

Facial recognition permitted without a concrete legal basis – judgment confirms biometric reference database

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Yesterday, the Administrative Court of Hamburg pronounced its judgment on the complaint by the Hamburg interior authority against an order by the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) to delete a biometric database used by the police in the course of the G20 investigations. The complaint of the interior authority was upheld.

The judgment of the VG Hamburg as well as the verbal reasons for the judgment raise a number of questions from the point of view of data protection. Apparently, the court limits the competence of the data protection officer to reviewing the data processing in a concrete form and to violations of individual data protection laws. This is problematic and contradictory in cases in which the data processing is carried out by the responsible body without a legal basis and there is therefore no legal framework for verification.

The vehicle screening, which was the subject of the Federal Constitutional Court and was seen there as an encroachment on fundamental rights, is recognized by the Hamburg Administrative Court as systemic data processing. However, it is assessed as not being comparable to the recording and biometric comparison of people during the G20 summit. Due to the proximity to the riots at the G20 summit at the time, the recordings of those affected are less serious than the processing of license plates. This is not convincing, especially since when scanning vehicle numbers, the data of non-participating road users is immediately deleted as non-match cases, while the biometric facial prints of non-participants remain stored in the database for an indefinite period of time.

The court apparently sees in the general clause of § 48 BDSG, which regulates the processing of special categories of data, including biometric data, in a blanket form, a sufficient basis for the mass creation of facial profiles for criminal prosecution - especially of uninvolved persons. In principle, this paves the way for collecting all conceivable data from the public sphere for criminal prosecution in the future and generating biometric profiles from it, without concrete legal requirements enabling independent control to safeguard the rights of those affected. It is to be feared that a corresponding practice will not only establish itself in Hamburg, where the responsible interior authority is already considering other fields of application, but also in the areas of responsibility of the federal government and other states in Germany. Despite the fundamental questions raised by the present case, and despite the willingness of the Hamburg interior authorities who are suing, the court declared that it

would not allow the appeal. Once the written reasons for the judgment are available, an application for admission of an appeal to the Hamburg Higher Administrative Court will have to be examined.

Johannes Caspar, Hamburg's representative for data protection and freedom of information: "The technical means available to law enforcement agencies in the digital world require constant adaptation to possible threats. In this respect, the code of criminal procedure, which essentially dates back to the 19th century, and a general clause in the BDSG are not sufficient. To this end, it is necessary to create new encroachments based on the fundamental rights of those affected, which enable clear and controllable specifications for the protection of those affected. Implementing modern search technologies such as the use of automatic facial recognition under the conditions of big data without a clear legal basis creates threats to the right to informational self-determination and privacy and does not do justice to a free and open society."

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