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### **Patient files in Büren without Data Protection - HmbBfDI lodges complaint to the Higher Administrative Court**

Since 2010, thousands of patient files have been stored unsecured in the property of the hospital in Büren, which has been vacant for years. The hospital management company originally responsible for the files, a subsidiary of Marseille Kliniken, had filed for insolvency in 2010 and then closed its business in the same year. The insolvency administrator returned the property to the original owner, a subsidiary of Marseille Kliniken with its registered office in Hamburg, when the insolvency proceedings ended. The hospital premises have since been temporarily looked after by a caretaker. The patient files in the vacant building were not secured.

This case was reported in detail on YouTube in May 2020. This caused a broad media impact. The public reporting led to complaints by data subjects about the easily accessible storage of their patient files to the Authority for Data Protection and Freedom of Information in North Rhine-Westphalia. In addition, the property was subsequently entered several times by unauthorized persons who had illegally gained access to the building out of curiosity or with the intent to steal things from there.

Since the property company has its registered office in Hamburg as well as the parent company its headquarters, the complaints were submitted to the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI). In coordination with the city of Büren as the competent regulatory authority on site, the HmbBfDI initiated further security measures. Nevertheless, there were renewed attempts by unauthorised persons to gain access to the file rooms. This necessitated the commissioning of a 24-hour security service on site.

In a decision dated from 23.6.2020, the HmbBfDI ordered the property company of the premises, a sister company of the original hospital operating company, to store the patient files in a manner compatible with data protection and, in order to safeguard the rights and freedom of data subjects, to have them taken into care by a holder of medical confidentiality. In view of the acute threat posed by recurrent burglary attempts, the HmbBfDI enacted the immediate enforcement of the administrative order.

The Hamburg Administrative Court (VG Hamburg) now cancelled the immediate enforcement of the administrative order and confirmed the application for restoration of the suspensive effect in the interim legal protection proceedings. The Court argued that the storage of the patient files in question was "from no legal point of view a processing operation (attributable to the applicant)" within the meaning of the General Data Protection Regulation (GDPR). Rather, the presence of the files in the applicant's building complex would just be a passive status. What would be required of the concept of processing would be a relevant change of state, which in the present case was not met by the pure storage of files. The GDPR would not establish an abstract obligation to guarantee data protection in these cases.

The decision must be questioned from a data protection perspective. The restrictive interpretation of the concept of processing is likely to leave significant gaps for the protection of fundamental rights of

data subjects. In the event of legal succession of a data processor, pure inactivity would then be sufficient to undermine the data protection regulations: According to these provisions, data subjects have neither the possibility of obtaining information about their data, nor of objecting to the processing of data, nor of demanding them to be erased. They do not have the right to complain to an independent body, nor can they demand compliance with the necessary technical and organisational security measures. The application of injunctive relief of the civil law against the unlawful handling of data is legally problematic and is unlikely to be enforceable anyway in the absence of accountability. An interpretation in conformity with fundamental rights, which the Administrative Court apparently does not consider in this case, can help here: In this respect, it has to be examined whether storing data on one's own premises complies with the legal term of processing personal data, which is also indicated by the term "Storing" given as a legal definition by the GDPR for the term of processing. Moreover, there are considerable concerns that, as a result of company split-ups, the responsibility for data protection can be transferred to a legal entity which then after falling into insolvency does not effect any data protection obligations for the parent company or subsidiary.

Johannes Caspar, Hamburg Commissioner for Data Protection and Freedom of Information: "In recent weeks we have done everything possible to safeguard the health data of a large number of former patients on site. To this end, we have coordinated our efforts with the city of Büren, the Detmold district government, the Minister of Labour, Health and Social Affairs of the state of North Rhine-Westphalia and our colleagues from the LfDI NRW. The decision of the Court that in the present case there is no competent data protection supervisory authority comes as a surprise not only to us. This raises many questions concerning the further handling of patient files by the regulatory authorities on site and ultimately also weakens the enforcement of the rights of numerous affected persons. We have therefore lodged an appeal against the decision to the Hamburg Higher Administrative Court to ensure that data protection law applies to patient files at the Büren site. At the same time, it must be fundamentally clarified that effective data protection is guaranteed, especially for particularly sensitive data in such cases, which cannot be undermined by creating specific company structures."

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