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**REVIEW REPORT**

on

the application by GISS of forensic investigation methods  
involving biological materials

CTIVD no. 42

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REVIEW COMMITTEE  
on  
THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 42

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## REVIEW REPORT

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## **SUMMARY**

**Of the review report on the application by GISS  
of forensic investigation methods involving biological materials**

The Review Committee on the Intelligence and Security Services (further: the Committee) investigated how GISS applies forensic investigation methods involving biological materials. Forensic investigation involving biological materials means investigating physical characteristics, in particular body materials. Examples are DNA investigation and fingerprint detection.

When GISS investigates physical characteristics of persons in this way, the privacy of these persons is at issue. The protection of privacy calls for increasing attention because of the rapidly increasing technological possibilities in the field of DNA and cellular investigation. Nowadays it is possible, for instance, to obtain a lot of information from just minute traces of cellular material. In this review report the Committee therefore sets out the frameworks governing the application of forensic investigation methods involving biological materials.

Forensic investigation methods involving biological materials interfere with the right to respect for private life. The nature of the infringement is so serious that it must be considered to involve a special power which requires a legal basis. This legal basis is provided by article 22 of the Intelligence and Security Services Act 2002 (ISS Act 2002). Legislative history shows that this article also covers the application of forensic investigation methods involving biological materials. This means that GISS must satisfy the requirements of necessity, proportionality and subsidiarity when it exercises these special powers. The Committee holds the opinion that the ISS Act 2002 provides an adequate framework for this.

This legal framework of the ISS Act 2002 serves as a safeguard of privacy when a service applies a forensic investigation method involving biological materials. It does so by imposing two framework conditions on the use of such methods.

*Framework condition 1: only investigation of objects*

GISS may only conduct forensic investigation involving biological materials on **objects** on which body material is present. The ISS Act 2002 allows no scope for collecting such materials from a person's body itself. GISS may not violate physical integrity.

*Framework condition 2: only for the purpose of establishing identity*

The aim of the investigation must be to **establish a person's identity**. This means in the first place that the law does not allow for investigation if the identity has already been established. At the time of the investigation there must be reasonable doubt about the identity of the person to be investigated. So this excludes future situations in which questions may arise as to the identity of a person already identified by GISS. For investigations to establish a person's identity, the service may compare the acquired body material, such as DNA material, with an external database.

In the second place it means that the investigation may only be aimed at the *identity* of the person in question and at related identifying characteristics, such as DNA profile or fingerprints. Consequently, the ISS Act 2002 allows no scope for investigating personal characteristics like origin, hair colour or health.

In addition to the legal framework embodied in the ISS Act 2002, the Committee also assessed the relevant case law of the ECtHR. This case law sets an additional framework condition which protects privacy. It follows from this case law that in the third place an adequate legal basis must exist for **storing cellular material** and **DNA profiles**. **Minimum safeguards** must have been put in place regarding storage period, use, third-party access, procedures preserving the integrity and confidentiality of the data, and procedures for its destruction.

The Committee has established that GISS does not have specific, publicly accessible rules laying down safeguards with respect to the storage of cellular material and DNA profiles. In the opinion of the Committee the ISS Act 2002 only allows scope for storing DNA profiles and cellular material for identification in individual cases. As long as existing law does not regulate the storage of DNA profiles and cellular material, GISS is not authorised to set up a DNA database of its own. As soon as GISS has established the identity of a person, the service must remove and destroy the DNA profile and any cellular material it may possess.

The ISS Act 2002 therefore contains the legal basis for conducting forensic investigations involving biological materials. However, the developments that have taken place in recent years and the corresponding rules aimed at protecting privacy have not been incorporated into the ISS Act 2002 yet. This is remarkable because in the criminal-law context, on the contrary, this has been done.

The forensic investigation methods involving biological materials examined in the present review investigation are the investigation of human fingerprints, cellular material and other identifying characteristics, e.g. face shape. In such investigations GISS investigates body materials like saliva, skin tissue, blood and hairs. In this way the service can, for instance, create a DNA profile. In addition, GISS analysed the health of one person and it investigated objects on which fingerprints had been or might have been left.

The Committee examined the operations in which GISS applied forensic investigation methods involving biological materials. These operations took place in the period from the entry into force of the ISS Act in 2002 up to and including June 2014. In this review period GISS did not make large-scale use of forensic investigation methods involving biological materials. The Committee has established, however, that these methods are being applied with increasing frequency. The Committee has concluded that in a very limited number of the operations in which the service applied forensic investigations methods involving biological materials this must be regarded as having been done unlawfully.

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## **REVIEW REPORT**

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### **1 Introduction**

In the context of its intelligence and security tasks the General Intelligence and Security Service (GISS) collects data from different sources. Possible methods for doing so are e.g. telephone tapping, deploying agents and informers and conducting investigations on social media. Less well-known is the application of forensic investigation methods involving biological materials. These methods investigate physical characteristics, particularly body materials. Examples are DNA investigation, fingerprint detection, investigation of cellular material and the use of biometric technology, such as facial image comparison.

In the performance of its tasks GISS must strike a balance between protecting privacy and protecting national security. It must do so because investigations aimed at protecting national security may infringe the privacy of citizens. The investigation of a person's physical characteristics will interfere with that person's privacy, at any rate there is a likely risk that it will. Moreover, the technological possibilities of forensic investigation involving biological materials are rapidly increasing, for example in the field of DNA investigation and the investigation of cellular material. Nowadays, minute traces of cellular material yield ever increasing amounts of information.

#### **Objective of this report**

In this review report the Committee specifies the legal framework within which GISS may apply these investigation methods. The Committee also describes and assesses all activities of GISS in this field. The decision to do so was based on an earlier exploratory investigation (a 'scan') of the use by GISS of DNA information.<sup>1</sup> The scan showed that the (legal) framework for the application of forensic investigation methods involving biological materials is still uncertain. It is particularly on account of this legal framework that the Committee envisages a role for itself in this matter.

