

Instruction for information on investigation and prosecution (2020A004)

Category	• Information provision
Legal nature	Instruction within the meaning of Article 130, par. 6 RO Act
From	Board of Procurators General
To	Heads of the Public Prosecution Service (PPS), Chief of Police, Heads of the Special Investigative Services, Commander of the Royal Netherlands Marechaussee
Registration no.	2020A004
Date effective	01-09-2020
Publication in Government Gazette	
Cancelled	Instruction for information on investigation and prosecution (cancelled) (2012A009)
Relevant policies	Instruction Investigation reporting (2017A007) Instruction high transactions and special transactions (2008A021) Instruction punishment by the Prosecution Service (2018A010); Instruction Judicial and Criminal Data Act (2018A003)
Legal provisions	-
Appendices	-

SUMMARY

The Public Prosecution Service and the investigative authorities [1] provide active and targeted information about tackling and preventing crime and about criminal justice. By doing so they inform society about the way in which they carry out their duties in the context of criminal law enforcement of the rule of law and they publicly account for their performance. This instruction provides rules for the use of information about investigation and prosecution. The instruction deals with the situation in which information infringes on the privacy of identifiable persons, specifies where the responsibility for using information lies in the distinguishable cases and at the different moments of communication, and provides rules for cooperation in media productions.

1. Introduction and Starting Points

1.1 Introduction

As criminal enforcers of the legal order, the Public Prosecution Service and the investigative authorities make an important contribution to social security.

Publicly they render account via the media [2] by means of targeted and active communication about the approach and prevention of crime and about developments in (specific) investigations and criminal cases (criminal justice). In this way they provide society with the information that is necessary for a good public debate about criminal justice. In addition to serving the public interest, information is also used in the criminal justice system in the context of transparency and (the prevention of) social unrest.

Information must be distinguished from criminal investigation reporting. If an information message asks for the public's help in obtaining information for the purpose of investigation, the applicable policy applies. [3] Information and investigative reporting can be used in combination.

1.2 Starting Point

The social obligation to provide information arises from Articles 6 (public nature of criminal justice) and 10 (freedom of expression) of the European Convention on Human Rights (ECHR) and Article 8 (provision of information on one's own initiative) of the Government Information (Public Access) Act. The European Court of Human Rights (ECHR) attaches great social importance to public information about criminal justice. Without such openness, no proper public debate on criminal justice is possible, while public debate is necessary for the proper functioning of criminal justice and a core value for preserving a democratic society. This public interest also follows from the case law of the ECHR, in which the provision of information about criminal justice, in particular with regard to individual criminal cases, is increasingly seen as an independent interest. [4]

In view of the general provisions of Articles 141 and 148 Criminal Procedure (Cp), information about criminal justice in principle takes place under the (ultimate) responsibility of the (Chief) Public Prosecutor.

The Public Prosecution Service is ultimately responsible for information by the investigative authorities in criminal cases.

1.3 Comparative Assessment of Interests

When information that can be traced back to a person is used in communication about criminal justice, publication thereof infringes that person's privacy (Article 8 ECHR, Article 10 Constitution). Such an infringement is permitted for the sake of public access to criminal justice, provided that it has been preceded by careful assessment of interests. The requirements of proportionality, subsidiarity and efficiency are leading here.

The following factors play a role in the assessment of interests:

- the nature and seriousness of the offences;

- the accused as a person;
- respecting the presumption of innocence;
- the involvement of victims and/or next of kin;
- the social impact of the case;
- the purpose of the information;
- the stage of the case;
- the media attention for or public debate about or in response to the case;
- the degree of traceability;
- the course of the investigation.

The more relevant the information is for the public debate, the more the importance of information increases. The basic principle remains that no more information is provided than is necessary to realize the interest served by disclosure. This therefore always requires a tailor-made assessment of interests. The limitation of (the interpretation of) information about criminal cases lies in guaranteeing the right to a fair trial (fair-trial principle) and the protection of the privacy of those involved (suspects, defendants, witnesses, victims and next of kin).

When assessing the above interests, the (Chief) Public Prosecutor has a certain discretion, as follows from case law of the ECHR.

