



On application in criminal proceedings of certain norms of the legislation governing the protection of state secrets

Unofficial translation

Normative Decree of the Supreme Court of the Republic of Kazakhstan dated December 13, 2013 № 3.

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In order to correctly and uniformly apply the legislation of the Republic of Kazakhstan on protection of state secrets, the plenary session of the Supreme Court of the Republic of Kazakhstan

hereby DECREES AS FOLLOWS:

1. To clarify that in accordance with Article 1 of the Law of the Republic of Kazakhstan dated March 15, 1999 No. 349-1 “On State Secrets” (hereinafter - the Law on State Secrets), state secrets shall be information protected by the state, constituting state and official secrets, the disclosure of which limited by the state in order to carry out effective military, economic, scientific-technical, foreign economic, foreign policy, intelligence, counterintelligence, operational-investigative and other activities, not conflicting with generally accepted norms of international law.

2. The amount of damage caused by the crimes provided by Articles 185, 186 and 458 of the Criminal Code of the Republic of Kazakhstan (hereinafter - the Criminal Code) shall be established in accordance with the decision of the Government of the Republic of Kazakhstan dated July 17, 2003 No. 701 “Rules for determining the amount of damage that may or may be caused to the national security of the Republic of Kazakhstan or to the interests of state authorities and organizations as a result of disclosure or loss of information constituting state secrets, as well as damage, inflict to the owner of information as a result of their secrecy” (hereinafter - the Rules).

Footnote. Paragraph 2 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

3. Determination of the amount of damage shall be carried out at the stage of pre-trial criminal proceedings by a permanent commission on the protection of state secrets (hereinafter - PC) of a state body or organization. If there is no PC in the organization, the amount of damage shall be determined by an expert commission created by Order of the head of the organization, where the information was lost or disclosed (hereinafter - the expert commission).

4. When determining the amount of damage in a criminal case, the PC or the expert committee should be guided by the provisions of Paragraph 8 of the Rules. If Paragraph 9 of the Rules shall be applied, the PC or the expert commission must necessarily take into account the indicators provided in paragraph 8 of the Rules, giving in its conclusion the reasons and grounds for considering these indicators.

5. The agency conducting the criminal process, in cases where the previous opinion of the expert commission is not sufficiently justified or its findings are in doubt, appoints a repeated expert study to determine the amount of damage, the production of which is assigned to the interdepartmental expert commission. The composition of the specified commission shall be made up of members of the PC or expert commission of state bodies of the Republic of Kazakhstan, empowered to manage information constituting state secrets.

6. The severe consequences provided by Articles 185, 186 and 458 of the Criminal Code should include the transfer of information into the possession of foreign special services, terrorist and extremist organizations or organized criminal groups, damage to the foreign policy interests or national security of the Republic of Kazakhstan, failure of the global scientific research program as a result of criminal actions, government events and international negotiations, the relocation of a sensitive facility, death, grievous bodily harm or the arrest of employees of the law-enforcement and special state agencies, rendering (rendered) confidential assistance to these bodies, as well as members of their families, etc.

Footnote. Paragraph 6 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

7. Criminal proceedings should be carried out in strict compliance with legislation governing the protection of state secrets. If the materials of the criminal case contain information constituting state secrets, the body conducting the criminal process must issue an appropriate resolution restricting access to them, notify the participants in the criminal process in writing and explain to them the procedure for admitting such information.

In order to exclude the possibility of unlawful acquaintance with information constituting state secrets by persons who do not have appropriate access, it is recommended that criminal case materials containing state secrets be attached to the case separately from unclassified materials (in separate volumes).

8. Criminal proceedings in all courts and in all court instances are open. The limitation of publicity of a trial is allowed on the basis of a court resolution in cases where this is contrary to the interests of protecting state secrets.

Part one of Article 29 of the Code of Criminal Procedure of the Republic of Kazakhstan (hereinafter - the CPC) also provides other grounds for conducting a closed trial. The list of the grounds indicated therein is exhaustive and not subject to broad interpretation.

In the absence in the criminal case of the grounds provided in part one of Article 29 of the Code of Criminal Procedure to limit the transparency of the trial, including those related to

the protection of state secrets, the mere fact that a person committed a grave or especially grave crime, such as banditry, terrorism, etc., is not a circumstance for a closed trial.