#### **Structure of this report**

In chapter 2 the Committee first discusses the organisation of the review investigation. Chapter 3 then sets out the legal framework for the application of forensic investigation methods involving biological materials. Chapter 4 describes the position of the forensic adviser to GISS. Subsequently the operational activities of GISS are discussed in chapter 5. The conclusions and recommendations are presented in chapter 6.

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<sup>1</sup> In a scan the Committee actively seeks information about various activities of the services with which it is less familiar. By staying informed of developments within GISS and DISS the Committee can properly assess and decide which in-depth investigations it will carry out. In making such decisions the Committee takes account of the relevance of the subject to the performance of tasks by the services and the extent to which the subject involves relevant legal issues and external interests.

The report has a secret appendix. This appendix does not contain any conclusions that are not presented in the public report as well.

## 2 Organisation of the investigation

The Committee is aware that technological developments in e.g. the field of forensic investigation involving biological materials have been opening up ever increasing possibilities at a rapid pace. This type of investigation may, however, infringe privacy. The Committee therefore investigated how GISS has been applying forensic investigation methods involving biological materials and what the role of these methods is in operational investigations. The details of what does, and what does not fall within the scope of this review investigation are set out below. This chapter also describes the further set-up of the investigation.

### **What are the questions answered in this report?**

The Committee examined how GISS applies forensic investigation methods involving biological materials. In addition, it wanted the investigation to produce answers to a number of other questions as well.

#### *What is the legal framework applying to forensic investigation involving biological materials?*

The Committee has noted that a particularly relevant issue in the context of the subject of forensic investigation methods involving biological materials is the question what is the legal framework that governs their application. In its investigation the Committee therefore devoted attention to the statutory framework embodied in the ISS Act 2002 and to relevant case law of the European Court of Human rights (ECtHR).

#### *What are the internal rules at GISS governing the application of the investigation methods?*

Furthermore, the Committee examined the rules at GISS that govern the application of forensic investigation methods involving biological materials. Questions asked in this context were: what are the specific roles and involvement of the different departments of the service? What are the levels at which permission must be obtained for applying the various methods? And when does GISS cooperate with external parties? The Committee also investigated whether, and if so: how, GISS has described and laid down procedures for the application of forensic investigation methods involving biological materials in internal rules.

#### *Which forensic investigation methods involving biological materials have been applied by GISS?*

Finally, the Committee investigated which forensic investigation methods involving biological materials GISS has actually applied in practice. In addition to DNA investigation it chose to include other forms of forensic investigation involving biological materials in its investigation, too, by way of supplementing an earlier scan it had done. The Committee examined the application of the methods from the date on which the ISS Act 2002 entered into force up to and including June 2014. It has thus obtained a complete picture of how GISS has been applying forensic investigation methods involving biological materials.

### **What falls outside the scope of this investigation?**

All other forms of forensic investigation, such as digital forensic investigation, explosives investigation and document and handwriting analysis, fall outside the scope of this investigation because they lack biological aspects. Neither does this report deal with the mere recording of biological information concerning a person, for instance a person's health or DNA profile. By this the Committee means the situation that GISS receives information without having had to do or order investigative activities itself, for example when GISS receives information about the health of a person from a foreign counterpart. GISS itself need not do any forensic investigation involving biological materials to obtain this information.

**How was the review investigation carried out?**

The Committee thoroughly studied the files. This comprised studying the internal rules and policy documents and studying the documents relating to the operational activities of GISS stored in the information system of GISS. The Committee used the findings from the aforementioned scan as points of departure for its further investigations. In addition to studying the files, the Committee conducted interviews with employees of GISS who are involved in the application of forensic investigation methods involving biological materials. It also asked questions in writing.

**Announcement of the review investigation**

The Committee conducted this review investigation pursuant to the oversight task assigned to it by article 64 of the Intelligence and Security Services Act 2002 (ISS Act 2002). On 28 March 2014 the Committee announced its intended investigation to the minister of the Interior and Kingdom Relations and to the presidents of both chambers of Parliament.

**Comments of the minister on the review report**

The Committee completed its investigation by drawing up the review report on 20 October 2014. The minister of the Interior and Kingdom Relations was given the opportunity to comment on the findings in the review report (pursuant to article 79 ISS Act 2002). The Committee received the minister's comments on 2 December 2014. These comments resulted in some modifications to the text, after which the review report was adopted on 7 January 2015.



### 3 Legal framework for forensic investigation methods involving biological materials

In this chapter the Committee describes the legal framework for the application of forensic investigation methods involving biological materials. In §3.1 it considers the relevant case law of the European Court of Human Rights. Next, in §3.2, it deals with the framework for the application of these investigation methods embodied in the ISS Act 2002. Finally, the Committee presents its conclusions regarding the legal framework in §3.3.

#### 3.1 Case law of the European Court of Human Rights

In its judgment in *S and Marper v United Kingdom* (further referred to as: *Marper*) the European Court of Human Rights (ECtHR) expressed its view on the English system of DNA investigation. The central issue was the retention of DNA profiles.<sup>2</sup> First of all the ECtHR pointed out a difference between retaining fingerprints on the one hand and retaining DNA profiles and cellular material on the other hand:

‘The Convention organs have already considered in various circumstances questions relating to the retention of such personal data by the authorities in the context of criminal proceedings. As regards the nature and scope of the information contained in each of these three categories of data, the Court has distinguished in the past between the retention of fingerprints and the retention of cellular sample and DNA-profiles in view of the stronger potential for future use of the personal information contained in the latter. (...)

In *Van der Velden*, the Court considered that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material was sufficiently intrusive to disclose interference with the right to respect for private life (...). The Government criticised that conclusion on the ground that it speculated on the theoretical future use of samples and that there was no such interference at present.

