

February 20, 2019

Introduction

In a recent case between the owner of a plot with a number of business premises and the local residents the Dutch Data Protection Authority (the DDPA) ruled that the owner is allowed to protect its property with camera surveillance. The DDPA's decision provides (practical) insight on the requirements the DDPA sets for camera surveillance and in the assessment of the legal basis of "legitimate interests" where applying camera surveillance.

Background

The case relates to a land plot with a number of business premises secured by means of two outdoor cameras. The cameras film part of the public road. The local residents requested the DDPA take enforcement actions against the controller, as, in their opinion, the camera surveillance was in breach of the applicable privacy legislation. The local residents live next to and opposite the area where the cameras are placed. To access their homes, the local residents have to pass part of the public road on which the cameras are directed.

The DDPA initially rejected the request for enforcement and ruled that the controller has a legitimate interest in camera surveillance. The local residents objected to the DDPA's decision. In their statement of objection, the local residents argue that (i) the DDPA has not motivated sufficiently its decision of the controller having a legitimate interest, and (ii) the controller is in breach of its obligation to inform data subjects about the fact that they are filmed on public roads. The DDPA responded to this in its decision of objection of 28 June 2018 (Dutch only), published on November 1, 2018.

Legitimate interest in camera surveillance

In the decision on the objection, the DDPA sets out that three cumulative conditions must be met in order to rely on the legal ground of legitimate interests. The DDPA based its judgment on the Article 29 Working Party opinion of 9 April 2014.

The three conditions are as follows.

i. The legitimate interest of the controller must be lawful, sufficiently clearly articulated and must represent a real and present interest

In the present case, the controller aims to secure its property, and the goods and persons entrusted to it by means of the camera surveillance. Camera surveillance also ensures that the controller is able to make a substantiated report

to the police in case of security incidents, if necessary. The DDPA sets out that the protection of property is the exercise of a fundamental right and as such is a legitimate interest.

In addition, it has been established that an incident occurred recently on the controller's plot. The DDPA deems that the interest of the controller is therefore a real and present interest, and not 'speculative'. The question is whether an incident is a key requirement for a controller's interest to be "real and present". We assess this not to be the case. It is more likely that the DDPA means that if an incident occurred, the interest is real and present in any case, but there may also be a real and present interest in other cases.

ii. Processing must be necessary for the purpose(s) pursued; proportionality and subsidiarity should be assessed

When applying the proportionality and subsidiarity test, the controller should first consider whether the breach of the privacy of the data subjects is proportionate to the purpose that the processing serves. In addition, the controller must verify if the purpose can also be pursued in a way that is less detrimental to the data subjects.

In the decision on the objection, the DDPA first assesses the proportionality principle. The DDPA considers that filming (part of) the public road is not necessarily disproportionate. However, it emphasizes that filming the public road must be limited to the parts that are inevitable and strictly necessary for the protection of persons and property.

In this case, it proved impossible to protect the property (including the fence) and persons adequately without filming part of the public road.

Whether it is permissible to film part of the public road or publicly accessible areas depends on the particular circumstances of the case. The controller must ensure that the filming of the public road is limited to what is strictly necessary for the purpose of the camera surveillance. Additionally, the controller must determine whether it is necessary for the cameras to film 24/7. It may be sufficient to make recordings during limited periods of the day.

With regard to the principle of subsidiarity, the DDPA considers it to be necessary for the purpose that the plot boundary (entirely fenced) and the adjacent public road are filmed. The local residents suggested that the controller could use an internal security system instead of two outdoor cameras. However, the DDPA takes the view that with an internal security system the controller would not be able to achieve the purpose, because it would be impossible to capture appropriately footage of individuals causing damage in front of the fence or on the plot. Accordingly, the DDPA finds that the purpose for which the personal data is processed cannot be achieved in a less detrimental way.

iii. Applying the balancing test

The legal ground of legitimate interests calls for a balancing test. The controller must balance its (or a third party's) legitimate interests against the interests or fundamental rights and freedoms of the data subjects. The controller may only rely on the legal basis of legitimate interests if the controller's legitimate interests outweigh the interests, fundamental rights or freedoms of the data subjects.

This balancing test must address the consequences of the processing of personal data for the data subjects. It must also address the (additional) measures that the controller has taken to prevent and limit the undesirable consequences for the data subjects. In the present case, the DDPA considers the following factors relevant:

- The camera footage is deleted automatically after two weeks. This is within the four-week period as prescribed in the DDPA's Policy on Camera Surveillance (Beleidsregels Cameratoezicht) (Dutch only). The four-week period provides the controller sufficient time to review the camera footage and, where necessary, to report incidents
- The video recorder is password protected. This prevents unauthorized access to the camera footage. In addition, the supplier of the camera equipment maintains log files of log-in attempts; and

- Passers-by on the public road are informed sufficiently about the camera surveillance and the possibility that they are being filmed.

The DDPA states that these measures are sufficient for the protection of personal data.

Information provision

In the present case, the DDPA established that a sticker with a camera symbol was affixed to the door of the controller's business property. According to the DDPA, it can be deduced clearly from the context of this symbol who the controller is and for what the purpose of the camera surveillance is. Furthermore, the symbol is also clearly visible from the public road, so that passers-by are also sufficiently informed of the camera surveillance.

The decision on the objection does not address whether and how the other information in accordance with the GDPR is provided to the data subjects (namely informing data subjects on, among other things, the retention period and their rights). The data subjects also have a right to receive this information under the GDPR. In practice, controllers can solve this by placing information about camera surveillance on their websites or by making an information form available at the location itself.

It is questionable whether a single sticker with the symbol of a camera is still sufficient if more than one company would have been located in the building, or if the camera footage would also have been used for other purposes, such as analyzing footfall flows in a shopping center.

Carrying out a DPIA

If the controller systematically and on a large scale monitors the public space by means of camera surveillance, the controller is obliged to carry out a Data Protection Impact Assessment (DPIA). This is the case, for example, if camera surveillance is applied in shopping centers, parking lots and garages, at stations or at airports. The DDPA's Policy on Camera Surveillance (Beleidsregels Cameratoezicht) may provide guidance.

Final comments

The decision on the objection of June 20, 2018, provides insight on the requirements the DDPA deems important with regard to camera surveillance. This includes the DDPA's Policy on Camera Surveillance (Beleidsregels Cameratoezicht), even though this policy was adopted under the Privacy Directive.

The decision is relevant for organizations using camera surveillance in or near public areas. It is our experience that camera surveillance is a sensitive topic that may lead to tension between organizations and local residents or other stakeholders. As the DDPA acts in response to data subjects' complaints, it is important that organizations make sure the personal data processing in the context of camera surveillance is organized appropriately. This means in any case that the relevant considerations and decisions must be recorded. Furthermore, in many cases a DPIA must be carried out prior to the processing.

The local residents have appealed against the decision on the objection. The court is currently examining the case.

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Overview of subjects

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March 2017	Sensitive Data
April 2017	Accountability, Privacy by Design and Privacy by Default
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June 2017	Rights of Data Subjects (access, rectification and portability)
July 2017	Rights of Data Subjects (erasure, restriction, object and automated individual decision-making)
August 2017	Data Processors
September 2017	Data Breaches and Notifications
October 2017	Data Protection Officers
November 2017	Transfer of Personal Data (outside the EEA)
December 2017	Regulators (competence, tasks and powers)
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March 2018	Processing of Personal Data in the Employment Context
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May 2018	Overview
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November 2018	Data Protection Impact Assessments (DPIAs)
December 2018	EDPB Guidelines on the territorial scope of the GDPR
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