BANKING
SWITZERLAND

Swiss banking secrecy revisited: revised disclosure framework for documents in criminal investigations

Urs Feller and Mohamed Hasnaoui of Prager Dreifuss analyse the current legal position and case law regarding the unsealing of bank clients' documents in Swiss criminal proceedings

This article provides an overview of the situation regarding criminal proceedings in Switzerland, in which banking secrecy has not been considered an obstacle to unsealing requests by public prosecutors for some time (**Federal Tribunal judgment 1B_249/2015, consideration 10**; **Federal Tribunal judgment 1B_85/2016, consideration 7.9**; in German). With the recent partial revision of the Swiss Criminal Procedure Code (CrimPC) effective since January 2024, further restrictions on the sealing rights of accused parties have been implemented, which also affects Swiss banks.

When documents and data carriers are seized during a search performed by the criminal prosecution authorities, holders are entitled to request sealing to protect certain enumerated legitimate confidentiality interests (**Article 248, CrimPC**). The courts dealing with compulsory measures in the past were sometimes overwhelmed by the triage of extensive electronic data secured by the prosecutors for which the accused had requested sealing. The assessment of the evidentiary relevance of documents proved to be very time consuming, especially in the case of white-collar crimes.

Since the search for potentially evidence-relevant records has to be halted from the time of the application for sealing until a legally binding decision to unseal is rendered, the sealing, in practice, frequently led to considerable procedural

delays. Before the law was revised, the average unsealing procedure took 328 days to complete through all court instances, and in financial crime proceedings it took as long as 397 days.

The 2024 Criminal Procedure Code revision: key changes within the (un)sealing procedure

Sealing procedures temporarily block law enforcement bodies from accessing potentially relevant items or records for as long as the accused's claim to confidentiality is unresolved.

To secure sealing of evidence, a party (the holder or a third party with protected confidentiality interests) must credibly assert a valid basis for sealing, such as a right to refuse testimony. Subsequently, the prosecutor has 20 days to file an unsealing request, which transfers authority on the matter to the independent compulsory measures court to decide on the protection of the documents. Concerns over delays in unsealing procedures prompted legislators to revise the CrimPC in its latest overhaul, adjusting sealing regulations accordingly.

The revised Article 248, paragraph 1, of the CrimPC states that the holder of records or items may demand sealing within three days from the date of the seizure. During this period, the criminal authority may "neither inspect nor use the records or items".

With the introduction of the three-day forfeiture period for filing a sealing application, the legislator has undoubtedly created legal certainty. The introduction of this statutory period has significantly reduced the period of up to seven days that had applied under old case law. This, however, entails the risk, particularly for those affected parties not benefiting from legal representation, of missing the short deadline and unwittingly forfeiting legal protection.

Under the new provision, the criminal authorities are therefore required to explicitly, understandably, and in a timely manner draw the attention of those affected to their right to demand sealing, the sealing period, and the possible consequences. A mere imprint of the legal provisions on the search warrant is not considered sufficient in this regard (**Federal Tribunal judgment 1B_91/2016, consideration 5.4**; **Federal Tribunal judgment 1B_85/2019, consideration 4.2**).

Information of the entitled party

According to the wording of Article 248, paragraph 1, of the CrimPC, the right to request sealing is granted only to the holder of the documents. Accordingly, Article 248, paragraph 2, of the CrimPC specifies that if the prosecuting authority finds that the custodian of the items is not the proprietor, it must notify the proprietor and set a three-day deadline to request sealing. This ensures that custodians and legally interested parties have an opportunity to assert their confidentiality interests within the revised procedural framework.

Under the old case law, the authorities already had a duty to inform other persons who had a "legally protected interest" in maintaining confidentiality and to give them the opportunity to request sealing. The amendment of Article 248, paragraph 1, of the CrimPC codifies this case law.

Reasons for sealing

The wording of the new version of Article 248, paragraph 1, of the revised Swiss Criminal Procedure Code has been amended with regard to the sealing reasons that may be invoked. Now, for the reasons for a legitimate sealing, there is a direct reference to **Article 264 of the CrimPC**, which deals with seizure restrictions such as correspondence with the lawyer of the accused and other privileged data, such as health records. This was intended to create consistency between the reasons for sealing and the prohibitions on seizure: records that may not be seized due to a prohibition on seizure under Article 264 of the CrimPC should also not be viewed or secured in advance by the public prosecution.

The old provision mentioned "other reasons" as reasons for sealing, in addition to the right to refuse to give evidence or testify. This has been eliminated with the new reference to Article 264, with the legislator attempting to restrict the available reasons for sealing, in order to expedite proceedings.

Key case analysis: interpretation and implications

First court rulings under the new law

In a recent decision (**judgment 7B_313/2024 of September 24 2024**), the highest Swiss court, the Federal Tribunal, had to rule on one of the first cases under the revised Article 248 of the CrimPC, in which a bank asserted banking confidentiality and its business secrets under the new law as reasons for sealing in the unsealing procedure. The case demonstrates that a bank rarely has a legally protected interest to prevent the unsealing of bank records relating to customers.

Federal Tribunal judgment 7B_313/2024

In the judgment of September 24 2024, the Office of the Attorney General of Switzerland (OAG) had conducted a criminal investigation against B and other accused persons on charges of qualified fraud and qualified money laundering. In April and October 2023, the OAG had requested banking records from bank A.

