



On authorization of covert investigative actions

Unofficial translation

Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated December 11, 2020 No. 5

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For the purposes of uniform application of the norms of the law governing the authorization by the court of covert investigative actions, the plenary session of the Supreme Court of the Republic of Kazakhstan hereby resolves to give the following clarifications:

1. A covert investigative action - an action carried out in the course of pre-trial proceedings to clarify the circumstances to be proven in a criminal case without prior notification of the persons concerned.

Authorization of covert investigative actions shall be carried in accordance with the procedure and in cases stipulated by the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC).

The procedure of covert investigative actions shall be determined by the Rules approved by law enforcement and special state bodies in coordination with the General Prosecutor of the Republic of Kazakhstan (hereinafter referred to as the General Prosecutor).

2. Carrying out covert investigative actions shall be carried out in a criminal case pending before the pre-trial investigation body, subject to the conditions and the existence of grounds for their conduct in order to clarify the circumstances to be proved in the case with strict observance of the law and ensuring human and civil rights and freedoms provided for by the Constitution of the Republic of Kazakhstan (hereinafter referred to as the Constitution).

Covert investigative actions shall be carried out, as a rule, in cases where information about the circumstances of the case cannot be obtained through other investigative actions.

3. The courts are required to differ covert investigative actions, conducted within the framework of a criminal case from operative-search measures (hereinafter referred to as the OSM), carried out in accordance with the Law of the Republic of Kazakhstan dated September 15, 1994 No. 154-XIII "On operative-search activities" (hereinafter referred to as the Law on OSA).

Special operative-search measures (hereinafter referred to as the SOSM) similar to covert investigative actions, stipulated by subclauses 1), 2), 3), 4), 5), 6) of clause 3 of article 11 of the Law on OSA shall be carried out with the approval of the prosecutor for the purposes stipulated by subclauses 1) and 2) of clause 4 of article 12 of this Law.

4. According to clause 1 of article 14 of the Law on OSA materials obtained in the process of operative-search activities can be used for the preparation and implementation of

investigative actions and for conducting OSM to prevent, suppress criminal offenses, as well as in the process of proving in criminal cases, subject to their verification in accordance with the provisions of the criminal procedure legislation of the Republic of Kazakhstan, regulating the collection, research and assessment of evidence.

The courts should borne in mind that in accordance with part two of article 120 of the CPC, materials, received in compliance with the requirements of the Law on OSA and the Law of the Republic of Kazakhstan dated December 28, 2016 No.35-VI "On counter-intelligence", in which actual data on data on illegal actions have been recorded, are documents and can be used in criminal proceedings as evidence.

5. Covert investigative actions shall be carried out according to statements, reports or reports on criminal offenses registered in the Unified Register of Pre-trial Investigations, if there is one of the grounds provided for in part four of article 232 of the CPC, in the framework of pre-trial proceedings.

Prior to the commencement of pre-trial proceedings, the conduct of covert investigative actions is unacceptable. In these cases, the tasks of the criminal process can be ensured by carrying out operational-search measures provided for by the Law on the OSA.

Covert investigative actions shall be carried out on the initiative of the pre-trial investigation body (prosecutor, investigator or interrogator), directly carrying out criminal proceedings. Other state bodies and officials do not have this right.

In accordance with part one of article 241 of the CPC information about the proceedings of the covert investigative action and information obtained as a result of its conduct, until the end of the covert investigative action, shall be confidential and shall not be subject to disclosure.

6. Authorization of covert investigative actions, stipulated by clauses from 1) to 6) of article 231 of the CPC, shall be carried out by the investigating judge of a specialized investigative court, a specialized interdistrict investigative court at the location of the body conducting the pre-trial investigation and (or) at the location of the authorized subdivision of the law enforcement or special state body executing the order of the person conducting the pre-trial investigation or at the place of pre-trial investigation.

Investigating judges of a district or an equivalent court, which is not a specialized investigative court or a specialized inter-district investigative court, shall not be entitled to consider materials for authorization of covert investigative actions.

The authorization of the extension of the conduct of the covert investigative action shall be made by the investigating judge who authorized the conduct of the covert investigative action.