Footnote. Paragraph 8 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

9. In accordance with the requirements of part five of Article 47 of the Code of Criminal Procedure, evidence containing information constituting state secrets shall be examined in closed court session. Only participants in the process who have access to state secrets in the appropriate form participate in it.

The admission to state secrets before the court session is issued by the authorized agency for ensuring the activity of the court (court apparatus) - in relation to judges, jurors, court clerk and other court employees, prosecution authorities - in relation to the public prosecutor, justice bodies - in relation to lawyers and others participants in the criminal process. It shall not be allowed to restrict the issuance of access to state secrets to lawyers due to lack of reserve or for other reasons not provided by law.

If the defender is replaced in the trial and another attorney who does not have access to state secrets enters the case, the court postpones the trial for the attorney to obtain the corresponding admission. Moreover, in the court resolution, in accordance with part one of Article 341 of the Code of Criminal Procedure, a period is set for which the trial is postponed, as well as a period during which the judicial authorities are obliged to resolve the issue of obtaining access to state secrets with regard to the lawyer.

When examining in closed trial evidence, containing information constituting state secrets, the presiding judge shall take measures to prevent the disclosure of state secrets by bailiffs, escorts and other persons who participate in a court hearing.

Footnote. Paragraph 9 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the day of its first official publication).

10. In accordance with part three of Article 29 of the Code of Criminal Procedure, the verdict of the court and the decisions adopted in the case are in all cases pronounced publicly. In cases considered in closed court session, only the introductory and resolute parts of the sentence are publicly proclaimed.

Footnote. Paragraph 10 as amended by the normative resolution of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the day of its first official publication).

11. Information on the organization and tactics of conducting operational-investigative measures (hereinafter referred to as the "OIM") may constitute official or state secret in accordance with departmental acts containing a list of information subject to classification developed by state authorities in the manner determined by the Government of the Republic of Kazakhstan.

In this regard, materials obtained in the process of operational-investigative activities shall be used in the process of proving criminal cases, subject to their collection, verification and evaluation in accordance with the provisions of the Code of Criminal Procedure and the legislation of the Republic of Kazakhstan governing the protection of state secrets.

If it is necessary to use the results of operational-investigative activities in criminal proceedings, the agency conducting the criminal process shall order the declassification of information constituting state secrets, taking into account the requirements of Article 22 of the Law on State Secrets and Article 239 of the Code of Criminal Procedure.

Footnote. Paragraph 11 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

12. Criminal prosecution authorities attach to the criminal case materials of operational-investigative activities as evidence and (or) documents in accordance with Articles 118 and (or) 120 of the Code of Criminal Procedure and in compliance with the requirements of Articles 47 and 97 of the Code of Criminal Procedure.

The inclusion of material evidence and documents obtained as a result of operational-investigative activities in the list of criminal case materials shall be mandatory.

Failure to comply with the requirements of the criminal procedure law specified in this Paragraph in accordance with the requirements of Article 112 of the Code of Criminal Procedure entails the recognition of factual data obtained in the course of operational-investigative activity as inadmissible as evidence.

Footnote. Paragraph 12 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

13. When examining and evaluating evidence, including evidence obtained as a result of operational investigative activities, the court shall be entitled, subject to the provisions of part eight of Article 115 of the CPC, to interrogate as a witness an employee of the agency that carried out operational investigative activities. With the consent of a person who provides confidential assistance to agencies conducting operational investigative activities, this person may also be questioned as a witness in accordance with part eight of Article 115 of the CPC. Moreover, the interrogation of these persons as witnesses, if security measures were not applied to them on the basis of Article 97 of the Code of Criminal Procedure, shall be carried out by the court in accordance with the rules of parts one, two, three, four, five, six of Article 370 of the Code of Criminal Procedure.

Footnote. Paragraph 13 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

14. The interrogation of a witness in respect of whom procedural security measures have been applied on the basis of a relevant decision shall be carried out in compliance with the

rules provided in Article 98 and in part seven of Article 370 of the Code of Criminal Procedure. In this case, before the interrogation begins, the judge (court) must personally in the absence of other process participants, establish the identity of the witness, verify whether this person can act as a witness, and also verify the validity of the application of security measures to him. Then the court in a closed session has the right to interrogate such a witness in accordance with the rules established by the part two of Article 98 of the Code of Criminal Procedure, including using the witness's pseudonym or in conditions that exclude his recognition to others present in the courtroom or without visual observation by other participants of the judicial trial.

