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Изъятие информации и требования по ее хранению "под печатью" в швейцарском праве

Аннотация. В статье обсуждается обыск и изъятие информации для целей конфискации предметов или активов для обеспечения их сохранности и использования в качестве доказательств или в целях исполнения судебного решения. Выемка является вынужденной мерой, которая аннулирует право распоряжения объектом у лица, который будет помещен под государственный контроль, пока не будет достигнуто окончательное судебное решение. Если аудио, видео и текстовые записи, содержащиеся на устройстве хранения данных, предположительно содержат информацию, имеющую отношение к преступлению, правоохранительные органы могут ходатайствовать о проведении обыска. Если владелец инормации считает, что данная информация не должна использоваться в уголовном расследовании, либо потому, что она ни в коей мере не связана с расследованием, либо потому, что человек имеет право отказаться от дачи показаний, он имеет право требовать, чтобы записи быть опечатаны. Следствием этого требования является то, что судья, который не несет ответственности за назначение наказания, будет опредять, может ли данная информация быть предметом конфискации и использована в качестве доказательства по уголовному делу.

Ключевые слова: поиск информации, изъятие информации, принудительные меры, защита частной жизни, уголовное преследование, конфискация, печать, уголовный процесс, обязанность сохранять конфиденциальность.

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The seizure of recordings and the requirement that they be kept under seal in Swiss law

Abstract. This article discusses the search and seizure of recordings for the purposes of confiscating objects or assets with a view to securing them in order that they can be used in evidence or for the purposes of enforcing the judgment. Seizure is a coercive measure which allows for the revocation of a person's power of disposition over an object and for the object to be placed under state control until a definitive decision has been reached in criminal proceedings. If audio, video or text recordings contained on data storage media are believed to contain information of relevance to the criminal offence, the criminal justice authorities can order that these be searched. If the owner of the recordings considers that this information should not be used in the criminal investigation, either because they are not in any way related to the investigation or because the person has the right to refuse to give evidence, he is entitled to demand that the recordings be placed under seal. The consequence of this request is that a judge who is not responsible for determining the criminal charge will determine whether or not the information in question can be subject to seizure and used as evidence in the criminal proceedings.

Keywords: Search of recordings, seizure of recordings, coercive measure, protection of privacy, criminal investigation, confiscation, seal, criminal proceedings, duty of confidentiality.

1. The nature of search and seizure of recordings

1. Seizure[1]

Seizure involves the compulsory withdrawal of objects or assets from their owner with a view to ensuring[2] that they can be used in evidence or for the purposes of enforcing the judgment[3].

Seizure inevitably constitutes an interference with constitutional rights. The right to the protection of privacy as set out in Article 13 of the Federal Constitution[4]

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[1] Bommer Felix/Goldschmid Peter, in: Basler Kommentar zur Schweizerischen Strafprozessordnung, Jugendstrafprozessordnung, hrsg. von NIGGLI MARCEL ALEXANDER/HEER MARIANNE/WIPRÄCHTIGER HANS, 2. Auflage, Basel 2014, Art. 263 - 268 N 1.

[2] OBERHOLZER NIKLAUS, GRUNDZÜGE DES STRAFPROZESSRECHTS, 3. AUFLAGE, BERN 2012, N 1122.

[3] OBERHOLZER (FN. 3), N 1122.

[4] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18.04.1999, SR 101.

as well as the right to property as guaranteed by Article 26 of the Federal Constitution are of particular relevance in this regard. Any infringement of these rights must have a statutory basis and must be deemed to serve a legitimate public interest. Further, it is essential that the principle of proportionality is respected (Article 36 of the Federal Constitution). The relevant statutory basis is set out in Articles 196 ff., 241 ff. and 263 ff. of the Federal Code of Criminal Procedure[5].

Seizure is a coercive measure in the sense of Article 196 lit. a und b StPO, which means that the requirements governing such measures have to be met. According to Article 263 StPO, evidence, objects and assets which are to be returned to the aggrieved party or which are to be confiscated in accordance with Articles 69 – 72 StGB[6] are subject to seizure as are assets which are to be secured for the purposes of covering procedural costs, monetary penalties, fines or damages[7].