In exceptional cases, if it is impossible to authorize the extension of the covert investigative action by the same investigating judge, authorization shall be carried out by another investigating judge of the same court.

The legality of the covert investigative action carried out in urgent cases shall be checked by the investigating judge of a specialized investigative court (specialized interdistrict investigative court) at the location of the body conducting the pre-trial investigation and (or) at the location of the authorized subdivision of a law enforcement or special state body, executing the order of the person conducting the pre-trial investigation or at the place of pre-trial investigation.

Authorization of covert investigative actions in relation to a judge shall be carried out by the investigating judge of the specialized interdistrict investigative court of the city of Nur-Sultan by order of the pre-trial investigation body agreed with the General Prosecutor, and in relation to the General Prosecutor by the investigating judge of the specialized interdistrict investigative court of the city of Nur-Sultan by order of the pre-trial investigation body agreed with the First Deputy General Prosecutor.

7. The courts should meet the requirements of clauses from 1) to 4) of part seven of article 232 of the CPC, defining an exhaustive list of persons in respect of whom covert investigative actions can be carried out.

Conducting covert investigative actions in relation to persons not indicated in this list, as well as in relation to the victim, in the absence of his/her written consent, shall not be allowed .

A third party, indicated in clause 4) of part seven of article 232 of the CPC, shall be understood as any individual (for example, relatives, friends, acquaintances of the suspect) received or transmitted information relevant to the case, with the exception of the victim and the lawyer specified in part eight of article 232 of the CPC.

In relation to a third party, covert investigative action can be authorized only on condition that the pre-trial investigation body has information that a third person receives or transmits information relevant to the case.

The place, in respect of clause 5) of part seven of article 232 of the CPC shall be understood as the tangible objects where there are circumstances that are relevant to the case, or their occurrence is expected (for example, an office or other room, a vehicle where giving and receiving a bribe can be carried out; dwelling where a meeting of accomplices in a criminal offense can take place, preparing, committing or who committed it).

Carrying out covert investigative actions in relation to lawyers providing professional assistance shall be prohibited, unless there is reason to believe that they are preparing or have committed a serious or particularly serious crime.

8. If, during the production of covert investigative actions against one person, evidence of the unlawful actions of another person is revealed, then these data can be used as evidence of the accusation against this person only in compliance with the requirements of article 235 of the CPC. An authorized official of the body, who is entrusted to conduct of the covert investigative action, and in the case of secret control of postal and other items - the investigator, the investigating officer shall send to the investigating judge a notification and a

resolution on the conduct of the covert investigative action in cases that do not tolerate delay in relation to another person and requests the appropriate authorization from the investigating judge for the conduct of the covert investigative action. In this case, a decision of the investigating judge must be received on the recognition or non-recognition of the conducted of the covert investigative action as lawful.

9. Resolution on conducting the covert investigative action must comply with the requirements, indicated in articles 198, 232 and 233 of the CPC, and contain a brief description of the summary of the criminal case, justification for the need for the covert investigative action, information about the place or person in respect of whom the covert investigative action is planned to be carried out, as well as other data listed in part one of article 233 of the CPC.

The conclusions of the authorized official of the body, which is entrusted to conduct the covert investigative action, and in the case of covert control of postal and other items - the investigator, the inquirer on the need for the covert investigative action, specified in the resolution, must be motivated and confirmed by the materials of the criminal case.

In order to verify the arguments specified in the decision, the investigating judge has the right to request materials that confirm the circumstances set forth in the decision, including the factual evidence of the object in respect of which it is planned to carry out or is being carried out covert investigative action, encrypted in accordance with part two of article 233 of the CPC.

Failure to present the demanded materials to the investigating judge shall be the grounds for refusal to authorize the covert investigative action.

10. The factual evidence obtained as a result of the conducted of covert investigative actions shall be subject to consolidation, research, assessment and recognition as evidence in the manner prescribed by the norms of chapters 15 and 16 of the CPC.

