

Appeal Court The Hague

Van Oosten Schulz De Korte
Advocaten
attn. G.J. van Oosten LLM
Vondelstraat 41
1054 GJ Amsterdam

Department Criminal Law
visiting address
Prins Clauslaan 60
2595 AJ The Hague
Correspondence address
Mailbox 20302
2500 EH The Hague
t 088-3622333
f 088-3610651

Date: 3 December 2019
Contact person: C. van der Laan and/or S. Ramroep
Extension number: 088-699 2660
e-mail: rp.denhaag.art12@om.nl
our reference: K18/220498
subject: Progress complaint Hohmann

Dear Mr Van Oosten,

By interim decision of 30 September 2019 the court considered that it is important for the assessment of the complaint to be able to review the underlying documents, at least the documents of the investigation referred to in the Houston statement of facts and on which the Public Prosecution Office based its assessment. The court noted that if the court – after reviewing the file made available – comes to the conclusion that the file is not sufficiently complete, the court will (again) instruct the Attorney General to provide further (specific) documents. Finally, the court considered that, after having reviewed the file – taking into account the provisions of Article 12f of the Criminal Procedural Code – it will determine which documents (whether or not anonymised) will be made available to complainants and their lawyers or provided access to.

In the meantime, the court has received some documents from the Attorney General. For the description of those documents, reference is made to the letter from the Attorney General dated 11 November 2019, which you will find attached.

The letter from the Attorney General shows that in the view of the Public Prosecution Office no documents can be made available to complainants until all privacy-sensitive information has been removed and the documents have been made anonymous.

The court is of the opinion that the complainants should be able to review the documents that the court currently has and that are described in the letter of the Attorney General. The court has therefore asked the Attorney General to remove the privacy-sensitive information from the documents and, where necessary, to make the documents anonymous. As soon as this process is completed you will be notified hereof and you can have access to these documents at the court registry.

The court is also of the opinion that all underlying file documents must be made available to the court and has requested the Attorney General to arrange this. The Attorney General has

declared she is willing to do so and will soon provide the court with the entire file. After reviewing the entire file, the chairman may – taking into account Article 12f of the Criminal Procedural Code – determine whether complainants may also review those additional documents.

The foregoing implies that the initial planning of the court has been too ambitious. The hearing in chamber scheduled for 18 December 2019 will not take place and in due course you will hear from the court about a new hearing date (probably in March 2020).

I trust that I have informed you sufficiently.

Yours sincerely,
Also on behalf of the chairman, T.E. van der Spoel LLM,

M.M. Bakker-Otjens LLM
senior secretary

Public Prosecution Office
Public Prosecution Office at Appeal Court The Hague

Correspondence address: PO Box 20302, 2500 EH The Hague
To the Appeal Court
The Hague

Visiting address: Prins Clauslaan 60, 2595 AJ The Hague
Telephone: (088) 699 2660
Fax (088) 699 0210

Division: Public Prosecution Office at Appeal Court
Extension number: 088-6992660
Date: 11 November 2019
Our reference: K18/220498; K18/220489; K18/220377
Subject: Complaint 12 Criminal Procedural Code — Hohmann, Van Doorn,
SOBI

Honourable College,

By interim decision of 30 September 2019 the Court stated in the above referenced cases that for the appropriate assessment of the complaint the Court considers it important to be able to review the underlying documents, in any event the documents from the investigation referred to in the Houston Statement of facts and on which the Public Prosecution Office has based its assessment. In addition, the Court considers that if, after reviewing the file made available, it comes to the conclusion that the file is not sufficiently complete, the Public Prosecution Office will (again) be instructed to provide further (specific) documents. Finally, the Court considers that, after reviewing the file, taking into account Article 12f of the Criminal Procedural Code, the chairman will determine which documents (whether or not anonymised) are made available or provided access to complainants (and their lawyers).

On the basis of these considerations, the Court requests the Attorney General:

1. to inform the Court of the documents in the underlying file and at least provide a description of what the Houston investigation involves;
2. to make the underlying documents available to the Court, at least the documents of the investigation referred to in the Houston Statement of facts and on which the Public Prosecution Office service based its assessment.

The purpose of this letter and the accompanying documents is to fulfil both instructions.

As part of this procedure, we received a letter from H.J. Biemond and N. van der Aa, lawyers of ING, on 1 November 2019. We enclose a copy of this letter, with the approval of the relevant lawyers, as an appendix to this letter. We hereby explicitly note that the lawyers do not agree that this letter is brought to the attention of the complainants.

In short, this letter requests – as we understand – to exercise the utmost care in the selection of documents and to remain strictly within the scope of the Court's request. Specific attention should be given to the privacy of all involved. After all, the documents that

are requested contain multiple personal details of employees and board members of ING. ING is committed to protecting the privacy of its employees and board members. In addition, both lawyers point to their privilege with regard to a number of documents.

We understand the arguments and interests that have been put forward by ING in this letter. In the selection of documents, we have weighed as carefully as possible all the interests relevant to the present proceedings, within the framework of the Court's requests.

We also note *ex officio* that the documents that we provide to the Court include, in addition to the personal data of ING employees, personal data from ING clients, as well as numerous data from (legal) persons, as well as privacy-sensitive data that can simply be related to (legal) persons involved in financial transactions that have been carried out via the bank accounts held by these clients with ING. We must also take these interests into account.