The Court maintains its view that an individual’s concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today. Accordingly, the Court does not find any sufficient reason to depart from its finding in the *Van der Velden* case.<sup>3</sup>

The ECtHR further considered that *cellular material* in particular contains highly personal information, including information relating to the person’s health. For this reason the mere retention of cellular material already interferes with the right to respect for private life within the meaning of article 8 ECHR:

‘Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (...)<sup>4</sup>

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<sup>2</sup> ECtHR 4 December 2008, nos. 30562/04 30566/04 (*S and Marper v United Kingdom*).

<sup>3</sup> *Marper*, nos. 70 ff.

<sup>4</sup> *Marper*, no. 73.

The case shows, moreover, that the ECtHR finds it irrelevant how the cellular material was acquired (whether secretly or otherwise), since the mere retention constitutes infringement of privacy:

'The Government contends that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept the argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having a direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (...)' [underlining *CTIVD*]<sup>5</sup>

It is true that this ruling was pronounced in the context of a criminal case. But the ECtHR extended its conclusions in this case so as to apply to retention and storage by public authorities in general. The term public authorities also covers intelligence and security services.

The ECtHR observed that using *DNA profiles* can likewise serve a broader purpose than the mere establishment of identity. Services can also compare various DNA profiles. For this reason, so the ECtHR held, storing DNA profiles, too, results in interference with the right to respect for private life within the meaning of article 8 ECHR.

In the *Marper* case the ECtHR established that English law provided a clear basis for the retention of DNA. Subsequently, however, the Court examined whether retention is necessary in a democratic society. On this point the Court criticised the retention of DNA information of suspects who have not yet been convicted of a criminal offence. In the English system, DNA information of persons who have not been convicted may be retained for an indefinite period. On this subject the Court stated *inter alia* the following:

'In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention (...). Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the material destroyed (...); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances. The Court acknowledges that the level of interference with the applicants' right to private life may be different for each of the three different categories of personal data retained [*CTIVD: fingerprints, DNA profiles and cellular material*]. The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. However, such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of the differences.'<sup>6</sup>

This means that the ECtHR considers the retention of cellular material to be particularly intrusive. The Court further observed that the open-ended retention of personal information may have a stigmatising effect. It has the result that persons who have never been convicted receive the same treatment as convicted persons. Retention can be particularly harmful for minors and ethnic minorities. The ECtHR concluded that there was violation of article 8 ECHR.

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<sup>5</sup> *Marper*, no. 121.

<sup>6</sup> *Marper*, no. 119.

For the present investigation of the Committee it is important to know what are the requirements imposed by the ECtHR on the legal basis for the retention and making accessible of DNA profiles in databases and on the retention of cellular material. The ECtHR placed the retention of DNA profiles in the same category as secret surveillance and intelligence-gathering:

'It reiterates that it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (...)'<sup>7</sup>

So the ECtHR has stated that national legislation must contain minimum safeguards concerning the retention and accessibility of DNA data. These safeguards relate to storage duration, use, third party access, procedures for preserving the integrity and confidentiality of data and procedures for its destruction.

### **3.2 Legal framework of the ISS Act 2002**

The application of forensic investigation methods involving biological materials infringes privacy. This infringement is so serious that the power to apply these methods must be considered a special power requiring a legal basis. In the legislative history the legislator has in fact recognized this with respect to fingerprint detection.<sup>8</sup> Like the exercise of other special powers, the application of forensic investigation methods involving biological materials must satisfy the requirements of necessity, proportionality and subsidiarity.

The ISS Act 2002 does not expressly specify how GISS must set about exercising the special power to apply forensic investigation methods involving biological materials. The legislative history of the ISS Act 2002 as recorded in the explanatory memorandum to article 22 only mentions fingerprint investigation, e.g. investigating a plastic cup for fingerprints.<sup>9</sup> There is no mention in this context of any other forensic investigation methods involving biological materials. Article 22(1)(c) of the ISS Act 2002 is the only provision that allows scope for applying forensic investigation methods involving biological materials. Pursuant to this provision GISS is authorized:

'to investigate objects, whether or not with the aid of a technical tool, for the purpose of establishing a person's identity.'

The formulation of this statutory provision is technology-neutral. The Committee takes the position that other investigation methods than fingerprint investigation fall under this article, too.

#### *3.2.1 Exercising the power*

The Committee has established that three requirements ensue from article 22 ISS Act 2002 for forensic investigation involving biological materials.

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<sup>7</sup> *Marper*, no. 99.

<sup>8</sup> See *Parliamentary Papers II 1997/98*, 25 877, no. 3, p. 35.

<sup>9</sup> *Idem*.

**Requirement 1: Only investigation of objects is permitted**

The first requirement is that GISS may only carry out forensic investigation involving biological materials on objects. The ISS Act 2002 allows scope for investigating objects on which body material is present, for instance a cigarette butt or a coffee cup. This implies that GISS may not subject a person to such investigation. The ISS Act 2002 does not allow scope for taking body materials from a person in any way whatsoever. So GISS may not itself separate body material from a person's body. For example: the service may not secretly cut off some hairs or take a blood sample nor order this to be done, because by doing so GISS would violate a person's physical integrity, which the ISS Act 2002 does not permit.

In a criminal-law context the compulsory collection of cellular material may occasionally occur. In the context of the secret investigations of GISS, however, this does not come into play.

According to the Committee the fact that GISS may conduct this type of investigation on objects implies the power to acquire objects to be so investigated. This follows from article 22(3), which provides that the object need not be replaced, for instance if its replacement does not serve any reasonable interest. Obviously, such replacement of an object is preceded by its removal. Not replacing an object is quite common when GISS applies a forensic investigation method involving biological materials, for instance when it collects DNA material from a cigarette butt or coffee cup. The acquisition of the object precedes its investigation to establish identity.

**Requirement 2: Investigation must be aimed at establishing identity**

The ISS Act 2002 further provides that forensic investigation involving biological material must be aimed at establishing identity. Article 22 ISS Act leaves no scope for conducting such investigations for other purposes. It is not permitted, therefore, to use forensic investigation involving biological materials in cases in which the identity of the person concerned is already certain. Moreover, forensic investigation involving biological material is only permitted if identification by a less infringing method is not possible.