2. Searching of recordings

The searching of recordings is also considered to constitute a coercive measure, by which – as is also the case in the context of seizures – constitutional rights are affected, especially the right to the protection of privacy. In view of this it is essential that the requirements of Article 36 of the Federal Constitution are respected. The statutory basis for the searching of recordings is set out in Article 246 ff. StPO.

In practice search and seizure is of particular relevance in the context of evidence, although it is also of relevance in other situations, such as the seizure of securities for the purposes of confiscation or covering the costs of the proceedings.

Recordings which might be of interest in a criminal investigation and which could therefore be subject to seizure can be stored on a variety of storage media. They may be available in written form, or may be in the form of pictures, videos or sound files. As it may not be easy for the criminal investigating authorities to determine at first glance which information is contained in a folder, on a storage

[5] Schweizerische Strafprozessordung (Strafprozessordnung, StPO) vom 05.10.2007, SR 312.0.
[6] Schweizerisches Strafgesetzbuch vom 21.12.1937, SR 311.0.
[7] PIETH MARK, Schweizerisches Strafprozessrecht, 2. Auflage, Basel 2012, 123.

disk, CD or hard drive, it is important that it is possible for them to search these storage media for information relevant to the investigation. In order to prevent the disclosure of information which is not related to the investigation or information which the owner of the information is not required to disclose during questioning (as a result of a right to refuse to give evidence), the owner is afforded the opportunity to comment on the content of the recordings. If the investigating authorities subsequently decide to seize the recordings, the owner is entitled to demand that they be placed under seal[8]. Subsequently the investigating authorities are temporarily prohibited from taking note of the respective information. Instead, on the application of the party, it will fall to an independent judge to determine whether some or all of the information seized can be used in the criminal proceedings.

II. Formal requirements

As seizure and search of recordings are considered to constitute coercive measures, it is essential, before they can be undertaken, that a criminal investigation (Article 309 para. 1 lit. b StPO) or autonomous forfeiture proceedings have been initiated[9].

According to Article 263 para. 2 StPO the order that a seizure is to be made must be undertaken in writing and accompanied by reasons (seizure order). In urgent cases an order for a seizure can be made orally. It must subsequently be confirmed in writing[10]. The person affected by the seizure must be provided with a copy of the summarily substantiated seizure order (Article 199 StPO). The seizure order will also contain further information regarding the case and the evidence on which the case is deemed to rest. Additionally it must also refer to the connection between the alleged crime and the seized object. Furthermore, the aim of the seizure and the applicable legislation must be clearly stated.

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[8] BGE 138 IV 227 f.

[9] HEIMGARTNER STEFAN, in: Kommentar zur Schweizerischen Strafprozessordnung (StPO), hrsg. von DONATSCH ANDREAS/HANSJAKOB THOMAS/LIEBER VIKTOR, 2. Auflage, Zürich 2014, Art. 263 N 22.

[10] OGer ZH vom 25.05.2012, UH120060, E. 2.2; SCHMID NIKLAUS, Handbuch des schweizerischen Strafprozessrechts, 2. Auflage, Zürich/St. Gallen 2013, N 1117 f.

The order that recordings be searched must also be made in writing as required by Article 241 StPO. The search warrant must state which recordings are to be searched and the aim of the search. Finally the authorities and/or persons responsible for carrying out the order must be named.

The owner must be provided with the opportunity to comment on the content of the recordings before the recordings which are subject to seizure are searched (Article 247 para. 1 StPO) [11]. This means that the owner must be informed of the subject of the search.

III. Jurisdiction

According to Art. 198 para. 1 lit. a and b StPO, the prosecution and the courts are authorised to order that coercive measures – i.e. those involving search and seizure - be imposed. In urgent cases, the person in charge of the proceedings is responsible for ordering the imposition of the measures.

Jurisdiction is established if the prosecution or at least the confiscation falls within the competence of the prosecutor or court. If jurisdiction is established, a seizure order can be imposed within the whole of Switzerland and without restrictions on the basis of Article 52 para. 1 StPO for the purposes of international mutual legal assistance[12].

