

Investigation protocol oversight

I. Purpose of review

a. Purpose of the investigation protocol

The Oversight Department of the Review Committee on the Intelligence and Security Services (CTIVD) uses this investigation protocol to provide insight into the way in which it implements its review task. Set down in this protocol are the Department's statutory duty, its investigatory powers and the types of review the Department applies when implementing its duty. The investigation protocol further details the various steps to be taken in each of these types of review. The protocol acts as the guide for the Oversight Department when conducting an investigation.

The protocol is a public document. It can be accessed through the website of the Review Committee (www.ctivd.nl) and is actively brought to the attention of everyone involved in the implementation of the CTIVD's duty of oversight.

b. CTIVD strategy

The CTIVD's strategy (see below) is its core task and provides direction to the Oversight Department's actions. This strategy is the guiding factor for the choices the Oversight Department makes regarding the subject matter of investigations.

By its independent investigation into the lawfulness of the conduct of our intelligence and security services, the CTIVD provides an insight into the right balance between the interests of national security and protection of citizens' privacy.

c. Core values of the Oversight Department

The Oversight Department organizes its work according to the following core values, which govern the Department's activities in interviews, reporting, presentation and debates.

- Its oversight is independent, professional and predictable
- The oversight is aimed at establishing facts and assessing them
- The oversight is aimed at the lawfulness of the AIVD and the MIVD's conduct and the efficiency aspects directly related to that conduct
- Social context is taken into account when prioritizing and shaping oversight
- The oversight is as fully transparent and accessible as possible
- The oversight is incorporated into recognizable products

II. Grounds for oversight

a. Duty

The Oversight Department's duty is set down by law in Section 97 (3) of the Intelligence and Security Services Act 2017 (ISS Act 2017). The Department's duty is threefold:

- a. reviewing the lawfulness of the duties performed by the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD);
- b. providing solicited and unsolicited information and advice to the Ministers concerned about the findings established by the review committee. The Oversight Department can ask the Ministers

- concerned to bring this information and advice to the attention of one or both Houses of Parliament;
- c. issuing unsolicited advice to the Ministers concerned about the implementation of the obligation to notify.

b. Independence

The Oversight Department's independence is expressed in the following ways:

1. By its position: the Department is able to work independently, partly because it decides which matters to investigate, has wide-reaching investigatory powers given by law and has direct access to all information it deems important to the performance of its duty.
2. By its opinion-forming: the Department itself establishes the facts, determines autonomously which findings, conclusions and recommendations it will include in its review reports, directly manages staff with legal, operational and technical expertise, can call in external expertise and ensures both internal and external critical input with regard to its investigations.
3. By its image: the Department reports in public review reports, renders account, by its reports, directly to Parliament about its activities and with impartiality takes into consideration social issues and concerns that relate to the intelligence and security services.

c. Composition

The Oversight Department consists of three members, including a Chair. The ISS Act 2017 regulates the appointment of members of the Department. At least two of the members, including the Chair, have a university degree in law. Members are appointed for a period of six years and can be re-elected once.

The Oversight Department is supported by the CTIVD's secretariat. The secretariat is led by the general secretary of the CTIVD. The secretariat consists of a number of review officers, an IT expert unit and secretarial support.

Investigations are conducted in a smaller setting by so-called investigation groups. An investigation group consists of one member of the Oversight Department and at least one review officer, whether or not assisted by the IT expert unit. The members of the Oversight Department draw up and adopt reports and other documents.

d. Investigatory powers

The Oversight Department has direct and independent access to all data processed in the context of the ISS Act 2017 and the Security Screening Act. The Ministers concerned, the heads of the services and others involved in the implementation of these Acts will provide full cooperation to the Oversight Department. The Oversight Department has direct access to all digital and physical information systems of both the AIVD and the MIVD. The Oversight Department establishes of its own accord which information and which cooperation it deems necessary.