All this leads to the following.

Re (1) Documents of the underlying file and a description of the Houston investigation:

In the first annex to this letter, an index is included that gives an overview of the contents of the entire Houston file. More in particular, this index gives an overview of:

- the official acts performed, both the official acts in the corruption investigation, and also in the non-reporter investigation (relevant for the present case);
- the special investigative means that were used in the course of the investigation;
- the hearing of witnesses, of both the witnesses heard in the corruption investigation, as well as in the non-reported investigation (relevant for the present case);
- the taps and tap reports;
- documents.

Furthermore, as a second annex to this letter, a summary report is included (0-OPV-001). As stated in the introduction to this summary report, this official report is based on the official reports written in the context of this investigation. This official report gives:

- an overview of the suspect and suspicions that exist against this suspect;
- a description of the structure of the file;
- an overview of the formal investigation acts carried out in the context of this investigation.

The Statement of facts and the Public Prosecution Office's Assessment are based on the so-called non-reporter investigation. This Summary Official Report (p. 2, under 1.1. and p. 4 and 5, under 2.1. and 2.3 respectively) shows that, more specifically, official reports of official acts starting with '2-AMB' concern the reports, which relate to the non-reporter investigation. Among the written evidence, the documents with the coding DOC-1001 up to and including DOC-6000 also form part of the non-reporter investigation (p. 4, under 2.2.). Of the witnesses heard, the interrogations that start with the code 2-G (p. 10, under 3.9) also fall under the non-reporter investigation.

Re (2) Underlying documents of the Statement of facts and the Public Prosecution Office's Assessment

As already mentioned above, the transaction between the Public Prosecution Office and ING – and therefore also the Statement of facts and the Public Prosecution Office’s Assessment – concern the non-reporter investigation. We believe that documents 2-AMB-001 to 2-AMB-12 are relevant for this.

In their letter of 1 November 2019 the lawyers of ING listed a more limited number of documents, namely the documents 2-AMB-001, 2-AMB-008 up to and including 2-AMB-012, where privilege is invoked as regards 2- AMB-007.

We therefore believe that we should provide the Court with more documents than indicated in the aforementioned letter on behalf of ING. We have already informed the ING lawyers of this by telephone. In order to take into account the objections on the part of ING as much as possible, we propose that the Court should, if and to the extent that the Court decides to make these documents available to the complainant(s), this will only be done after all privacy-sensitive information has been removed and the documents have been made anonymous, and furthermore that this is only done after the defendant has been given the opportunity to make known and further explain its views and objections on this point to the Court, either in writing or oral. We also informed the ING lawyers about this proposal. Through Van der Aa LLM, we have been informed that ING agrees with this.

Considering that lawyers Biemond and Van der Aa LLM invoked their privilege with regard to (among other things) 2-AMB-007, we are of the opinion that for the time being we are not allowed to provide this to the Court and we await any further instruction by the Court.

To substantiate the privilege invoked by the lawyer, reference is made to two documents that the lawyer has attached to the letter of 1 November 2019. Also for these documents it explicitly applies that we have only received permission from the lawyers of ING to bring these documents to the attention of the Court; these documents are not intended for complainants.

Insofar as the privilege with regard to documents DOC-1179 up to and including DOC-1182 has been invoked, this is apparently only meant to be done in the relationship between ING and DNB [the Dutch Central Bank]. The Public Prosecution Office has obtained these documents by means of a criminal law claim addressed to the DNB. For document 2-AMB-007 it applies that the privilege has not been invoked for underlying documents, apparently – as we understand – within the context of an optimally cooperative attitude in the criminal investigation of the Public Prosecution Office, with a view to achieving a possible transaction. This is different if the intention is to bring these documents to the attention of third parties, such as complainants in the present art. 12 Criminal Procedural Code procedure.

If the Court considers it important for the assessment of the complaint that the Court possesses the official record 2-AMB-007, we propose to follow a route in line with art. 98, second paragraph of the Criminal Procedural Code, namely to have a magistrate judge decide whether the lawyers are entitled to invoke their legal privilege. The same applies to the documents referred to in the letter from the lawyers of ING, if the Court also wishes to review those documents. Although the art. 12 Criminal Procedural Code procedure strictly speaking does not have the possibility of art. 98 Criminal Procedural Code, this could possibly offer a solution in this matter. If the Court does not want to follow this route, and nevertheless considers instructing the Public Prosecution Office to provide (one of) the

documents, then the Public Prosecution Office believes that it is reasonable for the Court to give the lawyers of ING the opportunity explain their objections.

Finally, we note that although not only the documents attached to this letter, but also a series of documents and a series of witness hearings are part of the non-reporter investigation, which together form a large file (approx. 17 binders), we for now believe that we can assume that the official summaries suffice for the Court to rule on the complaint and to examine the prosecution decision of the Public Prosecution Office. Of course, we are prepared to – subject to what we have noted above in relation to objections from ING – provide further documents.

Yours sincerely,

Prof Dr M.E. de Meijer LLM,
Also on behalf of T. de Jong LLM,
attorneys-general