In some cases, however, GISS would want to record the DNA profile of a target who has already been identified, for instance if the service suspects that he will later travel under an alias. In the future, the DNA profile could then serve as reference material. There is however no legal basis for such future-oriented forensic investigation involving biological material. In the first place this type of investigation may only be done if reasonable doubt as to the identity of the person concerned exists at the time of the investigation. This is the case, for example, if the person concerned is at that moment travelling under an alias or using a disguise. This has the result that doubts exist at that time about the identity of the person concerned. Situations in which doubt may come to exist in the future are therefore excluded.

In the second place the Committee draws attention to the fact that there is no legal basis for setting up a database.<sup>10</sup> Recording DNA profiles for future use implies setting up such a database. Under current law, however, GISS will have to obtain this kind of reference material from an external database set up under or pursuant to the law.

According to the Committee, however, GISS does have power, under article 22 ISS Act 2002 in combination with article 17 ISS ACT 2002, to compare (or match) a DNA profile with other profiles stored in an external database. If GISS establishes a DNA profile and matches it

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<sup>10</sup> See section 3.3.

against available DNA databases, this can be regarded as acts serving to establish an identity. The ISS Act 2002 provides a sufficient legal basis for doing this. The same legal basis underlies the power to collect fingerprints (e.g. on a soft drink can) and compare them with other fingerprints recorded in an external fingerprint data base. Article 17 ISS Act 2002 contains the legal basis for requests to have such checks done in databases not managed by GISS. This may e.g. be the DNA database used for criminal investigation and prosecution.

So GISS may compare a DNA profile it has obtained itself with profiles stored in this external database. GISS does not acquire DNA profiles from the DNA database that is used for criminal investigation and prosecution. GISS and the ministry of Security and Justice (responsible for this DNA database) have agreed that GISS must send a written request to the ministry of Security and Justice for each check it wishes to have done in the database. This has not been formalised in a covenant.

The power to match fingerprints against the fingerprint database is implied in article 22 ISS Act 2002. This power is linked to the Police Data Act and article 62 ISS Act 2002.

### **Requirement 3: Investigation must be restricted to ‘identifying characteristics’**

In view of the preceding requirement, the exact meaning of the term ‘identity’ is of course important. The ISS Act 2002 does not offer any further clues. The Committee finds reason to interpret the term restrictively. It does so because of the increasing technological possibilities of forensic investigations methods involving biological materials and the (potential) privacy infringement they entail. This type of investigation must be restricted to personal characteristics that identify the person concerned. Identifying characteristics make a person unique compared to other persons. As far as biological characteristics are concerned this is true, for example, for a fingerprint, a DNA profile or a hand vein pattern. The Committee finds no scope in the law for the investigation of other kinds of personal characteristics such as origin, or external characteristics like the colour of hair or eyes. Neither does the Committee find scope for the collection of biological materials for the purpose of establishing a syndrome or certain (genetic) characteristics. In the opinion of the Committee, origin or external characteristics (e.g. skin colour) are not identifying characteristics. Under the ISS Act 2002 it is therefore not permitted to investigate those.

GISS may therefore carry out investigations to establish the identity of persons. As with other special powers, forensic investigation involving biological materials can be exercised with respect to a target and also with respect to a non-target where this is necessary to obtain information concerning the real target. Examples of a non-target are a family member or a partner of the real target.

#### *3.2.2 Retention of the results of forensic investigation involving biological materials*

The Committee has established that the law does not regulate how the results of forensic investigation involving biological materials must be stored, for example cellular material and any DNA profiles obtained from it. Only the general provisions for processing data (articles 12 ff. ISS Act 2002) and the provision for removing and destroying data (article 43 ISS Act 2002) are applicable to such retention. Article 12, for instance, instructs GISS to process data, and consequently also to store data, in accordance with the law and with proper and due care. Article 43(1) requires GISS to remove data if, in view of the purpose for which it was processed, it is no longer meaningful. The Committee will discuss the retention issue in greater detail in section 3.3.

### 3.2.3 Level of permission

Pursuant to article 19 ISS Act 2002 the minister or the head of GISS on his behalf must grant permission to apply article 22 ISS Act 2002. Article 19(2) ISS Act 2002 provides for the possibility for the head of GISS to delegate this power. Article 6 of the Ministerial (Special Powers of GISS) Mandate Decree 2009 states that the director, the unit heads and the team heads have a mandate to grant permission to apply Article 22(1)(c) ISS Act 2002. In May 2012 the Mandate Decree was amended and specific rules were included regarding the taking or collection of DNA material aimed at establishing a person's identity. In addition to the power of the (deputy) head of the service to give permission for this activity, the director and the unit heads also have a mandate to do so. This means that since the entry into force of this amendment to the Mandate Decree the team heads no longer have a mandate to grant such permission. This amendment was fully incorporated into the Ministerial (Special Powers of GISS) Mandate Decree 2014 that entered into force on 12 June 2014.

Pursuant to the Ministerial (Special Powers of GISS) Mandate Decree 2014 (and the amendment of 2012 to the former Mandate Decree) an employee must first have obtained permission before he may acquire DNA material. The Committee has established, however, that GISS has recently started using a procedure that is contrary to this requirement. According to this procedure the object on which DNA material may be present is already secured before an application is made for permission to apply article 22 ISS Act 2002. It is only when the team considers it desirable to actually conduct a DNA analysis that it will apply for permission. Until that moment the procedure prescribes that the object with the cellular material on it must be retained. This procedure has been laid down in an internal memorandum, but has not been incorporated in all relevant policy documents on the subject. The internal memorandum states that the secured objects may be retained for two years awaiting obtainment of permission to apply article 22 ISS Act 2002. The retention period may be extended by two years in agreement with the head of the operational team. The policy does not preclude continued retention after the two-year extension.