It should be taken into account that the security measures of witnesses and other persons involved in criminal proceedings, in accordance with part one of Article 96 of the Code of Criminal Procedure, shall be applied only if there is a real threat of violence or other acts prohibited by the criminal law against these persons.

In each case of applying security measures, the courts must check whether the requirements of Article 23 of the Law of the Republic of Kazakhstan dated July 5, 2000 No. 72-II "On State Protection of Persons Participating in the Criminal Procedure", including the obligations of the body conducting the criminal process, have been met, if there is reason to register in the Unified Register of Pre-trial Investigations in connection with the revealed threat of committing an act prohibited by the criminal law against a person participating in the criminal process.

Variable interrogation of a witness is not allowed under his real name or under a pseudonym. If a person was questioned as a witness before the security measure was applied to him, then the protocol of his interrogation should be removed from the criminal case file and stored separately from the main proceedings together with other information about the protected person. Subsequently, in this case, his interrogation should be carried out only as a witness under a pseudonym according to the rules established by Articles 97 and 98 of the Code of Criminal Procedure.

Footnote. Paragraph 14 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

15. In order to ensure the requirements of part one of Article 24 of the Code of Criminal Procedure, a judge at his request in accordance with Paragraph 4 of Article 5 of the Law of the Republic of Kazakhstan dated September 15, 1994 No. 154-XIII "On operational-investigative activity" (hereinafter - the Law on the OIA) must be additionally provided all available operational and official documents, with the exception of information about the organization of operational- investigative activities, specific operational-investigative measures, sources and methods of obtaining information.

At the same time, when examining the requested documents, the court shall be obliged to take the necessary measures aimed at preventing disclosure of the results of

operational-investigative activities that were not used in the criminal process, as well as other information not subject to declassification, including information about the organization of operational-investigative activities, about specific OIM, about sources and methods of obtaining information, etc.

Footnote. Paragraph 15 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

16. The circumstances characterizing the identity of the accused in criminal proceedings in accordance with Paragraph 5 of part one of Article 113 of the Code of Criminal Procedure shall be proved. Therefore, in cases where the criminal prosecution authorities, with reference to the availability of operational and official documents containing information constituting state secrets, information on the participation of the accused in unlawful acts or other data negatively characterizing his personality shall be attached to the criminal case materials, the court shall also be entitled to demand official documents and examine them. Operational information without confirmation by official documents should not be taken into account. It should be taken into account that the fact of a person's participation in an organized group or a criminal organization forms the corpus delict provided in the second part of Article 262 of the Criminal Code, and must be proved in criminal proceedings.

Footnote. Paragraph 16 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

17. In criminal cases, for which evidence was obtained as a result of a special operational-investigative measures (hereinafter referred to as SOIM), the inclusion in the case file of a decision to conduct this measures, authorized by the prosecutor, shall be mandatory. If the SOIM was carried out in accordance with Paragraph 6 of Article 12 of the Law on OIA without the sanction of the prosecutor, then the decision of the prosecutor on the legality of the SOIM shall be attached to the materials of the criminal case along with the decision to conduct the SOIM.

The absence in the materials of the criminal case of a decision to conduct SOIM sanctioned by the prosecutor or a decision of the prosecutor on the legality of SOIM shall be the basis for the recognition of evidence obtained by the results of SOIM as unacceptable as evidence.

18. After conducting an operational purchase or other OIM (special or general) to document a criminal offense that is not ongoing, but shall be carried out simultaneously with, for example, the sale of narcotic drugs, repeated OIM against the same person to identify a similar criminal offense shall be allowed only by issuing the appropriate decisions indicating the grounds for its implementation provided by law.

Footnote. Paragraph 18 as amended by the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated March 31, 2017 No. 3 (shall be enforced from the date of its first official publication).

19. According to paragraph 1 of Article 4 of the Constitution of the Republic of Kazakhstan, this regulatory decision shall be included in the current law, as well as generally binding and comes into force from the date of its official publication.

K. MAMI,

The Chairman of the Supreme Court

Republic of Kazakhstan

D. NURALIN,

Plenary Secretary

Judge of the Supreme Court

Republic of Kazakhstan