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Federal Supreme Court rules that competent authority is entitled to order retroactive disclosure of access information beyond six months

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Telecommunication Newsletter Switzerland

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Facts

The prosecutor for Brugg-Zürzach opened an investigation against unknown persons in connection with suspected child pornography. On August 13, 2012, the prosecutor in charge requested the retroactive disclosure of access information for an internet access for the period from June 2 to July 20, 2011. This request was denied by the court. The prosecutor filed an appeal with the Federal Supreme Court.

The court of first instance denied the request, despite its finding that all the (substantive) requirements for such disclosure and access to information were met, simply on the basis that article 273 para 3 Criminal Procedural Act stipulates that such information may be requested retroactively only for a period of six months. The court of first instance argued that such result does not appear to be in the public interest but found that it is not within the power vested in the court to deviate from the wording of the law.

Reasoning

In case of a strong suspicion that a crime has been committed, and provided the requirements of Art. 296 para 1 lit. b and c Criminal Procedural Act are fulfilled, the prosecutor may request information with whom (or with which IP-Addresses) the person under surveillance communicates and has had communications in the period six months prior to the order. Art. 14 para 4 Lawful Interception Act requires a provider of internet services to disclose to the authority all information which may lead to the identification of the person suspected of a criminal act.

The Federal Supreme Court found that all requirements for the retroactive delivery of pertinent information to be met. The Federal Supreme Court then proceeded with the analysis, whether such information could be provided beyond the six month period set out in the Criminal Procedural Act. The Court found that when enacting the law, there was a general consensus that information cannot be requested retroactively for an unlimited period of time and that the Lawful Interception Act required providers of telecommunication services to store ancillary communication data for a period of six months.

The law, however did not specifically address the situation where a provider stores ancillary communication data for a longer period nor was such situation addressed in the report of the Federal Council to the Criminal Procedural Act.

The legal nature of the six months period in Art. 273 para 3 Criminal Procedural Act is subject to dispute. Some authors are of the opinion that the six months period must be strictly observed, whereas others concluded that the six month period must not be strictly observed. The Federal Supreme Court however concluded that this question can remain open. Since in the case at hand a crime committed via the internet is concerned, the provision of Art. 14 para 4 Lawful Interception Act is applicable and which as *lex specialis* takes precedence over Art. 273 para 3 Criminal Procedural Act. Art. 14 para 4 Lawful Interception Act does not contain any time limitation regarding historical information. Hence the court upheld the appeal.



Comment

According to the ruling historic ancillary communication data must be made accessible to the prosecutor for the investigation of crimes. Since however a telecommunication and internet service provider (as defined in the Lawful Interception Act) must only store historical data for a period of six months, this decision does not impose an undue burden on telecommunication and internet service providers. To the extent a telecommunication or internet service provider stores historic data for a period of more than six months they can be required to deliver such data irrespective of the six month period set out in the Criminal Procedural Act.

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