In performing its duty, the Oversight Department may interview anyone involved, now or in the past, in the implementation of the ISS Act 2017 and the Security Screening Act. In the first place this will concern current or former AIVD and MIVD staff, but it could also concern other individuals. If the Oversight Department deems it necessary, it can hold hearings with these individuals under oath. If called to a hearing, current and former staff of the services cannot invoke their obligation to secrecy towards the Oversight Department. The Oversight Department can call experts to hearings. Experts are obliged to perform their duty with impartiality and to the best of their ability. The Oversight Department is authorized to enter any premises. However, the Oversight Department must have a resident's consent to enter their home.

e. Types of oversight

The Oversight Department lays down its findings, conclusions and recommendations where possible in public review reports. Section 113 of the ISS Act 2017 stipulates how these review reports are established. The Oversight Department aims to publish relevant, practice-based reports for both the work field (the AIVD, the MIVD, the Ministers concerned and organizations who fulfil tasks on the basis of the ISS Act 2017) and for Parliament. To achieve this aim, the Department has a number of oversight methods.

- *Baseline measurement*: establishing the availability of policy, work instructions, manuals, instruments and/or preconditions and marginally testing their content, offering a starting position for effective review. The baseline measurement provides the Oversight Department with a picture of the extent to which the AIVD and/or the MIVD give substance at that time to the applicable legal framework. A baseline measurement can be compared to a risk analysis and is used by the Department for example in the case of the application of a new investigatory power or a new processing technique. Based on the outcome of a baseline measurement, the Oversight Department will determine the further structure of its review activities. A baseline measurement results in an internal report which includes a list of the established risks. This could give rise to conducting an in-depth investigation, a short-term investigation, a follow-up investigation and/or a systems investigation. Based on the results of the baseline measurement, an advisory opinion may also be issued (see below).
- *In-depth investigation*: a detailed investigation into a certain activity of the AIVD or the MIVD. This could be the use of a general investigatory power, for instance, such as processing information from open sources, a special investigatory power, such as the deployment of an agent or intercepting telephone communication, or cooperation with foreign intelligence and security services. In principle, an in-depth investigation relates to an activity into which the Oversight Department has not previously conducted an investigation. However, an in-depth investigation can also relate to an activity which was previously investigated but which the Oversight Department considers necessary to investigate again, for example to further investigate certain aspects that had been addressed to a lesser degree in a previous in-depth investigation. That is a distinguishing factor between this type of investigation and the follow-up investigation detailed below. The Oversight Department uses an in-depth investigation to get a clear picture of the activity and looks at both the legal framework and the operational practice. An in-depth investigation results in a public review report, with a classified appendix if necessary.
- *Short-term investigation*: an investigation into a certain activity of the AIVD or the MIVD that is characterized by its short duration, often initiated by incidents or current affairs. By means of a short-term investigation, the Oversight Department can quickly identify a certain activity in a short period of time and issue a report in broad outlines. A short-term investigation is limited in scope, for example because only a certain aspect of an activity is examined or an investigation is conducted by carrying out a random check. The legal framework is tailored to the restricted scope of the investigation. A short-term investigation results in a public review report, with a classified appendix if necessary.
- *Follow-up investigation*: an investigation into an activity of the AIVD or the MIVD previously investigated by the Oversight Department. The Oversight Department has already conducted various investigations into the activities of the services. In due course, the Department may deem it necessary to conduct a new investigation into a certain activity, to investigate whether the Minister concerned has kept the commitments made in response to the first review report. It can do so by means of a follow-up investigation. A follow-up investigation results in a public review report, with a classified appendix if necessary.

- *Systems investigation*: an investigation into the workings of a system (or the whole of systems) for data processing. A systems investigation is aimed at the policy, staffing, organizational and/or technical set-up of data processing procedures by the AIVD and/or the MIVD. The Oversight Department checks whether the AIVD and/or the MIVD give sufficient substance to the duties of care for lawful data processing with which the services are charged on the basis of Section 24 of the ISS Act 2017, in part based on the range of instruments used by the services. Central to this point is whether there is a sufficient system of internal control of compliance with legal obligations. A systems investigation is often conducted in combination with an investigation into a certain activity of the services, e.g. reviewing practice by a random check. When an organization has a properly functioning management system, it will also be aimed at compliance with legislation and regulations (compliance management). When there is a management system of that kind, it can help an oversight body to gain a faster and more comprehensive insight into compliance performance than in the case of direct oversight which is aimed primarily at the result of a certain activity of the service. In the case of systems oversight, the oversight body will have to form an opinion on the quality of the management system itself because this determines the value of the available information. A systems investigation results in a public review report, with a classified appendix if necessary.
- *Advisory opinion*: if the Oversight Department comes across matters that cannot or can only indirectly be included in an ongoing investigation and that on their own do not qualify for an investigation, they may opt to inform one or more of the services and/or the Minister concerned by means of an advisory opinion. When findings in an ongoing investigation, in the Department's opinion, should be immediately brought to the attention of the Minister concerned, the Department may also opt to issue an advisory opinion in anticipation of the report. Moreover, the Oversight Department can request that its advisory opinion be presented to Parliament.