In accordance with part two of article 239 of the CPC, the factual evidence contained in the protocols of the study of the results of covert investigative actions, sound and image recordings, photographs, other results recorded using scientific and technical means, seized objects and documents or their copies may be recognized as evidence.

11. If, based on the results of covert investigative actions, circumstances are established that require verification by conducting a forensic examination (for example, in cases of illegal drug trafficking), then the appointment of an examination shall be made by the investigator or , on his behalf, by the body of inquiry in accordance with the procedure of article 60 of the CPC. The conclusion of the expert, obtained by order of the body of inquiry in the absence of a corresponding instruction from the investigator, may not be recognized as admissible evidence.

12. Covert investigative actions, except for covert control of postal and other items, shall be carried out by order of the pre-trial investigation body (hereinafter referred to as the order), by an authorized subdivision of a law enforcement or special body using the forms and

methods of operational-search activities in accordance with the Rules of conducting the covert investigative actions.

The order must contain the justification for the need to conduct the covert investigative action in respect of a particular person or a place, and must be supported with materials of the case.

One order may indicate the need to carry out several of covert investigative actions in relation to different persons, the list of which is indicated in part seven article 232 of the CPC.

Resolution on conducting the covert investigative actions, stipulated by clauses 1), 2), 3), 4), 6) of article 231 of the CPC, shall be made by the executor, who is entrusted to conduct the covert investigative action. Resolutions to conduct covert control of postal and other items and to extend the period of covert investigative actions shall be made directly by the investigator himself/herself or the interrogator conducting the pre-trial investigation.

13. The justification for the need for the covert investigative action, its type, location (when carrying out the covert investigative action at the place), subscriber phone numbers, e-mail address, the period of time for which information should be obtained, must be set forth in the order of the person, carrying out pre-trial investigation.

The order must contain data confirming the ownership of the monitored subscriber numbers to the person in respect of whom the covert investigative action is being carried out.

The executor of the covert investigative action shall not be entitled to carry out any other covert investigative action not specified in the order.

The inclusion of additional subscriber numbers, email addresses, social media accounts and other information not specified in the order by the executor in the resolution on the conduct of the covert investigative action shall not be allowed.

If the executor, during the conduct of the covert investigative action, went beyond the order given to him/her, then the information obtained as a result of their conduct cannot be recognized as admissible evidence in the case.

14. Covert investigative actions may be carried out only after the pre-trial investigation body establishes the signs of a crime, as well as the conditions and grounds for conducting of covert investigative actions prescribed by article 232 of the CPC.

Before the initiation of the covert investigative action, the pre-trial investigation body must have information about the person's involvement in the crime being investigated (the statement, report on the criminal offense indicates the person preparing, committing or perpetrating it, or in relation to this person there is reason to believe that he/she is related to the offense under investigation or has information about a prepared, committed or committed criminal offense) or have information that a third party receives or transmits information relevant to the case.

Materials of operative-investigative measures, obtained before the start of pre-trial investigation may be used as such information.

15. The authorization of the covert investigative action shall be carried out by the investigating judge within twelve hours from the moment the court receives the corresponding decision.

In cases where it is necessary to request additional materials, it shall be allowed to consider the resolution beyond the established time limit, but not more than twenty-four hours

The investigating judge shall consider the order to conduct of covert investigative actions alone without holding a court hearing and informing the participants in the criminal process.

16. The investigating judge, having recognized the decision on the conduct of the covert investigative action as lawful and well-grounded, shall authorize it by affixing the word "Authorize" on it, his signature, the court seal and the date.

If the decision is unfounded or there is no sufficient materials confirming the necessity and validity of the conduct of the covert investigative action, the investigating judge shall refuse to authorize, whereof he/she issues a reasoned decision.

When the pre-trial investigation body establishes violations of the law in the preparation of materials for the conduct of the covert investigative action (for example, the absence of an order from the person conducting the pre-trial investigation, the issuance of an order on the conduct of the covert investigative action by an inappropriate person, an indication in the order of the conduct of the covert investigative action, not provided for in the order, violation of the procedural time limit for the provision of a decision on the conduct of the covert investigative action provided for in the second part of article 234 of the CPC the investigating judge, in the event of a refusal to authorize the authorization, may also issue a private order to take appropriate response measures.

