

## Unsealing procedure

# Restriction on the disclosure of sealed bank data to participants in the procedure

Par Katia Villard le 3 August 2023

In the course of unsealing proceedings, the disputed data may not be passed on to other parties and participants in the proceedings, even if disclosure is prohibited. This is what the Federal Supreme Court said in its decision 1B\_635/2022, 1B\_636/2022 of June 15, 2023.

The Geneva Public Prosecutor's Office was conducting criminal proceedings for various economic offences against former and current employees of a bank. In June 2022, it carried out a search of the bank's premises. All e-mails in the professional e-mail accounts of two of the defendants – B and C – as well as D, E, F, G and H (hereinafter referred to as "the others") were seized. In August, in the case of the two defendants, and in September 2022, in the case of the others, the bank provided the Public Prosecutor's Office with two encrypted USB sticks containing the e-mails from the above-mentioned persons' professional e-mail accounts, and requested that they be placed under seal.

The Public Prosecutor's Office then asked the Tribunal des mesures de contrainte (TMC) to lift the seal. In December 2022, the TMC sent a letter to the bank, giving it a deadline to indicate, for each document or group of documents, the nature of the secrecy covering them and how this would override the public interest in ascertaining the truth. The letter also mentioned that the other persons involved in the sorting of the items under seal had been questioned. The bank asked the TMC not to allow these people to obtain copies of the USB sticks ; only the possibility of consulting them on the TMC's premises was to be provided for. The TMC replied to the bank that the defendants and other interested parties only had access to their own mailboxes – the contents of which were in principle known to them – and that they had been forbidden, under threat of the penalties of art. 292 of the Criminal Code, to copy or retain the data handed over.

The bank considered these terms to be insufficient, and appealed to the Federal Court, which upheld the appeal.

In its decision, the Federal Court reminds us that, while the primary aim of the sealing procedure is to keep (potentially) secret material from the criminal authorities, it must not allow third parties to gain knowledge of confidential data.

In terms of admissibility, in view of the incidental nature of the decisions taken, the Federal Court will consider whether irreparable harm has been caused. In the case in point, the procedure chosen by the TMC means that the data allegedly covered by secrecy would fall

outside the TMC's sphere of control. The risk of such data being disclosed to third parties cannot be ruled out. As no subsequent decision could remedy such a disclosure, the Mon Repos judges accepted that the damage was irreparable.

On the merits, the issue concerns the right of access to the file within the meaning of art. 101 CCP, which may be restricted under the conditions of art. 108 CCP. In accordance with art. 108 al. 1 let. b CCP, it may be restricted when necessary to protect private interests in maintaining secrecy. However, art. 108 para. 2 CCP specifies that legal counsel for the parties – or other participants in the proceedings – may not be restricted, except on the grounds of their own conduct.

In this case, therefore, a distinction must be made between those assisted by a professional attorney and those who are not. In the case of the former, data may be passed on to lawyers, subject to certain obligations – on pain of a fine under art. 292 of the Criminal Code ( ! ) – such as consultation by the principal in the presence of the lawyer, or a ban on making copies. With regard to the latter, the Federal Court considers that the threat of art. 292 of the Swiss Penal Code – or of other norms sanctioning the violation of a duty of confidentiality, in particular banking secrecy, for those subject to it – is not sufficient to avoid any risk of disclosure (notably involuntary). In such cases, consultation must take place at the TMC headquarters.

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