

Change of practice: The Administrative Court of the Canton of Zurich allows the exchange of supporting documents at the Registry of Commerce

In its published decision of 16 December 2021, the Administrative Court dealt with the issue of whether the Registry of Commerce must exchange a supporting document that was erroneously not redacted.

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Facts

The complainant is a foundation registered in the Commercial Register of the Canton of Zurich. In order to have various changes in the Board of the Foundation entered in the Commercial Register, the foundation submitted erroneously complete minutes of the Board of Foundation meeting to the Commercial Register. The Registry of Commerce of the Canton of Zurich subsequently entered the changes in the Commercial Register and published the complete minutes of the Foundation Board meeting as a supporting document. Among other things, these minutes contained confidential information about third parties. The Foundation subsequently approached the Registry of Commerce and requested that the minutes be replaced by a partially redacted version of the same document.

The Registry of Commerce rejected the request. The Foundation appealed against this decision to

the Administrative Court of the Canton of Zurich.

Considerations of the Administrative Court

The purpose of the Commercial Register is to record and disclose legally relevant facts about legal entities and serves legal certainty and the protection of third parties (§ 3.3).

The Federal Act on Data Protection does not apply to the Commercial Register. The reason for the exception from the scope of application is that specific information processing and data protection provisions exist for these registers, which are not intended to be modified by data protection legislation (§ 4.1).

However, this cannot mean that the interests in protecting data are of no importance in the area of the Commercial Register. The so-called right to informational self-determination is derived from Art. 13 para. 2 of the Federal Constitution (§ 4.1).

The decisions of the meeting of the Board of the Foundation included personal data of organisations as well as information about the Foundation itself, namely about its decisions and the underlying reasons for these. The Foundation can invoke the fundamental right of informational self-determination with regard to these personal data. Moreover, its rights are affected with a certain intensity, since in the present case it is not only a matter of an insignificant processing of personal data, but highly confidential data on third parties were published. After affirming the restriction on fundamental rights, the Administrative Court examined whether this restriction could be justified under Article 36 of the Federal Constitution (§ 5 ff.):

- Legal basis: There is no legal basis for denying the right to (subsequent) redaction or otherwise deletion of personal data in the supporting documents, which can be derived directly from Art. 13 of the Federal Constitution.
- Public interest: There is no public interest in having access to contents which are not relevant for the Commercial Register.
- Proportionality: The interference with fundamental rights is only necessary in relation to legally relevant facts. In accordance with the principle of proportionality, the Registry of Commerce may only obtain and process data that it actually needs objectively.

Based on this consideration of fundamental rights, the Administrative Court concluded that personal data which is not legally relevant and which was published, for example, due to a misunderstanding, can also be subsequently made unidentifiable (§ 5.4).

The Administrative Court also dealt with the question of whether the protection of fundamental rights is waived by submitting the documents by means of consent (cf. Art. 4 para. 5 FADP). It stated that with the submission of the documents, it was to be assumed that there was implied consent to their publication. In the specific case, however, such consent was denied, as the Registry of Commerce could not assume on the basis of the specific circumstances that the Foundation agreed to the publication of the personal data. (§ 6.4).

The Administrative Court concluded that for the decision as to whether data must be made unidentifiable, the personal data in question, the interests of the public in the reliability of the Commercial Register and the group of persons authorised to access the Register must be taken into account (§ 6.5).



Decision

The Administrative Court weighed the private interest in the subsequent redaction higher in the present case. The appeal was upheld in this case and the replacement of the document was ordered. The judgement is final.

The Foundation was represented by attorneys-at-law Prof. Dr. Jürg Simon and David Hitz.

If you have any further questions on this topic, please do not hesitate to contact us.

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