IV. Prohibition on seizure

Art. 264 StPO refers to a number of objects and document which are not to be subjected to seizure. In particular, these include personal records, correspondence between the accused person and defence counsel, and information in respect of which the accused has a right to refuse to give evidence. Express reference is made in this regard to the provisions regulating the sealing of evidence (Art. 264 Abs. 3 StPO).

Article 264 StPO underscores the fact that confidential information is to be treated as more important than the interests in uncovering the substantive truth in

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[11] BGE 140 IV 30 f.

[12] HUG MARKUS/SCHEIDEGGER ALEXANDRA, in: Kommentar zur schweizerischen Strafprozessordnung (StPO), hrsg. von DONATSCH ANDREAS/HANSJAKOB THOMAS/LIEBER VIKTOR, 2. Auflage, Zürich 2014, Art. 198 N 2 ff.

the context of criminal proceedings. The scope and limitations of the protection of confidential information cannot be discussed in detail here. For our purposes it is sufficient to focus briefly on two particular matters, namely the correspondence between the accused and defence counsel and the right of the accused to refuse to give evidence.

The protected status of correspondence between the accused and defence counsel is guaranteed by Article 6 ECHR[13]. This guarantee is expressly set out in in Art. 264 Abs. 1 lit. a of the Swiss Code of Criminal Procedure. According to this provision, all documents concerning communications between the accused and his defence counsel are expressly excluded from the scope of the law on seizure[14]. The protection extends not only to written communications but also to all documents and electronic communications in the form of E-mail, including any attachments. The defence counsel's case files are also protected, as are any recordings of the accused which were prepared to pass on to defence counsel with a view to developing the defence strategy[15].

Documents and objects belonging to those who are entitled to refuse to give evidence are also exempt from the provisions on seizure. This includes recordings and correspondence which stem from conversations between the accused person and those persons who are entitled to refrain from giving evidence in accordance with Articles 170-173 StPO, providing that they themselves are not accused of a crime in the same context (Article 264 para. 1 lit. c StPO)[16]. This concerns principally an exemption from the provisions on seizure in the context of contact between the accused persons and other persons who are bound by a duty of professional confidentiality. The exemption from seizure complements the right to refuse to give evidence. This ensures that these rights cannot be circumvented by

[13] Konvention zum Schutze der Menschenrechte und Grundfreiheiten, abgeschlossen in Rom am 04.11.1950, in Kraft getreten für die Schweiz am 28.11.1974, SR 0.101.

[14] SCHMID (Fn. 12), N 1120.

[15] BGE 138 IV 227 f.; SCHMID NIKLAUS, Praxiskommentar, 2. Auflage, Zürich/St. Gallen 2013, Art. 264 N 4.

[16] BGE 138 IV 228 f.; BOMMER/GOLDSCHMID (Fn. 4), Art. 264 N 33 ff.

using the provisions on seizure to access the desired information[17]. Evidence, which was only passed on to the person with the right to refuse to give evidence with a view to preventing the information from being accessed by the prosecuting authorities is not protected in this regard[18].

If the criminal prosecution authorities prepare to seize such recordings because they do not have knowledge of the secrets contained within them, the owner can request that they be kept under seal (Art. 264 para. 3 StPO)[19].

The protection of this information is not only provided, while the information is under the direct control of the person with the duty of confidentiality, it also effective when the information is out of his control[20]. The protection covers documents which were created or communicated before, as well as after those created after, the initiation of a criminal investigation.

V. Right to refuse to give evidence

With regard to persons with information in the sense of Article 178 lit. b – g StPO, the right to refuse to give evidence is unproblematic, as such persons cannot be obliged to make statements[21]. An exception to this applies in the case of those persons who participate in a trial in their capacity as a private claimant (Art. 178 lit. a StPO)[22].