### 3.3 Conclusion regarding the legal framework

Secret acquisition of body material entails infringement of privacy. It follows from *Marper* that the ECtHR holds the opinion that the mere retention of cellular material and DNA profiles constitutes infringement, regardless of how these have been obtained. It is true that this ruling was pronounced in the context of a criminal case, but in that case the ECtHR extended its conclusions so as to apply to retention and storage by public authorities in general. The term public authorities also includes intelligence and security services. It is clear from the case law of the ECtHR, moreover, that where a public authority is granted powers whose exercise may infringe fundamental rights of citizens, this requires a clear legal basis. The ECtHR considers such a legal basis to have even greater importance if the powers granted to the public authority are exercised in secret.<sup>11</sup> The ECtHR has stated that a legal basis must be sufficiently knowable ('be sufficiently clear in its terms to give citizens an adequate indication') and foreseeable ('conditions for the use of the power are clear').<sup>12</sup>

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<sup>11</sup> See e.g. ECtHR 2 August 1984, series A no. 82, p. 31 (*Malone v United Kingdom*); ECtHR 12 May 2000, no. 35394/97, no. 26 (*Khan v United Kingdom*).

<sup>12</sup> See e.g. ECtHR 28 June 2007, no. 62540/00, nos. 75 ff. (*Association for European Integration and Human Rights and Ekimdzhev v Bulgaria*).

The Committee concludes that in the light of the requirements set by the ECtHR, article 22 ISS Act 2002 provides an adequate legal basis for using the power of forensic investigations involving biological materials, subject to the requirement, however, that the investigation must be aimed at establishing a person's identity. The Committee holds that in this context there are several forensic investigation methods that may be used, such as fingerprint and DNA analysis.

Current procedure at GISS allows it to acquire, without permission, objects on which cellular material is (probably) present and to store them for some time without having applied for and obtained permission to apply article 22 ISS Act 2002. The Committee has found that at the moment when GISS thus acquires an object, it has not yet assessed the necessity, proportionality and subsidiarity of the forensic investigation that may be carried out later. The mere storage of DNA profiles and particularly of cellular material in itself already results in privacy infringement. The Committee therefore considers it undesirable that GISS may store cellular material (unused) for two years and may extend this period by at least another two years and possibly longer. It is difficult to reconcile this with acquisition being necessary. Moreover, the Committee holds that this procedure is not in accordance with the Ministerial (Special Powers of GISS) Mandate Decree 2014 (and the amendment of 2012 to the preceding Mandate Decree). This Mandate Decree states that the director and the unit head have a mandate to grant permission for '(...) collecting DNA material'. The Committee points out that this includes the acquisition of an object containing DNA material. An employee must therefore obtain the prior permission of the director or unit head to obtain such objects. The procedure at GISS disregards the requirement of prior permission.

The Committee notes that it is clear from *Marper* that the ECtHR requires the existence of a legal basis for setting up and maintaining a DNA database (with the DNA profiles stored therein). The same applies to the storage of cellular material. With regard to the latter the ECtHR stated that the degree of infringement is even greater given the large amount of genetic and health-related data contained therein. The Committee deduces from the case law of the ECtHR that this legal basis must provide for minimum safeguards concerning the storage of DNA profiles and cellular material. These include safeguards concerning storage duration, use, third parties access, procedures for preserving the integrity and confidentiality of data and procedures for its destruction.

The legal basis for carrying out forensic investigation involving biological materials is regulated in the ISS Act 2002. It is remarkable that the developments that have taken place in recent years and corresponding regulations aimed at protecting privacy have not been incorporated into the ISS Act 2002 yet. In the context of criminal law, on the contrary, this has been done.

The Committee has established that GISS does not have specific, publicly accessible rules on the storage of DNA profiles and on the handling of cellular material it has acquired. The Committee holds that the general rules of the ISS Act 2002 governing data processing (article 12 ISS Act 2002) and data removal and destruction (article 43 ISS Act 2002) are insufficiently specific to serve as a legal basis, in view of the requirements which the ECtHR has imposed on the exercise of these powers. Until such a legal basis has been established, so the Committee holds, the ISS Act 2002 only provides scope for storing DNA profiles and cellular material for the purpose of identification in individual cases. As soon as GISS has established the identity of the person concerned, the DNA profile and any cellular material that is present must be removed and destroyed. Under applicable law GISS is not permitted to set up a DNA database of its own.

## 4 Forensic adviser

GISS has described in an internal policy document how employees may apply forensic investigation methods involving biological materials. The document states:

- the conditions for the application of the investigation methods by GISS;
- how employees must ask permission for such application;
- how employees must store biological materials;
- which departments are involved in the application of the methods.

For several years now GISS has been employing a forensic adviser. Before his appointment GISS did not have an employee whose focus was primarily on the application of forensic investigation methods involving biological materials. The forensic adviser's role is twofold.

Firstly, the forensic adviser gives advice on the possibilities offered by forensic investigation (involving biological materials) in the context of intelligence investigations. In this role he acts as an expert to whom employees can go with their questions, and he explains the potential added value of these investigation methods. The Committee has established that in the past few years the forensic adviser has actively sought to perform this role with vigour. He gave workshops to the service's employees, for instance, and posted informative reports on developments in the field of forensics on the internal network (intranet) of GISS. When an operational team wants to answer a specific intelligence question (e.g. establishing the identity of a target) it can pass on the question to the department responsible for operational execution. If the intelligence question has a forensic component, the forensic adviser can, on the basis of his specific knowledge and experience, give advice about possible forensic investigation methods that may help find the answer to the question. He may e.g. recommend acquiring an object of the target from which a DNA profile can be created.

Secondly, the forensic adviser plays a role in the operational application of forensic investigation methods. The concrete way in which he does so can vary from one operation to the next. The forensic adviser may be involved in the operational execution, in the sense that he is the person gathering the object that is to be subjected to forensic investigation. In certain cases, however, it will not be possible for the forensic adviser himself to be involved in the acquisition. In those cases an operational team will acquire the object, usually in consultation with the forensic adviser. The forensic adviser may then be involved in subsequent investigation acts, for example, securing the traces of DNA that are present on the object. The actual creation of e.g. a DNA profile is done by a third party, with the forensic adviser acting as liaison. He is responsible for maintaining contact with the third party.