f. Assessment framework

The Oversight Department's assessment framework is mainly determined by the ISS Act 2017, the Security Screening Act and European case law related to this legislation. The AIVD and the MIVD are bound to this legislation and case law in the performance of their duties. In their conduct, the services must conform to the ensuing requirements. The AIVD and the MIVD must comply with the requirements of necessity, proportionality and subsidiary, and authorization must have been obtained at the appropriate level and the correct procedure followed before an investigatory power can be applied. The Oversight Department assesses whether the services observe the statutory requirements in the performance of their tasks. The Oversight Department also includes relevant international treaties and related case law in its assessment framework. In particular the case law of the European Court of Human Rights and the European Court of Justice is important in this context.

In the context of its duty, the Oversight Department assesses the lawfulness of the AIVD and the MIVD's conduct. If the service's conduct conflicts with the law, for example if the legal requirements of necessity, proportionality and subsidiary have not been observed when deploying a general or special investigatory power, the Oversight Department will rule the conduct unlawful. The CTIVD considers its recommendations, if and insofar as followed by the Minister(s) concerned in communications to Parliament, as part of legislation and regulations. Any conduct by the AIVD and the MIVD not in accordance with this is therefore unlawful. The Oversight Department will conclude negligence if there is a failure in policy, procedure or process that could encourage unlawful conduct or future unlawful conduct.

The assessment conducted by the CTIVD of the use of investigatory powers already reviewed on lawfulness by the Investigatory Powers Commission (TIB) is not intended to redo the work of the TIB. The Oversight Department can establish in retrospect that the information in requests made to the

TIB was either incorrect or insufficient or that the requests should have been better substantiated in light of the implementation carried out. The situation might also occur that in retrospect the review places the deployment of an investigatory power, and the corresponding authorization granted by the TIB, in an operational context that differs from the one initially assumed (e.g. because of other circumstances than foreseen on implementation). Consequently, a different assessment of lawfulness may be made.

If the findings give rise to do so, the Oversight Department can make recommendations regarding the services' procedure.

III. Investigation

An investigation can be categorized into five types of review: baseline measurement, in-depth investigation, short-term investigation, follow-up investigation and systems investigation. There is a high degree of similarity in the way these five types are conducted. Unless stated otherwise, the following applies in principle to these types of investigation. The Oversight Department determines the subject matter and manner of its investigation independently.

a. Choosing and preparing the investigation

In its investigations, the Oversight Department sees many aspects of the services' work. The Department thus gets to see a great deal of information during its ongoing investigations and actively keeps itself informed of certain developments at both services. The Department monitors certain themes continuously. For example, it takes into consideration the questions in society regarding the intelligence and security services. Partly for this reason, the Department keeps in touch with individuals who can interpret certain social developments and it analyses the media. This can give rise to an investigation by the Oversight Department. A second possibility is that society, through Parliament, appeals to the expertise of the Oversight Department to further examine a certain activity of one of the services. In that case, the Oversight Department can be asked to start an investigation. The Department decides for itself whether or not to comply. The Oversight Department's complete investigation schedule is incorporated in an annual planning.

b. Action plan

After the subject matter for investigation has been chosen, the Oversight Department sets up an investigation group. An investigation group consists of one member of the Oversight Department and at least one review officer. The CTIVD's secretary appoints the review officer(s) to be involved in the investigation. The investigation group can be supported by the IT expert unit. The investigation group is charged with conducting the investigation and draws up an action plan. The Oversight Department may conduct exploratory investigation activities when drawing up the action plan. This allows the Department to formulate an action plan that is as specific and defined as possible.