As a general rule, witnesses are required to give evidence and to tell the truth (Article 163 para. 2 StPO). A conflict of interests may arise, however, between a witness's personal interests and his obligation to give evidence. In order to solve this problem, a witness is entitled in certain situations to refuse to give evidence. A right to refuse to give evidence is recognised in three distinct situations. First, a witness can refuse to give evidence, if this is necessary for the purposes of the protection his family or close personal relationships. This is justified by the need to ensure harmony within the family (Article 168 StPO). Second, a person may the

[17] HEIMGARTNER (Fn. 11), Art. 264 N 7.
[18] SCHMID (Fn. 17), Art. 264 N 10.
[19] BGE 140 IV 37.
[20] BGE 140 IV 31, 34 ff.
[21] SCHMID (Fn. 12), N 922.
[22] Botschaft zur Vereinheitlichung des Strafprozessrechts vom 21.12.2005, BBl 2006, 1211.

refuse to give evidence if in doing so he would either incriminate himself or persons close to him (Article 169 StPO)[23]. Third, those bound by a duty of confidentiality are entitled to refuse to give evidence[24]. According to Article 170 StPO, public officials and authorities may refuse to give evidence in relation to confidential matters communicated to them in their official capacity or which have come to their knowledge in the exercise of their office. Article 171 StPO protects the professional duty of confidentiality, the infringement of which is prohibited in Article 320 StGB, and entitles the person concerned to refuse to give evidence. An obligation to give evidence exists only in those cases in which the person with the duty of confidentiality is subject to a disclosure obligation or has been released from his duty of confidentiality by the person to whom the information pertains or on the basis of written authorisation of a superior or supervisory authority (Article 321 Ziff. 2 StGB). The same rules apply in the context of the protection of journalists sources (Article 172 StPO). Those subject to a duty of confidentiality on the basis of one of the grounds set out in Article 173 para. 1 StPO are only required to give evidence if the interests in investigating the truth are deemed to outweigh the interest in maintaining the duty of confidentiality. Those subject to a duty of confidentiality which is otherwise regulated in law are obliged to give evidence, unless they have been relieved of this obligation by the person in charge of the proceedings. Such a person may request that the person in charge of the proceedings do so on the basis that the interest in protecting the duty of confidentiality outweighs that in establishing the truth in the criminal case[25].

VI. Seal

Those persons who are entitled to refuse to give evidence and other persons who can demonstrate a compelling interest are entitled to request that records and items be placed under seal as a means to oppose a seizure order[26]. The principal aim

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[23] VEST HANS/HORBER SALOME, in: Basler Kommentar zur Schweizerischen Strafprozessordnung, Jugendstrafprozessordnung, hrsg. von NIGGLI MARCEL ALEXANDER/HEER MARIANNE/WIPRÄCHTIGER HANS, 2. Auflage, Basel 2014, Art. 168 - 176 N 1.

[24] SCHMID (Fn. 17), Art. 168 N 1.

[25] PIETH (Fn. 9), 158.

[26] SCHMID (Fn. 17), Art. 248 N 1.

is to enable a person to keep confidential information secret[27]. It provides the holder of the secret with temporary legal protection and has the effect of preventing the investigating authorities from becoming aware of the content of the sealed recordings or objects, thereby guaranteeing confidentiality[28]. In special proceedings, which run parallel to the criminal investigation, an independent judge decides whether, and potentially in relation to which information, a justified interest in confidentiality exists. Such information will not be made accessible to the investigating authority. The advantage of this regulation is that the investigating authorities are never made aware of the secrets in question. This means that they do not have to be subsequently removed from the files. Additionally, the decision is made by an authority which is not involved in the criminal proceedings at issue.

In other words, the requirement that documents or objects be kept under seal serves to enforce, by way an independent authority, the prohibition on seizure in the sense of Article 264 StPO.

The procedure regulating the sealing of evidence is formally initiated by way of an application to the prosecution or the court[29]. Persons who are asked to provide documents voluntarily are also entitled to request that they be held under seal[30].

The prohibition on seizure as set out in Art. 264 StPO is more restrictive than the scope of application of the seal, as all rights to refuse to give evidence can be relied upon to justify the sealing of the evidence[31].

If the authority is determined to ascertain the contents of the evidence under seal, it is obliged to file a request that the seal be removed. The evidence will remain under seal while the court reaches a decision on the matter[32]. Within the context of such proceedings regarding the lifting of the seal, the requirement that

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[27] SCHMID (Fn. 17), Art. 248 N 6.