The Committee has established that the forensic adviser is not involved in all operations in which forensic investigation methods (involving biological materials) play a role. For instance, a specific application of such a method may lie outside the forensic adviser's field of expertise. In such a case the expertise of a third party may be an option.

Furthermore, the forensic adviser has a specific role in the context of acquiring and storing cellular material and creating and storing DNA profiles. In addition to the aforementioned liaison function, he is also responsible for further processing the DNA profile obtained in an internal database of GISS. The forensic adviser is the administrator of this database, which is stored on a stand-alone computer that is not accessible via the internal network of GISS. If an operational team wishes to check a DNA profile, it must do so via the forensic adviser or his



direct superior. The forensic adviser also stores the acquired objects (e.g. soft drink cans or cigarette butts) from which no DNA profiles have been created as yet.

Within this context the Committee draws attention to its consideration in §3.2 that GISS may only store DNA profiles and body materials in those cases in which GISS has not yet established the identity of the person concerned. The forensic adviser must take account of this rule when storing objects. Moreover, as stated above, under current law GISS is not permitted to set up a DNA database of its own.

The Committee has doubts, moreover, about the arrangements made by the forensic adviser for storing DNA profiles and body materials of persons who are still unknown. In the Committee's view there is a risk that GISS will keep DNA profiles and body materials in storage for too long. This may happen in the first place because the forensic adviser has only limited knowledge of the (ongoing and closed) investigations of GISS. As a result, it is difficult for him to assess which stored data is still relevant. In addition, the operational teams do not have direct access to the stored DNA profiles of GISS or to the stored body materials. As a result, it is difficult to proactively destroy materials or order their destruction if the data is no longer relevant. The Committee concludes that more explicit rules must be established as to who is responsible for storing and destroying this data and how this person is to perform this responsibility.

## 5 Operational activities

The Committee has examined all operations of GISS in which it applied forensic investigation methods involving biological materials since the ISS Act 2002 entered into force. The Committee has found that compared with other special powers GISS applies these investigation methods only occasionally.

The Committee has divided its investigation findings into those relating to the investigation of body materials (discussed in section 5.1) and those relating to the other forms of forensic investigation involving biological materials, including fingerprint investigation (discussed in 5.2). For both categories the Committee examined the following:

- The aim for which the investigation method was applied;
- The assessments regarding necessity, proportionality and subsidiarity of the method;
- How the investigation was carried out;
- Which role the investigation method played in the context of the investigation.

The Committee also paid attention to the results obtained by applying these methods. To the extent necessary the Committee will give a more detailed explanation of the backgrounds of the operations discussed here in the secret appendix to this review report.

The Committee has further established that on 8 December 2010 GISS presented a memorandum to the minister of the Interior and Kingdom Relations in which it set out the legal framework for applying DNA investigation. In this memorandum GISS also requested the minister to agree with the intention of GISS to apply DNA investigation as part of the intelligence process, with the aim of establishing identity. On 13 December 2010 the minister agreed to this intention subject to the condition that GISS would lay down the framework conditions for such application and outline some application scenarios. Incidentally: GISS had already been acquiring and investigating objects for the purpose of creating DNA profiles prior to making its request to the minister of the Interior and Kingdom Relations on 8 December 2010 to agree to DNA investigation by GISS.

### 5.1 Investigation of body materials

The Committee has established that GISS investigated body materials on several occasions. This involved:

- DNA investigation to establish the identity of a person;
- DNA investigation for the purpose of subsequently carrying out a health analysis;
- forensic investigation involving biological materials done by an agent.

#### 5.1.1 *DNA investigation to establish identity*

The Committee has established that in several operations GISS carried out a DNA investigation or collected objects with the intention of subjecting them to DNA investigation. With one exception that is mentioned below in section 5.1.3, article 22 ISS Act 2002 was the legal basis for these investigations. The Committee has established that in its substantiation of the various applications GISS does not always specifically discuss the DNA investigation the service wishes to carry out, the privacy infringement entailed thereby and the necessity of carrying out such investigation. In one operation GISS merely stated that the operational team in question wanted to collect DNA in order to 'enhance the knowledge position of the team'. No other aim for which the DNA material was to be acquired was stated or

substantiated. In the opinion of the Committee this is not an adequate substantiation by reasons that satisfies the requirements of necessity, proportionality and subsidiarity. The reasons stated in the application are so defective that the Committee considers it unlawful.

Most of these cases occurred in operations in which the identity of the person concerned was unknown or in which the person concerned was suspected of using a false identity. In two operations GISS already knew the identity of the person concerned. The Committee emphasizes the fact that DNA investigation may only be aimed at establishing the identity of the person concerned. DNA investigation is therefore permitted only if there are doubts about the identity. In view of the requirement of subsidiarity, moreover, it must also be impossible for GISS to find out the person's identity using a less infringing method than DNA investigation. The Committee regards these two operations as unlawful, because GISS carried out DNA investigation or acquired objects to subject them to DNA investigation while the identity of the person concerned was already known.

The application for one specific operation did not mention that it would include DNA investigation while the subsequent operational report shows that instructions for DNA investigation had in fact been given. In this operation, objects were acquired without prior permission. The Commission considers this unlawful.

#### *5.1.2 DNA investigation aimed at health analysis*

The Committee has found that in two operations carried out in the context of one and the same investigation GISS applied forensic investigation methods involving biological material that were initially aimed at establishing whether body materials it had acquired could be matched to an investigation target of GISS. The ultimate goal, however, of these related operations was to subject the body materials to health analysis. The analysis would only be done if the body materials could actually be attributed to the investigation target in question. All this took place some time ago.