The assessment framework applies regardless of whether the case is dismissed, transposed, a criminal order has been issued or the alleged offender has been summoned. In general, the interest of respect for the privacy of the suspect and that of the presumption of innocence are relatively more important as long as a decision to prosecute has not yet been taken.

2. Use of Information

2.1 Division of Tasks

Until a suspect is brought before the examining magistrate, the communication in principle lies with the investigating authority. From the arraignment, the communication is taken over by the Public Prosecution Service. With regard to operational information, the Public Prosecution Service can also transfer the communication to the investigative authority after the arraignment.

Sensitive Cases

In sensitive cases, the Public Prosecution Service can decide that the communication will also be a matter of the Public Prosecution Service prior to the arraignment.

2.2 Moments of Communication

Reporting on Incidents and Arrests

In almost all cases, the investigative authority is responsible for the first communication. In sensitive cases (such as sexual offences and cases about which social unrest has arisen), that communication is always first coordinated with the Public Prosecution Service. If a case is sensitive, the choice can be made to have the communication done by the Public Prosecution Service from the very first moment.

Reporting after the Suspect is Brought before the Examining Magistrate

From the moment that a suspect is brought before the Examining Magistrate, the Public Prosecution Service is the spokesperson for the case.

The person who speaks to the media on behalf of the Public Prosecution Service is an officer with experience in dealing with the media. In socially sensitive cases, the Chief Public Prosecutor or (on appeal) the Chief Advocate General can provide an explanation.

The decision of the Examining Magistrate whether or not to detain a suspect is usually reported to the press by the Public Prosecution Service. For an explanation of the decision, reference is made to the press information department of the Judiciary.

From its own responsibility, the Public Prosecution Service takes the space to respond in the media to decisions of the Judiciary.

Reporting after the Decision to Prosecute has been taken

The Public Prosecution Service can report a decision to prosecute to the media after the suspect has been informed. The Public Prosecution Service can provide an explanation of the decision to prosecute.

Reporting after the Decision for Settlement has been taken

Cases that receive great social and/or political interest and that are dealt with by the Public Prosecution Service are actively reported, for example by means of a press release and a statement of facts. This also applies to settlements with (legal) persons. In the event of high or special transactions, a press release is issued in accordance with the High Transactions and Special Transactions Instructions.

Reporting after the Summons

After the summons has been issued, the Public Prosecution Service can explain the summons and explain why the summons was issued. If, prior to the hearing, public opinion has developed an image of a case that does not correspond to the

facts related to the investigation, the Public Prosecution Service can respond in the media. The basic principle is that a lawsuit is not conducted in the media. The basic principle is also that from the moment the summons has been issued, greater restraint is exercised with regard to substantive information about a case.

Reporting during the Hearing

Following its performance at the hearing, the Public Prosecution Service can provide an explanation of its own actions and the actions of officials and bodies that fall under the authority of the Public Prosecution Service. Victims and relatives are protected as much as possible.

The Judge or the President of the District Court or the Court of Appeal has the authority to authorize representatives of the audio visual media to film the appearance of the District Court or Court of Appeal. If permission has been given, the presentation of the case and the delivery of the closing speech may also be filmed (given the public function of a Public Prosecutor). The (Chief) Public Prosecutor can consult with the President of the Court about this and request not to allow video and audio recordings of the Public Prosecutor during the hearing.

Reporting after the Hearing

After the public hearing, the closing speech can be explained by the Public Prosecution Service.

2.3 Information about the Parties Involved

2.3.1 Suspects/Defendants

Pursuant to Article 8 of the Government Information (Public Access) Act, the Public Prosecution Service and the investigative authorities must of their own accord provide information about policy, including the preparation and implementation, as soon as this is in the interest of good and democratic governance. This may also include information from ongoing criminal investigations. Personal data as referred to in Article 10 of the General Data Protection Regulation (GDPR) are in principle not made public. An exception to this is possible if the provision apparently does not infringe privacy.

Information about the profession or position of an accused person is in principle not provided or confirmed, except in the case of a soldier. Because soldiers are, in principle, brought before the Military Court, regardless of the criminal offence of which they are accused, it is not possible to keep their employer anonymous. The profession can also be stated if the offence is related to the profession of the accused.