The action plan generally looks at the legal framework for the activity of the AIVD and/or the MIVD to be investigated. In addition, it details to what extent this activity has been addressed directly or indirectly in previous reports by the Oversight Department. The action plan for a follow-up investigation expressly discusses the in-depth investigation that preceded the follow-up investigation. The conclusions and recommendations of that investigation are listed as well as the response of the Minister concerned. If the Minister's response was to concur with a conclusion or recommendation, a part of the follow-up investigation will examine to what extent the Minister has complied with that commitment. In addition, the action plan clarifies which specific parts of the activity to be investigated will be explicitly addressed in the context of the follow-up investigation.

The action plan sets out the various investigatory actions that will be taken by the investigation group. The scope of the investigation is described, including the investigation questions and sub questions to be answered. As a rule the investigation can be divided into a phase consisting of file research, technical investigation if necessary and a round of interviews, followed by a reporting phase. The action plan includes a provisional proposal as to who will be interviewed in the context of the investigation. The interviewees will usually be service employees in key positions in the organization, but the Oversight Department does not only limit talks to senior officials. After this first round of interviews, an additional investigation may prove necessary. This can in turn lead to a new round of interviews.

The action plan includes an investigation planning, with as starting point that an in-depth or systems investigation is concluded within one year, i.e. that within one year of the announcement a review report has been drawn up which can be presented to the service or the Minister concerned (see under i). A follow-up investigation is concluded within six months. A short-term investigation has a duration of no more than three months. In principle, a baseline measurement is conducted within six weeks. The investigation planning includes a term within which the investigation will be evaluated after the review report has been published.

The action plan is presented to the members of the Oversight Department for approval.

c. A critical second reading

After consultation with the CTIVD's general secretary, the investigation group will include a proposal in the action plan to incorporate a critical second reading by individuals from within or outside the organization. This means that the considerations made by the investigation group in the various stages of the investigation are submitted to individuals who are not involved in the implementation of or decision-making in the investigation. A critical second reading is at least used to check the action plan of the investigation and the draft review report before it is submitted to the Oversight Department for decision making (see under i) but can be used in any stage of the investigation. A critical second reading can be done internally and/or externally. A critical second reading is part and parcel of the professionalism of investigations conducted by the CTIVD.

Within the CTIVD one or more of the review officers or employees of the IT expert unit are appointed to carry out a critical second reading. Outside the organization one or more members of the CTIVD knowledge network carry out a critical second reading. The knowledge network consists of reputable experts from various fields of expertise. The members of the knowledge network have passed an A-level security screening and are permitted to take note of state secret information processed by the Department in internal action plans, reports and draft review reports for the purpose of the investigation in question.

d. Announcement

After the action plan has been approved, the Oversight Department will in principle announce the investigation publically. The announcement is sent to both Houses of Parliament, to the Minister concerned and to the head of the service involved and is posted on the CTIVD website (www.ctivd.nl). If an investigation is conducted following a request to that effect by the Parliamentary Committee on the Intelligence and Security Services (CIVD) or the Minister concerned, the investigation may be confidential. In that case, the announcement is sent to the CIVD, the Minister concerned and the head of the service involved.

e. File research

On the basis of the approved action plan, the investigation group carries out file research. In most cases, file research firstly consists of researching the applicable legal framework for the activity of the service the investigation focuses on. If this concerns the application of a certain special investigatory power, for example, the file research will focus on the requirements ensuing from legislation. This will include the legislative history. The research will also examine if there is any relevant national and international case law and literature. The Oversight Department will assess whether this material is relevant to the interpretation of the regulations. This research results in the drawing up of a legal framework, which forms the legal basis against which the conduct of the service concerned is assessed.

In the event of a follow-up investigation, it is sufficient to analyse whether the legal framework drawn up in the context of the preceding in-depth investigation is still up to date and whether there is any reason to adjust the legal framework, in view of the subject matter of the follow-up investigation. This also comprises an analysis of the relevant developments in case law since the previous review report was published. This analysis results in the drafting of an updated legal framework, which forms the legal basis against which the conduct of the service concerned is assessed.