The Committee has found that the ultimate (and only) objective of the operations was to make health analysis possible. The Committee holds the opinion that the ISS Act 2002 does not allow scope for doing or ordering health analysis, since article 22 only permits forensic investigation involving biological materials for the purpose of establishing identity. The Committee holds the opinion that the operations aimed at making possible this health analysis were unlawful.

The Committee has found that GISS has adjusted its opinion on the question whether the ISS Act 2002 provides for the possibility of doing health analysis. This happened after it had carried out the aforementioned operations. Initially, GISS held that the ISS Act 2002 did permit such analysis. Subsequently, however, and after a legal analysis, GISS came to the conclusion that this was not the case after all. This conclusion was reached at the same time it turned out that body material of the investigation target had actually been acquired and GISS would have been able to proceed with the health analysis. The new conclusion was that the ISS Act 2002 did not allow scope for carrying out a health analysis. In 2013 this conclusion was incorporated into the internal rules of GISS and practice then followed the new rules.

### 5.1.3 *Application by agents of forensic investigation involving biological materials*

The Committee has established that in most cases the legal basis for analysing body material is article 22 ISS Act 2002. In two operations, however, an agent of GISS (article 21 ISS Act 2002) was responsible for carrying out such investigation or it was carried out under the flag of the agent operation. This was the case involving the two operations described in section 5.1.2, in which forensic investigation involving biological material was done with the aim of subsequently carrying out a health analysis. The agents did not do the investigation work themselves, though.

The Committee holds the opinion that in principle the ISS Act 2002 does not preclude the possibility of instructing an agent to exercise a special power. In this situation, however, adequate reasons must be stated to substantiate that the requirements of necessity, proportionality and subsidiarity with respect to the application of article 22 ISS Act 2002 are satisfied, in addition to the reasons stated for deploying the agent. GISS must at the same time also take account of the other requirements set by ISS Act 2002, e.g. with respect to the level of permission, documentation and the purpose for which the power will be exercised. Furthermore, the reasons stated for deploying the agent must make it clear that the agent will exercise a special power.<sup>13</sup>

The Committee has established that in one of these operations an agent investigated body material on the instruction of GISS. No approval existed, however, for the period in which this investigation took place. This means that the investigation done by the agent lacked a legal basis. As a result, the Committee considers the agent operation and his investigation unlawful as far as they took place in this period.

In regard to the other operation the Committee considers that there, too, there should have been a separate application for permission. This was the investigation done under the flag of the agent operation, although the agent did not do the investigation himself. The approval to deploy the agent contains only indirect mention of the investigation of body material, not based on a thorough assessment of the requirements of necessity, proportionality and subsidiarity. The Committee considers this unlawful, too.

### 5.1.4 *Storage of DNA profiles and body materials*

The Committee has found that all DNA profiles that have been created so far were stored in a DNA database of GISS. The body materials were also stored to the extent they had not been further processed yet (e.g. to create a DNA profile). The Committee has found that body materials that had already been processed were destroyed by a third party. Official reports were drawn up of such destruction.

As already stated in section 3.3, the ISS Act 2002 only allows scope for storing DNA profiles and cellular material for identification purposes in individual cases. This rule applies until a legal basis will have been established which regulates their storage. As soon as GISS has established the identity of the person in question, the DNA profile and any cellular material in its possession must therefore be removed and destroyed. Under present law GISS may not set up a DNA database of its own.

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<sup>13</sup> CTIVD review report no. 38 on the processing of telecommunications data by GISS and DISS, *Parliamentary Papers II* 2013/14, 29 924, no. 105 (appendix), no. 3.4.2, available at [www.ctivd.nl](http://www.ctivd.nl).

## **5.2 Fingerprint investigation and other forensic investigation methods involving biological materials**

The Committee has established that fingerprint investigations and other forms of forensic investigation involving biological materials were carried out to establish the identity of persons. The Committee holds the opinion that the application of these methods satisfied the requirements of necessity, proportionality and subsidiarity. The Committee has concluded that GISS has not set up a fingerprint database of its own .

## 6 Conclusions and recommendations

This chapter presents the successive conclusions of this report. Conclusions 1, 2 and 3 follow from the consideration of the legal framework in chapter 3. Conclusion 4 follows from chapter 4 about the forensic adviser. The list is concluded by conclusions 5, 6 and 7 taken from the chapter on the operational activities of GISS (chapter 5).

### 6.1 Forensic investigation methods involving biological materials may be applied to establish identity

The Committee concludes that article 22 ISS Act 2002 provides a sufficient legal basis for the application of forensic investigation methods involving biological materials (such as fingerprints and DNA investigation), subject to the requirement that the investigation is aimed at establishing the identity of a person. In addition, so the Committee holds, article 22 ISS Act 2002 (in conjunction with article 17 ISS Act 2002) permits GISS to match a DNA profile with other profiles stored in an external database.

### 6.2 Storage of cellular material requires a specific legal basis

It follows from the case law of the ECtHR that a specific legal basis must exist for setting up and maintaining a DNA database and for storing cellular material, because doing this entails serious infringement of privacy. The Committee holds that the general rules of the ISS Act 2002 governing data processing (article 12 ISS Act 2002) and data removal and destruction (article 43 ISS Act 2002) do not provide an adequate legal basis. This means that specific rules must be established and made public. These rules must lay down minimum safeguards for storing DNA profiles and cellular material. The safeguards concern storage duration, usage, access of third parties, procedures for preserving the integrity and confidentiality of the data and procedures for its destruction.

### 6.3 Greater clarity is needed about who is responsible for storing and destroying material.

Apart from the above conclusions the Committee has doubts about the arrangements made by the forensic adviser for storing DNA profiles and body materials of persons who are still unknown. In the Committee's view there is a risk that GISS will keep DNA profiles and body materials in storage for too long. This may happen in the first place because the forensic adviser has only limited knowledge of the (ongoing and closed) investigations of GISS. As a result, it is difficult for him to assess which stored data is still relevant. In addition, the operational teams do not have direct access to the stored DNA profiles of GISS or to the stored body materials. As a result, it is difficult to proactively destroy materials or order their destruction if the data is no longer relevant. The Committee concludes that more explicit rules must be established as to who is responsible for storing and destroying this data and how this person is to perform this responsibility.

