[NL] New rules on surveillance of journalists and protection of journalistic sources

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Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 1 May 2024, the *Openbaar Ministerie* (Netherlands Public Prosecution Service) adopted significant new rules in relation to criminal proceedings that may involve journalists. Notably, the new rules require that where there is surveillance, or surreptitious recording, of communication targeting suspects, and where journalists may also be present, an examining magistrate must give prior permission to record the communications. The new rules were adopted following a well-known recent controversy in the Netherlands, where during a criminal investigation, conversations between suspects were recorded, where journalists were also present. The *Nederlandse Vereniging van Journalisten* (Dutch Journalists Association) welcomed the new rules.

The new rules are part of the Public Prosecution Service's Rules for criminal proceedings with regard to journalists. These Rules are adopted under Article 130 of the *Wet op de rechterlijke organisatie* (Law on Judicial Organisation). These Rules describe the standards that the Public Prosecution Service, or the investigative services operating under the authority of the Public Prosecution Service, must observe in criminal proceedings involving a journalist.

Crucially, amendments have now been made to the Rules, which the Public Prosecution Service stated involved situations in which the "recording of confidential communication is not aimed at journalists, but in which journalists are (or could be) involved". First, the Public Prosecution Service required authorisation from the examining magistrate to record confidential communications from a suspect. However, there were no further rules for journalists on this point. The Rules have now been amended so that if it becomes clear before the use of the surveillance measures that a journalist is (also) involved, the examining magistrate must be informed immediately. This allows the examining magistrate to assess whether the eavesdropping can continue and, if so, whether this can be done under the same conditions. Further, a Chief Officer must also agree to the use of surveillance equipment, and the *College van procureurs-generaal* (Board of Attorneys General), the leadership of the Public Prosecution Service, must also be informed in advance. Second, although a journalist as a third party is not the target of the surveillance measures used, information about the journalists, as a result of that use, may end up in the case file to be provided to the defence in criminal proceedings. The Rules state that it

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is “not desirable for this to reveal how and with whom a journalist has contact in the performance of thier duties, without the journalist in question being aware of this in advance”. Now, if it has become clear that information about a journalist has been obtained as a third party, the journalist in question will be notified as soon as the interests of the investigation permit. Crucially, the Rules stated that “if, in retrospect, an unauthorized infringement of the journalist's right to source protection has occurred, the data obtained will be destroyed as soon as possible”.

Finally, the new rules take effect from 1 May 2024.

Openbaar Ministerie, Aanwijzing strafvorderlijk optreden met betrekking tot journalisten, 29 April 2024

https://www.om.nl/actueel/nieuws/2024/04/29/de-aanwijzing-strafvorderlijk-optreden-met-betrekking-tot-journalisten

Netherlands Public Prosecution Service, Instruction for criminal proceedings with regard to journalists, 29 April 2024

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