After the legal framework has been established, file research will be conducted at the service concerned. The Oversight Department investigates the relevant policy documents and other documentation related to the activity under investigation or the system in question. It investigates the deployment of general and special investigatory powers and the underlying substantiation and decision-making processes. The Oversight Department has insight into procedure descriptions and operational reports. In addition, the Oversight Department includes in its investigation the reports which are drawn up in the context of the various consultation structures within the services, both at work and at management level. The Oversight Department has access to and insight into all evaluated and unevaluated data.

The Oversight Department itself has direct access to the services' digital and physical information systems. Furthermore, it can request from the service all information it deems necessary to conduct its investigation. At both services, the Department has independent access to the building and a separate work space.

f. Technical investigation

The investigation can entail a technical investigation which is conducted by the CTIVD's IT expert unit, in consultation with the investigation group. A technical investigation consists of checking the functionality of the services' technical systems or parts thereof, for example by cross-referencing the data processed by the services automatically. The technical investigation can for example be focused on the functionality of algorithms, log files or the functionality of technical systems in conjunction with each other. A technical investigation can be part of a larger investigation, but can also be the central part of an investigation. The IT expert unit can thus form the core of the investigation group.

g. Interviews

Based on the file research and any technical investigation, in principal one or more interviews are held by the investigation group with employees of the service concerned and if applicable with any third parties involved in the service's activity under investigation (including former employees of the service, if necessary). The objective of these interviews is to fill any gaps in the file research or to provide further context for the technical investigation and to obtain further clarification of the findings. If the Oversight Department deems it necessary, it can hold hearings with individuals under oath.

A report is drawn up of every interview. This is not a literal report of what was said but a succinct representation of the interview. To aid the accuracy of the written report, a sound recording may be made of interview. The interviewee is notified of this before the start of the interview. The recordings are destroyed after the investigation concerned has been concluded.

The Oversight Department offers each interviewee the opportunity to inspect the interview report. They can thus include a remark in the report if they feel that the facts of the interview have not been properly represented. The individual involved is not required to sign for approval. The investigation group will incorporate these remarks as it sees fit into the interview report and will adopt the report.

h. Expert opinion

In the context of an investigation, the Oversight Department can arrange an expert opinion. An expert opinion is a theoretical analysis or an in-depth study of a specific issue. The Department can run into legal or technical issues on which its expertise is too limited or non-existent, or it can wish to explore a certain element of an investigation in greater depth. In that case, the Department can opt to seek an advisory opinion from an expert and to have the specific issue worked out in more detail into an expert opinion. The Department has set up a pool of experts in a range of fields for this purpose, but if necessary can seek an advisory opinion from an expert outside this pool. Experts who draw up an expert opinion on behalf of the Department and who are not a part of the knowledge network are not permitted to view state secret information processed by the Department in the context of the investigation in question.

i. Reporting

Once the investigation group has compiled the information necessary to answer the investigation questions and sub questions posed in the action plan, it will lay down its findings in a review report. In the context of a baseline measurement, an internal report is drawn up, setting out the investigation group's findings and a proposal for any further investigation or for an advisory opinion. The results of a baseline measurement can be part of the public announcement of an investigation or advisory opinion.

The review report's structure depends to a large degree on the AIVD's or the MIVD's activity under investigation. The review report in any case describes investigation methods applied, the legal framework and the activity as used in practice by the service concerned. The conclusions and recommendations are included at the end of the review report. The review report also contains a summary. Appendices are included, further detailing the investigation methods applied and the terms used in the report.

If the Oversight Department is of the opinion that during an investigation a certain activity must be reported immediately, it can opt to issue an interim review report which discusses this specific activity. Depending on the urgency and circumstances of the case, the Department can choose to issue an advisory opinion to the Minister concerned and request the Minister to bring the advisory opinion to the attention of Parliament (see under IV).

In principle, the review report is public but can contain a classified appendix. The classified appendix contains data providing an insight into the methods used by the service in specific matters (modus operandi), secret sources used by the service and the service's current level of knowledge (see also under j). The Oversight Department works from the starting point that all unlawful conduct established is communicated in the public review report. However, in light of the required confidentiality, unlawful conduct may only be described in the public report in general terms. If the report concerns a classified investigation on the basis of a request by the CIVD or the Minister concerned, the review report will in principle be classified and not made public.

