

Juristische Methodik – SW 4

Teil A:

II. Einführungsfall : Datenschutz

Sachverhalt:

Stellen Sie sich vor, Sie sind in der Rechtsabteilung einer Bank mit Sitz in der Stadt Zürich tätig. Sie erhalten seitens der IT-Abteilung eine Anfrage, wie die gesetzlichen Anforderungen zur Datensicherheit in der Bank konkret umzusetzen sind. Der IT-Abteilung ist nach der Lektüre von Art. 7 des Bundesgesetzes über den Datenschutz (DSG), welcher die Datensicherheit betrifft, nicht klar, was sie tun soll.

Art. 7 DSG Datensicherheit « 1 Personendaten müssen durch angemessene technische und organisatorische Massnahmen gegen unbefugtes Bearbeiten geschützt werden.

2 Der Bundesrat erlässt nähere Bestimmungen über die Mindestanforderungen an die Datensicherheit.»

Nach einer kurzen Recherche finden Sie heraus, dass der Bundesrat eine Verordnung zum Bundesgesetz über den Datenschutz (VDSG) erlassen hat. Diese fordert in Art. 20 ff. VDSG bestimmte technische und organisatorische Massnahmen zum Schutz der Datensicherheit. Zudem stellen Sie fest, dass es in Art. 13 Abs. 2 der Bundesverfassung (BV) zum Schutz der Privatsphäre heisst : «Jede Person hat Anspruch auf Schutz vor Missbrauch ihrer persönlichen Daten.» Aber damit nicht genug: Sie finden auch ein Gesetz über die Information und den Datenschutz (IDG), das der Zürcher Kantonsrat erlassen hat, mit einer zugehörigen Verordnung über die Information und den Datenschutz (IDV) des Zürcher Sie stossen schliesslich auch auf eine Datenschutzverordnung (DSV) des Gemeinderates der Stadt Zürich.

Diskussion: Gibt es eine Hierarchie zwischen den genannten Erlassen?

1. Richtiges Einspuren:

- a) Normenstufen: Verfassung, Gesetz (im formellen Sinn), Verordnung
- b) Staatsebene: Bund – Kantone -Gemeinden
- c) Kombination

2. Folge:

- a) höhere Staatsebene geht niederer Staatsebenen vor
- b) höherer Erlass geht niedererem Erlass vor

3. Begrifflichkeiten

- a) Erlasse = Gesetze im materiellen Sinn = generell-abstrakte staatliche Anordnung (= Verfassung, Gesetze im formellen Sinn, Verordnungen)
- b) Gesetz im formellen Sinn = Parlamentsgesetz = im ordentlichen Verfahren der Gesetzgebung unter der Mitwirkung des Parlaments (+Volk) erlassener Erlass (→ demokratische Funktion)
- c) «Konkordate», «Vereinbarungen», «Gemeindeordnung», «Reglemente»-Begriff nicht verwenden

4. Lösung

- a) doppelte Hierarchie (Norm- und Staatsebenen)
- b) BV- DSG (Gesetz im formellen Sinn) – VDSG – IDG (Gesetz im formellen Sinn) – IDV - DSV

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Table of Contents Juristische Methodik Juristische Methodik

1. Understanding the eBook Juristische Methodik Juristische Methodik
 - The Rise of Digital Reading Juristische Methodik Juristische Methodik
 - Advantages of eBooks Over Traditional Books
2. Identifying Juristische Methodik Juristische Methodik
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Juristische Methodik Juristische Methodik
 - User-Friendly Interface
4. Exploring eBook Recommendations from Juristische Methodik Juristische Methodik
 - Personalized Recommendations
 - Juristische Methodik Juristische Methodik User Reviews and Ratings
 - Juristische Methodik Juristische Methodik and Bestseller Lists

5. Accessing Juristische Methodik Juristische Methodik Free and Paid eBooks
 - Juristische Methodik Juristische Methodik Public Domain eBooks
 - Juristische Methodik Juristische Methodik eBook Subscription Services
 - Juristische Methodik Juristische Methodik Budget-Friendly Options
6. Navigating Juristische Methodik Juristische Methodik eBook Formats
 - ePub, PDF, MOBI, and More
 - Juristische Methodik Juristische Methodik Compatibility with Devices
 - Juristische Methodik Juristische Methodik Enhanced eBook Features
7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Juristische Methodik Juristische Methodik
 - Highlighting and Note-Taking Juristische Methodik Juristische Methodik
 - Interactive Elements Juristische Methodik Juristische Methodik
8. Staying Engaged with Juristische Methodik Juristische Methodik
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Juristische Methodik Juristische Methodik
9. Balancing eBooks and Physical Books Juristische Methodik Juristische Methodik
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Juristische Methodik Juristische Methodik
10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
11. Cultivating a Reading Routine Juristische Methodik Juristische Methodik
 - Setting Reading Goals Juristische Methodik Juristische Methodik
 - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of Juristische Methodik Juristische Methodik
 - Fact-Checking eBook Content of Juristische Methodik Juristische Methodik
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks

14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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