In the assessment of interests to be made, it is important to consider whether information that the Public Prosecution Service and the investigative authorities wish to disclose, in combination with information that has already been made public by others, can lead to the identification of the accused or perpetrator.

Information relating to religion, belief, race, political opinion, health, sexual life and membership of a trade union of the accused constitutes special personal data within the meaning of Article 9 of the GDPR and the GDPR Implementation Act and may also only be made public if the person involved has given explicit permission for this or if the personal data have apparently already been made public by the person involved. If a person is no longer regarded as a suspect and active information has been given about the suspicion at an earlier stage, this must be actively communicated – possibly in consultation with the ex-suspect or his counsel.

In order to avoid additional suffering, the Public Prosecution Service and investigative authorities will in principle be reluctant to provide information that, if published, has a major impact on the privacy of victims or next of kin.

2.3.2 Victims, Next of Kin and Witnesses

The provision of personal details of victims, next of kin and witnesses is treated very cautiously. These details are only provided if this is necessary due to the purpose of the provision, in a way that infringes as little as possible on privacy. For details about victims, next of kin or witnesses that are not relevant to the crime, with regard to religion, belief, race, political opinion, health, sexual life and trade union membership, this applies to an increased extent.

2.4 Information about Special Cases

2.4.1 Minors

International frameworks, such as the Convention on the Rights of the Child, which has been ratified by the Netherlands, prescribe that young people must be protected from violation of their privacy from the very first contact with the police and the judiciary, since this could result – given his vulnerable position – in needless stigmatisation. This means that the Public Prosecution Service will be reluctant to provide information about the investigation to the media in the case of a minor defendant. In these situations, the personal interest of the defendant in principle outweighs the interest in providing society with extensive information.

In principle, Juvenile Court hearings take place behind closed doors. This means that the press has no access to the hearing room unless the District Court or Court of Appeal decides otherwise.

Immediately after the closed session, the Public Prosecution Service can report the demand against the minor defendant and provide an explanation. In special cases, for example to counter rumours, for the purpose of rectification or to keep incorrect information from the media, additional information about the offence or defendant may be provided. In doing so, the privacy of the defendant and the victim is taken into account as much as possible. This applies to a greater extent to underage victims and/or victims with a greater vulnerability.

[5]

2.4.2 Hospital Order (TBS)

The communication concerning an offender who was detained under a hospital order and who has escaped from supervision lies with the Ministry of Justice and Security. The communication regarding the investigative acts (for example, reporting about the investigation) is the responsibility of the National Public Prosecutor's Office, which has authority over the reporting desk at the National Criminal Investigation Service of the National Police. Arrests are reported by the National Public Prosecutor's Office together with the National Police, which houses the central investigation team. In the event that the escape or evasion in a certain neighbourhood leads to unrest or in the event that the escaped detainee under a hospital order appears to play a role in a criminal investigation, coordination will be held with the relevant district prosecutor's office and with the relevant unit of the police because they can be contacted by the local authorities. In principle, the communication for the tracing of an escaped regular prisoner lies with the police unit.

2.4.3 Investigation Officers under Suspicion

If an employee of an investigative agency is involved as a suspect or accused in a particular case, the Public Prosecution Service will be responsible for the communication, even if there is no investigation (yet) by the State Department of Criminal Investigation (*Rijksrecherche*). A possible arrest can be reported – with general information regarding the suspicion – by the relevant police force or by the State Department of Criminal Investigation. The communication for the investigation lies with the Public Prosecution Service. The communication regarding the employment law position and any disciplinary measures against the accused person lies with the employer of that person.

2.4.4 Disciplinary Measures against PPS Staff

The Public Prosecution Service makes a distinction between judicial officials (those wearing a black robe) and civil servants (the other employees). In the event of a (disciplinary) dismissal of judicial officials, the media will be actively informed after the decision has been made known to the person concerned. If another disciplinary measure has been taken against a court official as a result of a violation related to the performance of work (primary process) or a conviction as a result of committing a crime (e.g. culpable crimes), this will be actively communicated after the person concerned has been informed. This is in line with the public nature of the position of a judicial officer.

The media are actively informed if a civil servant working for the Public Prosecution Service or the State Department of Criminal Investigation is (disciplinary) fired because of violations related to the performance of the work or a conviction as a result of committing a crime. The media are not actively informed about violations that do not involve (disciplinary) dismissal.