The draft version of the review report is presented by the investigation group to the Oversight Department for approval. After approval, the review report will be drawn up.

j. Drawing up a review report

The drawn up review report, including the conclusions and recommendations, is sent with a classified appendix, if any, to the service and the Minister concerned. The service concerned has three weeks to respond to any factual errors in the report. This response is made in writing but a verbal explanation to the written response is also possible. Both the verbal and written responses should be made within the three-week reply period. Where possible, the Oversight Department will announce a fortnight in advance that it will send a drawn up report to the service concerned. In that way, the service can prepare its organization to receive the report and reply within the set period.

Insofar as the remarks by the service concerned give rise to do so, the drawn up review report will be amended by the investigation group. The amended version of the review report is subsequently discussed by the Oversight Department. If the Oversight Department agrees with the amendment, a letter to the Minister concerned will be drawn up, indicating the amendments resulting from the service's response. The Minister then has three weeks to respond to the findings. In this phase, the Minister indicates if the drawn up review report contains sections that in the Minister's view cannot be made public because these give an insight into the service's modus operandi, secret sources and/or current level of knowledge. In that case, the Minister will request to have these sections moved to the classified appendix. The Minister's response to the review report is made in writing but can also include a verbal explanation to the written response.

Insofar as the remarks by the Minister give rise to do so, the drawn up version of the review report will be amended by the investigation group. The amended version of the review report is subsequently discussed by the Oversight Department. If the Oversight Department approves the amendments, the report will be adopted definitively.

k. Adopting the review report

The adopted review report, including the conclusions and recommendations, is sent with a classified appendix, if any, to the Minister concerned. The Oversight Department explains in the accompanying cover letter if - and if so, in which way - the Minister's remarks about the drawn up review report had been reason to amend the report. If a desired amendment was not made or a section not moved to the classified appendix, the Oversight Department will give its reasons. The Minister concerned has a maximum of six weeks to send the adopted review report with a response to both Houses of Parliament. If in the opinion of the Minister the review report contains sections that cannot be made public, the Minister will remove these sections from the adopted review report, for instance by rendering them illegible. The Minister should present the classified appendix of the adopted review report to the CIVD at the same time as the adopted public review report. If there is only a classified review report, the Minister concerned must send the report to the CIVD.

l. Publishing the review report and accompanying press release

The review report becomes public by sending the adopted review report and the Minister's policy document to both Houses of Parliament. The Oversight Department posts the digital version of the public review report on its website (www.ctivd.nl). The Oversight Department will, if it deems it necessary, issue an accompanying press release detailing the key points of the review report.

m. Evaluation of the investigation

The in-depth investigation is evaluated at the end of the period stated in the action plan. For that purpose, the investigation group holds one or more work floor talks with the service's staff in order to check how the report was received on the work floor. The Minister concerned is also requested in writing to indicate how the recommendations they adopted have been implemented. The investigation will only be evaluated after the review report has been discussed in the permanent parliamentary committee(s) or the CIVD. The lessons learned are secured in such a way that they are easily accessible and transparent for other investigations.

IV. Advisory opinion

In certain cases, the Oversight Department can deem it appropriate to inform or advise the Minister concerned about developments or incidents relating to the AIVD or the MIVD. These include topics that fall outside the scope of an investigation or that were only addressed indirectly in an investigation. These could also include activities of the services that are the subject of an investigation and that should be immediately brought to the attention of the Minister concerned.

Based on the ISS Act 2017, the Oversight Department has the authority to issue solicited and unsolicited information or advice about established findings. In these cases, it is up to the Oversight Department to inform or advise from its specific area of expertise. The Oversight Department can request the Minister to forward its advisory opinion to Parliament.

The ISS Act 2017 explicitly gives the power to issue unsolicited advice to the Minister concerned about the implementation of the obligation to notify by the services. This is the obligation to report to individuals against whom certain special investigatory powers were deployed.

It can also mean an advisory role regarding legislative matters. The Oversight Department sends these advisory opinions directly to Parliament.