Submission of a petition by the prosecutor for revising the decision of the investigating judge on authorizing or refusing to authorize of covert investigative actions and its consideration by a judge of a regional or equivalent court shall be carried out in the manner prescribed by article 107 of the CPC.

17. If there are doubts about the reliability of the information provided for the authorization of the covert investigative action, the investigating judge shall be entitled, in accordance with part two of article 234 of the CPC, after authorizing the order, to entrust its verification to the procedural prosecutor within twenty-four hours.

Such verification is also initiated in criminal cases for which a procedural prosecutor has not been appointed. In this case, a written notification from the investigating judge shall be sent to the chief of the prosecutor's office, which exercises prosecutorial supervision of the case.

The investigating judge can initiate verification of the reliability of any information received in the framework of pre-trial proceedings, including the reliability of the subscriber number, e-mail address, data of social networks, etc., specified in the decree on the conduct of the covert investigative action.

The prosecutor shall be obliged to conduct an appropriate check within five days and notify the investigating judge of the results. If the check establishes the illegality of the decision to conduct the covert investigative action, the prosecutor shall be obliged to submit to the investigating judge an appropriate motion to terminate it, which is subject to consideration by the investigating judge within the time limits provided for in part two of article 234 of the CPC.

18. In cases of urgent delay, it is allowed to proceed with covert investigative actions stipulated by clauses from 1) to 6) of article 231 of the CPC, with a written notification of the investigating judge within twenty-four hours and the subsequent receipt of a sanction in the manner prescribed by article 235 of the CPC.

Conducting of covert investigative actions in urgent cases should be of an exceptional nature, when it is not possible to obtain the sanction of the investigating judge before the commencement of their proceedings.

19. The subject-matter of forensic research when considering a notification of a covert investigative action, in addition to the validity of its production in relation to a particular person or place, shall be the mandatory verification of the existence of objective obstacles to obtaining a sanction prior to the commencement of the covert investigative action.

Such circumstances may include, for example, the need to conduct of the covert investigative action on a weekend or a holiday, later (night) time of the day, the remoteness of the area where the covert investigative action is carried out, the sudden appearance of third parties in respect of whom it is allowed in accordance with the CPC conducting the covert investigative action etc.

20. In accordance with part two of article 235 of the CPC, an investigating judge, having studied the submitted materials, in case of agreement with the urgency of the conducted covert investigative action, shall make a decision on recognizing as lawful the conducted exigent covert investigative action, in which he/she reflects the need and reasonableness of its conduct in respect of a particular person or place and shall indicate the date of consideration of the decision and notification. In case of disagreement, he/she shall issue a resolution on its termination and inadmissibility of using the results of covert investigative actions as admissible evidence.

The calculation of the time limit for the conduct of the covert investigative action, which does not tolerate delay, shall begin from the date of its actual implementation within the time limits established by article 236 of the CPC.

If an authorized official of the body entrusted to conduct the covert investigative actions receives a reasoned decision on the need for further covert investigative action in respect of a person or place, the investigating judge shall be entitled to authorize it in accordance with the procedure of article 234 of the CPC.

21. A covert investigative action shall be carried within the term, for which it has been authorized by the investigating judge, but not more than 30 days.

The extension of the term for the covert investigative action shall be authorized by the investigating judge in the manner provided for in part two of article 236 of the CPC.

In accordance with part 7-1 of article 45 of the CPC, interruption of the terms of the pre-trial investigation does not prevent the conduct of the necessary search measures in accordance with the Law on OIA and on covert investigative actions, the attachment of their results to the materials of the criminal case.

The investigative measures, conducting which shall be allowed within the period of interrupting the terms of pre-trial investigations, in accordance with clause of 56) article 7 of the CPC, shall be understood as performed by order of the body, conducting the criminal process, actions of the body of inquiry aimed at establishing the location of persons who have fled from the body conducting the criminal process and (or) evading criminal responsibility, missing persons, objects and documents that are significant for the case, as well as at identifying persons who have committed a criminal offense.