The communication for investigations by the State Department of Criminal Investigation is the responsibility of that part of the Public Prosecution Service that has requested the State Department of Criminal Investigation to conduct an investigation. If a spokesperson at the scene of the crime is necessary, the

investigating authority can, after coordination with the Public Prosecution Service, conduct the first factual communication.

2.5 Media Agreement

The Public Prosecution Service and the investigative authorities can cooperate in media productions jointly or separately. A media production is characterized by its long(er) lasting character. Sometimes it concerns overarching themes or investigation and prosecution in general, sometimes it concerns a specific case. The Public Prosecution Service and the investigative authorities can participate in media productions to draw attention to their work, because providing insight into the work they do serves an important social interest. For example, it could be a TV series about a certain part of the work, or about a theme, or a documentary in which a reconstruction of a case is central. A media agreement is concluded with the producer for these types of programs. Depending on the program, this agreement is signed by the producer and the Public Prosecution Service and the investigative authorities and contains the agreements that the producer in particular must adhere to when making the program. In doing so, the Public Prosecution Service and the investigative authorities take into account the interests of next of kin, victims and suspected or accused persons.

The following principles apply to cooperation in media productions:

1. When there is the intention to participate in a media production (this can be an audio visual publication, written publication or any other form), the victims, next of kin as well as the suspect or defendant are informed about the purpose of the production and the cooperation that the Public Prosecution Service and the investigative authorities want to grant it. Agreements about cooperation in a media production guarantee that there is sufficient opportunity for those involved to express any objections. The Public Prosecution Service and the investigative authorities take these objections into account as much as possible. If it is expected that (a part of) a media production will seriously infringe on the privacy of victims or next of kin, prior permission is requested from those involved, unless overriding interests of investigation or prosecution oppose this.

2. In principle, it is not possible to grant a journalist access to information that falls under the confidentiality obligation of the Public Prosecution Service and/or investigative authorities. There may be grounds for justification for inspection if more important interests are served thereby than are protected by the confidentiality. A personal confidentiality statement must in any case be signed prior to inspection or provision of that information.

- Publication of information obtained can only be allowed after explicit permission from the Public Prosecution Service. There is always a review prior to publication. In this assessment, the purpose served by the publication of the specific information is weighed up against the infringement of the privacy of those involved (victims, next of kin, defendants, but possibly also witnesses and others). The following applies in particular to this consideration:

- With regard to the interests of victims and next of kin, the importance of preventing additional suffering is also explicitly taken into account. Some details can be extra painful for victims and next of kin if they are publicized and have a major impact on the privacy of victims and next of kin. The Public Prosecution Service is exercising great restraint here. With regard to the interests of defendants, the presumption of innocence must be taken into account and the right to a fair trial is guaranteed (*no trial by media*).

3. The starting point is (where possible) that the information released cannot be traced back to natural or legal persons. In this context, traceability is a broader concept than just physical recognisability. Where traceability cannot be prevented, it is considered whether disclosure should outweigh the importance of protecting the privacy of persons/entities involved. The invasion of privacy is kept as limited as possible. The principles of proportionality and subsidiarity play an important role here.

1. When the Public Prosecution Service and the investigative authorities make agreements with media partners/journalists, they record these in writing.

TRANSITIONAL PROVISIONS

The policies in this instruction are applicable from the effective date.

Foot notes

[1] The instruction applies to all investigative bodies: Police, State Department of Criminal Investigation, Royal Military Police and the special investigative services FIOD, ILT/IOD, NVWA-IOD and ISZW-DO. Where in this instruction reference is made to the investigative authorities, this also refers to the Police, the State Department of Criminal Investigation (*Rijksrecherche*) and the Royal Netherlands Marechaussee (Kmar).

[2] In this instruction the term media is used in the broadest sense and includes all conceivable means of communication, including audio visual media, print media, online media and social media.

[3] Instruction regarding information about criminal investigations.

[4] See ECHR 26 April 1979, ECLI:NL:XX:1979:AC6568 (Sunday Times/United Kingdom).

[5] Also see EU-Directive Victim Rights, Directive 2012/29/EU.