose input it deemed necessary. Furthermore, the CTIVD has spoken to your attorney, in order to give you the opportunity to personally or indirectly

provide information in support of your complaint. On 13 January 2016, the CTIVD reported its conclusions to me. The contents of the CTIVD's report have been classified as secret.

The Intelligence and Security Services Act 2002 (*Wet Inlichtingen- en Veiligheidsdiensten*, WIV) stipulates that any information that discloses or could lead to the disclosure of the identity of a source, an ongoing operation or an operational method of an intelligence or security service must not be published. The report provided to me was classified as secret by the CTIVD because it contained information of the kind referred to above. Hence, its publication is prohibited by the Intelligence and Security Services Act 2002. The relevant prohibition also prevents me from forwarding the report to you for perusal. However, taking due account of the CTIVD's advice in this case, I am at liberty to share with you some of the information contained in the report.
(...)

In accordance with the complainant, the CTIVD defined the complaint as follows:

The complainant believes that the AIVD gathered information about him in an unlawful manner in the period from 1 January 2005 up to and including 10 October 2010.

The CTIVD has advised me to partially uphold and partially reject your complaint.

I cannot disclose the basis of the CTIVD's advice for the reasons set out above. I can nevertheless inform you that the AIVD did carry out an investigation in the course of performing its statutory duties. However, I cannot disclose to you whether the investigation was carried out in the Netherlands or elsewhere. Nor can I disclose to you what form the investigation took, i.e. whether it involved the use of special intelligence-gathering methods or merely drew upon open sources.

The CTIVD's investigation focused on the period specified by you, namely 1 January 2005 up to and including 10 October 2010, and on whether any unlawful activities took place. I cannot disclose whether an active AIVD operation was in progress throughout the period in question. The CTIVD considers the AIVD operation to have been largely lawful. However, the CTIVD has concluded that, for a short period, the AIVD was not entitled to undertake surveillance, implying that the portion of the AIVD operations that took place during the short period in question was unlawful. Hence the CTIVD's recommendation that I should partially uphold your complaint and partially reject it. It has been ascertained that, in respect of almost the entire period that you cite, your complaint is unjustified, insofar as either you were not the subject of investigation, or the investigations that took place were largely lawful.

I have adopted the CTIVD's advice in full. Insofar as the CTIVD's report highlighted matters warranting action, the necessary action has since been taken."

Complainant's response

The complainant indicated that he would have liked the investigation to consider the entire period that he was politically active. He was nevertheless aware that the National Ombudsman's investigations would be confined to the period from 2005 to 2010.

Investigation by National Ombudsman

The National Ombudsman interviewed a number of AIVD personnel on 17 June 2015. The National Ombudsman used the opportunity offered by the interviews to verify the information provided to the complainant by the Minister in the Minister's letter of 29 March 2016. The National Ombudsman was able to peruse the CTIVD's reported findings and advice, and the supporting documentation (see also 'Background').

JUDGEMENT OF NATIONAL OMBUDSMAN

The complainant alleged that, in the period from 2005 to 2010, the AIVD spied on politicians on Bonaire (including the complainant) who were negotiating with the Dutch government regarding Bonaire's accession to the Netherlands. According to the complainant, these surveillance activities were unlawful.

The Minister has stipulated that the information provided by the AIVD to the National Ombudsman for investigation of the complaint is secret. The National Ombudsman is therefore legally precluded from disclosing that information.

The government is to act correctly and use its powers only for their intended purposes. That implies that the public may expect the government to perform its duties in a conscientious and lawful manner. The government and those employed by the government may be expected not to abuse their positions, their powers, their time and the resources at their disposal.

The CTIVD advised that the complaint should be partially upheld and partially rejected. The reason for partially upholding the complaint was that, for a short period, the AIVD was not entitled to undertake surveillance. The minister adopted the CTIVD's advice.

On the basis of the information provided to and verified by the National Ombudsman, the National Ombudsman has concluded that, for a fairly short part of the period under consideration (2005 to 2010), the AIVD undertook surveillance of the complainant when it was not entitled to do so. The part of the AIVD's operations that took place during that period was unlawful. To that extent, the investigated activities were inappropriate.

On the basis of the information provided to and verified by the National Ombudsman, the National Ombudsman has ascertained that, in the remainder of the period under consideration, either the complainant was not under surveillance or the surveillance that took place was lawful. In that respect, the investigated activities were appropriate.

CONCLUSION

The complaint regarding the investigated activities of the General Intelligence and Security Service is upheld in respect of the investigation of the complainant undertaken during a relatively short part of the period from 2005 to 2010. Otherwise, the complaint is rejected.

The National Ombudsman,

Reinier van Zutphen

BACKGROUND

Investigation methods

When investigations are undertaken in response to a complaint regarding the AIVD, those investigations cannot usually be conducted or reported in the normal transparent manner.

Under Section 9:31, subsection 4, of the General Administrative Law Act (*Algemene Wet Bestuursrecht*, AWB), the Minister of the Interior and Kingdom Relations may refuse to provide the National Ombudsman with requested information or documents, or may make such information or documents available exclusively to the National Ombudsman, where compelling grounds exist. Such grounds include a statutory secrecy obligation or the national interest. Under Section 83, subsection 4, of the Intelligence and Security Services Act 2002, the National Ombudsman is required to respect a decision to that effect made by the Minister.

If the National Ombudsman undertakes an investigation in response to a complaint regarding the AIVD, the National Ombudsman gives the Minister of the Interior and Kingdom Relations and, where appropriate, one or more officials the opportunity to respond to the complaint. For that purpose, the National Ombudsman makes use of the investigative powers afforded by the General Administrative Law Act. In appropriate cases, the Deputy Ombudsman speaks directly to AIVD personnel or personally peruses relevant information (under Section 83, subsection 5, of the Intelligence and Security Services Act 2002). Such procedures enable the National Ombudsman to obtain the information required for the investigation.