[28] RASCH HANSJÖRG, Die Beschlagnahme von Beweismitteln insbesondere bei zeugnisverweigerungsberechtigten Personen und die Siegelung, Zürich 1977/1978, 11.

[29] Botschaft, 1239.

[30] BGE 140 IV 32; LENTJES MEILI CHRISTIANE, Zur Stellung der Banken in der Zürcher Strafuntersuchung: Insbesondere bei Bankabfragen und Beschlagnahmungen, Diss. Zürich. 1996, 207 f.

[31] THORMANN OLIVER/BRECHBÜHL BEAT, in: Basler Kommentar zur Schweizerischen Strafprozessordnung, Jugendstrafprozessordnung, hrsg. von NIGGLI MARCEL ALEXANDER/HEER MARIANNE/WIPRÄCHTIGER HANS, 2. Auflage, Basel 2014, Art. 248 N 4.

[32] SCHMID (Fn. 12), N 1076; DERS. (Fn. 17), Art. 248 N 2.

sufficient suspicion exists that a crime has been committed and that the measure is proportionate will also be considered. This means that the procedure for the lifting of the seal takes precedence over a complaint in the sense of Article 393 StPO[33].

The prosecutor must file his request, which must be accompanied by reasons, that the seal be lifted with the relevant authority (Art. 248 Abs. 3 StPO). In view of the fact that the prosecutor does not have detailed knowledge of the content of the sealed documents, it is sufficient that the request states that the contents could in fact be used in evidence and that there are no secrets which require to be protected[34].

VII. The role of the judge responsible for lifting the seal

It is self-evident that the judge responsible for determining whether or not to lift the seal has to decide whether the sealed recording is of relevance in the context of the criminal investigation and whether, taking into account any rights to refuse to give evidence or other reasons, it should be lifted. Seen from another perspective, the judge essentially decides whether the information can be used in the criminal investigation.

The question whether the judge is entitled to refuse to lift the seal for reasons other than those set out above is not mentioned in the Code of Criminal Procedure. It is possible, for instance, that the judge might refuse to release recordings which were obtained unlawfully and which cannot be used (Article 140 f. StPO). This would generally be in accordance with the law, as the judge is not only responsible for deciding whether a right to refuse to give evidence applies, but also whether «other reasons» exist (Article 264 para. 3 i.V.m. Article 248 para. 1 StPO). Generally, however, such matters concerning the admissibility of evidence fall within the competence of judge responsible for determining the charge[35].

VIII. Right of appeal

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[33] BGer vom 22.08.12, 1B_310/2012; BGer vom 07.05.2012, 1B_221/2012, E. 3.2; BGer vom 26.03.12, 1B_117/2012, E. 3.2.

[34] SCHMID (Fn. 17), Art. 248 N 7.

[35] BGE 138 IV 41 ff.

The decision of the prosecutor to seize recordings is subject to appeal in accordance with Article 393 para. 1 lit. a i.V.m. Article 20 para. 1 lit. b StPO[36]. The judgment of the appeal instance can in turn be contested by way of an appeal to the Federal Court[37]. As a seizure order is only of an interim nature (Art. 93 Abs. 1 BGG[38]), this decision can only be appealed once a judgment has been made. This does not apply however if there is a danger that serious and irreparable damage might occur[39], which will often be the case in the context of decisions to lift the seal[40].

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[36] SCHMID (Fn. 12), N 1118.

[37] Although the federal court has decided, that the direct voidability at the federal court of decisions to lift the seal is not appropriate. BGer vom 02.02.2012, 1B_492/2011, E. 1.2; BGer vom 02.02.2012, 1B_562/2011, E. 1.3; BGer vom 21.03.2012, 1B_595/2011, E. 2.3; BGer vom 10.10.2012, 1B_397/2012, E. 1.2.

[38] Bundesgesetz über das Bundesgericht vom 17.06.2005, SR 173.110.

[39] BGer vom 07.05.2012, 1B_221/2012, E. 3.2; SCHMID (Fn. 17), Art. 248 N 12.

[40] BGer vom 21.03.2012, 1B_595/2011, E. 1.