[AT] OGH Ruling on Scope of Editorial Confidentiality

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In a ruling handed down on 16 December 2010, the Austrian Oberste Gerichtshof (Supreme Court - OGH) dealt in detail with the protection of editorial confidentiality and its importance in relation to the freedom of expression and of the press.

The case concerned a report by Österreichische Rundfunk (the Austrian public broadcaster - ORF) about three young members of the extreme right, who had been accompanied by a journalist. On the basis of the report, the Wiener Neustadt public prosecutor's office investigated the youngsters for reviving national socialism (Art. 3g of the Verbotsgesetz - Prohibition Act) and other punishable offences. The public prosecutor's office ordered the confiscation of all the related video and audio material. This order was refused in the first instance, but granted in the second by the Oberlandesgericht Wien (Vienna Appeal Court - OLG). The OGH decision concerns this second-instance ruling.

In its judgment, the OGH found that ORF's basic right to freedom of expression as a media owner, protected under Article 10 of the European Convention on Human Rights (ECHR), had been violated by the confiscation of the video and audio material. Freedom of expression covered not only "information" or "ideas" that were well received or viewed as harmless or indifferent, but also those that were harmful, shocking or disturbing. It was not only the content of the information, but also the form in which it was conveyed that was protected. Without such protection, sources could be deterred from helping the media to inform the public about matters of public interest (chilling effect). This could interfere with the media's important function as a public watchdog. Article 10(2) of the ECHR authorised only certain restrictions prescribed by law, insofar as they were necessary in a democratic society to protect certain interests (in this case, the prevention of disorder or crime).

Such a restriction was authorised in the provisions on confiscation of evidence contained in Article 110 of the Strafprozessordnung (Code of Criminal Procedure - StPO). However, this was limited by the "protection of editorial confidentiality" guaranteed in Article 31 of the Mediengesetz (Media Act). Under this provision, media owners, editors and employees of a media company or service, who appear as witnesses in a criminal procedure or another procedure before a court or administrative authority, may refuse to answer questions about the identity of the

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author, sender or source of articles and documents or any information obtained for their profession. This right may not be bypassed by requesting the person concerned to hand over papers, printed matter, image, sound or data carriers, illustrations or other representations of such content, or by confiscating them.

Since this provision did not make any reference to the need to weigh up these interests against those of "the prevention of disorder or crime", the OGH decided that the confiscation of such protected material would infringe the basic right to freedom of expression, even if the video or audio material could provide information about a crime (although the protection of editorial confidentiality does not apply to individuals who themselves are strongly suspected of committing a crime).

The OLG Wien, however, held that only confidential information was covered by the protection of editorial confidentiality. Video and audio recordings meant for public broadcast and behaviour that could be seen by the public were therefore not protected.

The OGH nevertheless explained that all information was included, even though the heading of Article 31 of the Media Act contained the word "Geheimnis" (confidentiality), which could lead to the protection being limited to information that was "actually confidential".

The only type of information that was not protected was that which had been obtained after being made accessible by someone not in connection with media activities. However, all the courts involved assumed that the young people had always acted in the knowledge that they were providing information for a television report, which was why the recordings were covered by the protection of editorial confidentiality.

Entscheidung des OGH vom 16. Dezember 2010 (13 Os 130/10g, 13 Os 136/10i)

http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20101216_OGH0002_0130OS00130_10G0000_000

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