In a criminal case in which the terms of the pre-trial investigation were interrupted or the case was suspended by the pre-trial investigation body on the basis of article 50 of the CPC (as amended in 1997), authorization by the investigating judge of covert investigative actions shall be carried out only after the resumption of the terms of the pre-trial investigation in accordance with part nine of article 45 of the CPC or after the resumption in accordance with part 8-1 of article 673 of the CPC of a criminal case suspended until January 1, 2015.

22. When resolving the issue of authorizing the continuation of the covert investigative action, it is necessary to check the validity of its extension, find out for what purposes it is necessary and whether the conclusions of the pre-trial investigation body about the need to conduct the covert investigative action in respect of a particular person or place have been confirmed.

Lack of justification in the continuation of the covert investigative action shall be the basis for refusal to authorize it.

Covert investigative actions can be carried out during the pre-trial investigation, before notification of the end of the investigative actions in the case.

23. Covert investigative actions, stipulated by clauses from 1) to 6) of article 231 of the CPC, can be terminated by the investigating judge upon a petition of the prosecutor.

The petition shall be attached with evidence confirming the validity of arguments of the prosecutor on the need to terminate the covert investigative action. Ensuring the reliability of the information provided shall be entrusted to the prosecutor who made the specified petition.

If the petition of the prosecutor to terminate the covert investigative action is unfounded, it may be denied, about which the investigating judge issues a reasoned decision, which can be reviewed by a higher court upon the petition of the prosecutor according to the rules of article 107 of the CPC.

24. The person in respect of whom the covert investigative action was carried out must be notified of this by the pre-trial investigation body without acquaintance with the results of the

covert investigative action no later than six months from the date of the final decision in the criminal case, except for the cases provided for in article 240 of the CPC.

This period may be extended by the investigating judge upon a reasoned request of the pre-trial investigation body up to one year.

The written notification must contain information about the type of the covert investigative action and the time of its conduct, as well as an explanation of the rights provided for in parts two, four and six article 240 of the CPC.

The final decision at the pre-trial stage of criminal proceedings shall only be the decision to terminate pre-trial proceedings.

When a court pronounces a sentence, the six-month notice period shall be calculated from the moment it comes into legal force.

In cases where a person is notified of the fact of carrying out of covert investigative actions during pre-trial proceedings when familiarizing himself with the materials of the criminal case in accordance with the procedure provided for in articles 295 and 296 of the CPC, or notified in accordance with the procedure provided for in part two of article 239 of the CPC, this person shall be considered notified of the conducted undercover investigative actions and no further notification shall be required.

25. The pre-trial investigation body, in the cases provided for in part 1-1 of article 240 of the CPC, shall request the investigating judge not to notify the person of the covert investigative action carried out against him.

The investigating judge, upon a reasoned request from the pre-trial investigation body, may agree on the failure of a person to notify him/her of the covert investigative action carried out against him:

in a criminal case on a terrorist or extremist crime;

in a criminal case about a crime committed by a criminal group;

if the notification creates a threat of disclosure of state secrets;

if the notification poses a threat to the safety of persons carrying out activities on a confidential basis and in a secret form, and other persons.

The specified list is exhaustive and is not subject to broad interpretation.

26. The person in respect of whom the covert investigative actions were carried out, within fifteen days from the date of receipt of the notification, shall be entitled to apply to the court, which was authorized to conduct the covert investigative action in accordance with the procedure prescribed by article 106 of the CPC, with a statement on the recognition of the corresponding of the covert investigative actions illegal and seeking damages (if any).

When considering a complaint in accordance with the procedure of article 106 of the CPC the investigating judge must verify the legality of the actions of the pre-trial investigation body to execute the order to conduct the covert investigative action, without discussing the

legality of the authorization of this order. The decision of the investigating judge can be appealed, reviewed upon a petition of the prosecutor in accordance with the procedure provided for in article 107 of the CPC.

27. According to article 4 of the Constitution, this regulatory resolution is included in the current law, is generally binding and enters into force from the day of the first official publication.

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of the Republic of Kazakhstan*

Zh. Assanov

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