### 6.4 GISS is not yet making frequent use of forensic investigation methods involving biological materials

For GISS, the application of forensic investigation methods involving biological materials as a means of gathering information does not occupy an important place in the intelligence process. The Committee has examined all operations of GISS in which it applied forensic investigation methods involving biological materials. These operations took place in the period from the entry into force of the ISS Act in 2002 up to and including June 2014. In this review period GISS did not make large-scale use of

forensic investigation methods involving biological materials. The Committee has established, however, that these methods are being applied with increasing frequency.

**6.5 Some operations were unlawful**

The Committee has established that on several occasions GISS investigated body materials pursuant to article 22 ISS Act 2002. These were DNA investigations to establish the identity of a person.

The Committee concludes that a number of operations must be considered unlawful. In these operations the reasons stated for the investigation were defective or permission had not been obtained prior to the DNA investigation. In two operations GISS already knew the identity of the person concerned. The Committee regards this as unlawful, too. These operations are described in 5.1.1 and 5.1.3.

**6.6 Wrongful attempt to carry out health analysis in two operations**

In two operations carried out in the context of one and the same investigation GISS applied forensic investigation methods involving biological material which the Committee regards to have been unlawful. The investigation was initially aimed at establishing whether body materials that had been acquired could be matched to an investigation target of GISS. The ultimate goal, however, of these related operations was to subject the body materials to health analysis. The analysis would only be done if the body materials could actually be attributed to the investigation target in question.

The Committee has found that the ultimate (and only) objective of the operations was to make health analysis possible. The Committee holds the opinion that the ISS Act 2002 does not allow scope for doing or ordering health analysis, since article 22 only permits forensic investigation involving biological materials for the purpose of establishing identity. The Committee therefore considers the operations aimed at making possible this health analysis to have been unlawful.

*Thus adopted at the meeting of the Committee held on 7 January 2015.*

**REVIEW COMMITTEE**  
on  
THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 42

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## Definitions

**For the purpose of the public review report on the application by GISS  
of forensic investigation methods involving biological materials**

The following list contains definitions of a number of terms as used in this review report. It was not the Committee's aim to make the descriptions exhaustive, but rather it tried to give readers a concrete idea of the terms included in the list.

<i>Agent</i>	A person specifically deployed by the services to collect data. Agents operate under the control and the supervision of the services.
<i>Approval</i>	Permission to exercise a special power (e.g. the services require the minister's approval for telephone tapping).
<i>Cellular material</i>	Body material containing genetic information.
<i>Data processing</i>	Collecting, recording, arranging, storing, updating, altering, demanding access to, consulting or using data, providing data by forwarding, dissemination or any other means of making data available, assembling or combining data, and protecting, deleting or destroying data (article 1(f) ISS Act 2002).
<i>Database</i>	Organised collection of data.
<i>Director (GISS)</i>	Official at GISS positioned in the organisation's hierarchy as follows: head, <i>director</i> , unit head, team head.
<i>DNA</i>	Deoxiribonucleic acid. Molecule in the body functioning as the main carrier of genetic information. DNA is stored in genes.
<i>DNA investigation</i>	Comparative investigation of DNA profiles.
<i>DNA profile</i>	Specific characteristics at different places on the DNA strand. A DNA profile is an identifying data and virtually unique for each person.
<i>Facial image comparison</i>	Facial image comparison.
<i>Fingerprint investigation</i>	Comparative investigation of fingerprints.
<i>Fingerprints</i>	Identifying pattern left by fingers on a surface.
<i>Forensic adviser</i>	Employee who gives advice on the application of forensic investigation methods involving biological materials and who may be involved in their operational application.
<i>Forensic investigation</i>	Investigation aimed at finding physical characteristics, in



<i>involving biological materials</i>	particular body materials.
<i>Hand vein pattern</i>	Pattern of the veins on the back of one's hand. This pattern is a very strong identifier.
<i>Head (GISS)</i>	Official who is in charge of GISS. The head occupies the following position in the organisational hierarchy at GISS: <i>head</i> , director, unit head, team head.
<i>Health analysis</i>	Forensic investigation involving biological materials to establish the health condition of a person.
<i>Intelligence service</i>	A service that conducts investigations regarding other countries for the purpose of identifying (potential) threats to the service's own national security.
<i>Intelligence task</i>	Investigating other countries (see article 6(2)(d) and article 7(2)(e) of the ISS Act 2002).
<i>Personal data</i>	Data relating to an identifiable or identified individual natural person (e.g. a name or a photograph).
<i>Physical characteristic</i>	(External) characteristics of the human body. These can be identifying to a greater or lesser degree. Examples are colour of eyes and hair or a fingerprint.
<i>Procedure</i>	A service's written policy and/or the procedure followed in practice.
<i>Security service</i>	A service that investigates persons and organisations who or which may constitute a danger to the continued existence of the democratic legal system, or to the security or other vital interests of the state, or to the security and the readiness of the armed forces.
<i>Security task</i>	Task aimed at identifying dangers to the continued existence of the democratic legal order (article 6(2)(d) ISS Act 2002), or to the security or other vital interests of the state, or to the security and the readiness of the armed forces (article 7(2)(c) ISS Act 2002).
<i>Special power</i>	A power conferred on a service by law to use a specific means that infringes privacy, which provision of law also lays down the circumstances and conditions under which the power may be exercised. Special powers are usually exercised in secret. The special powers are set out in articles 20 - 30 ISS Act 2002 (e.g. interception and surveillance).
<i>Team head (GISS)</i>	Official at GISS who occupies the following position in the organisational hierarchy at GISS: head, director, unit head, <i>team head</i> .
<i>Unit head (GISS)</i>	Official at GISS who occupies the following position in the organisational hierarchy at GISS: head, director, <i>unit head</i> , team head.