Bank A initially requested sealing, a request that was upheld in December 2023 by the Federal Criminal Court. However, the OAG petitioned before the cantonal compulsory measures court to unseal in January 2024, a request that was granted. Bank A appealed this decision to the Federal Tribunal in March 2024, seeking to prevent the unsealing or to request a review of the conditions for unsealing.

The complainant initially asserted its business secrets as an obstacle to unsealing, which it believed applied under the old and the revised law (consideration 2.1). The previous instance had considered that the business secrets invoked by the complainant did not constitute an obstacle to unsealing (consideration 2.2).

The Federal Tribunal referred to the grounds for protecting secrets as provided for in Article 264 of the CrimPC and expressly stated that business secrets or "business protection interests" and banking secrecy (**Article 47, Banking Act**) did not fall under this provision (consideration 2.4.1).

However, the Federal Tribunal (at least) pointed out that, at the request of the person concerned, it may be necessary to examine whether a restriction of the parties' right of access to the files, to safeguard private confidentiality interests, could prove necessary (**Article 108, paragraph 1, letter b, CrimPC**; **Article 102, paragraph 1, CrimPC**). However, the complaining bank, which was not an accused person, had not substantiated any secrets worthy of protection within the meaning of Article 264 of the CrimPC in the unsealing proceedings (consideration 2.4.3).

Finally, the complainant claimed that there was insufficient suspicion for the investigation. The Federal Tribunal pointed out that even under the old law, the unsealing procedure served to protect secrets with regard to a search of records and data carriers. In this context, the general conditions governing compulsory measures pursuant to **Article 197 of the CrimPC** – namely, the proportionality of the gathering of evidence or the existence of sufficient suspicion – could also be examined on an ancillary basis (**Federal Tribunal judgment 142 IV 207, consideration 7.1**).

On the other hand, the unsealing procedure did not serve the function of independently ensuring the general legality of compulsory measures under criminal procedure (such as their proportionality). If no evidence subject to the search has been collected or if the persons concerned did not invoke any legal grounds for protecting secrets as an obstacle to compulsory measures, the corresponding complaints are not to be examined by the judge seized with the unsealing request but are to be brought in standard appeal proceedings.

Implications for banks

The Federal Tribunal clearly stated that third parties such as banks or other companies from which documents have been seized or produced during criminal proceedings cannot invoke business secrets or bank client confidentiality in the unsealing procedure. The reasons listed in Article 264 of the CrimPC are exhaustive. In practice, this means that banks can only invoke their own attorney-client privilege to prevent the unsealing of their customers' documents. However, banks can inform affected customers so that they can file appropriate motions directly with the criminal court to ensure the protection of their private confidentiality interests.

The Federal Tribunal at least stated that the disclosure of information covered by the attorney-client privilege to third-party authorities such as the Swiss Financial Market Supervisory Authority (FINMA) could not be understood as a waiver of the interest in maintaining attorney-client privilege in general (**Federal Tribunal judgment 7B_158/2023, consideration 5.2**).

If the court conducting the unsealing proceedings first recognises that the customers are also independently entitled in addition to the bank (as the holder), the court must inform the customers about the bank's request for sealing (Article 248a, paragraph 2, CrimPC) and include them in the proceedings as entitled persons. According to Article 248, paragraph 2, of the CrimPC, this duty also applies to the public prosecutor.

Final thoughts on the revision of the Swiss Criminal Procedure Code

The 2024 CrimPC revision was intended to streamline the unsealing process, addressing significant delays encountered in the past that complicated criminal investigations, particularly in complex financial crime cases. By codifying previous case law and reducing filing timelines, the revised CrimPC enhances procedural clarity. Overall, these updates underscore Switzerland's continuing commitment to more transparency and efficiency in criminal proceedings, balancing the demands of enforcement with enhanced procedural precision.

Nevertheless, bank clients may still rely on the principle of proportionality and anyone affected by seizure measures can invoke sealing and assert confidentiality interests. In its case law, the Federal Tribunal states that records and objects that are not relevant to the investigation must be restricted in terms of time and subject matter when unsealed (**Federal Tribunal judgment 7B_94/2022, consideration 3.1**). In doing so, the seriousness of the investigated offence must be weighed against the encroachment on the protected legal interest (ibid).

In Federal Tribunal judgment 7B_94/2022, the Federal Tribunal upheld the appeal of the complainant, who wanted to protect correspondence with his defence counsel and various emails exchanged with a social worker regarding his children and custody matters during the unsealing procedure. The previous instance was of the opinion that the indication of the contact details of the defence counsel and the social worker (such as telephone number and name) were insufficient to substantiate the legitimate sealing interest (consideration 4.1.1). Referring to the inquisitorial principle applicable in criminal proceedings, the Federal Tribunal, upon appeal, rejected this argument and upheld the complainant's requests for confidentiality and for the separation of correspondence with his lawyer and the social worker. Providing the email addresses of these two parties was sufficient to run detailed searches in the records and eliminate them from their scope.

It is therefore essential to at least specify and explain confidentiality interests to such an extent that a corresponding triage of the documents is possible . If such a specification is omitted or if the reference to the attorney-client privilege in the sealing request is too abstract and does not plausibly explain why the privilege could be affected, there is a risk that the request will be rejected as manifestly unfounded (Federal Tribunal judgment 7B_158/2023).

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