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PROCEDURAL OPPORTUNITIES FOR OBTAINING ITEMS AND DOCUMENTS IN CRIMINAL PROCEEDINGS

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Рогальська В.В. ПРОЦЕСУАЛЬНІ МОЖЛИВОСТІ ОТРИМАННЯ РЕЧЕЙ І ДОКУМЕНТІВ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ. Роботу присвячено дослідженню процесуальних шляхів отримання речей та документів у кримінальному провадженні. У статті проаналізовано підстави, умови та процесуальний порядок отримання речей і документів в межах виконання ухвали про тимчасовий доступ до речей і документів.

До системи процедурних способів одержання речей та документів у кримінальному провадженні віднесено: добровільне надання справ та документів слідчого; Попит на речі та документи на підставі запиту; отримання речей та документів у межах виконання рішення про тимчасовий доступ до речей та документів; захоплення речей та документів під час пошуку; 2) добровільне надання виступів та документів пропонується скласти протокол про добровільний прийом речей або документів відповідно до статті 104 КПК України з посиланням на ч.2 ст. 93 і ч.2 ст. 100 КПК України. Якщо речі або документи отримані від учасників кримінального провадження, які мають таке право (потерпілий, підозрюваний, цивільний позивач, цивільний відповідач, їх представники та законні представники, захисник), - також з посиланням на відповідну статтю, де таке право регулюється; 3) визначаються підстави, умови та процедурна процедура тимчасового доступу до речей та документів у кримінальному судочинстві.

***Ключові слова**: отримання речей і документів, захід забезпечення кримінального провадження, тимчасовий доступ до речей і документів, кримінальне провадження.*

Formulation of the problem. To ensure the tasks of the criminal process, which are regulated in Art. 2 of the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine), the legislator imposes certain obligations on the subjects of criminal proceedings and defines their rights. At the same time, the government hopes that the subjects of criminal proceedings will actively participate in the criminal process, contribute to the achievement of its tasks and in good faith carry out procedural duties. However, the tasks of criminal proceedings do not always coincide with the interests of the participants in the proceedings, and therefore the subjects of this proceeding may hinder the achievement of the tasks specified by the law, by not fulfilling or unduly executing procedural obligations or abusing the rights granted by the legislation. That is why, in order to ensure the achievement of the objectives of criminal proceedings, criminal procedural law provides for the possibility of applying measures to ensure criminal proceedings. These measures make it possible to identify, collect and preserve evidence, to prevent possible unlawful behavior or to exclude the possibility of a suspect, accused of avoiding pre-trial investigation and trial.

Analysis of the reporting of first instance courts on the examination by the investigating judge of petitions, complaints, applications during the pre-trial investigation in the period from 2014 to 2017 by the total number of petitions of the investigator, the prosecutor on the application of measures to ensure criminal proceedings makes it possible to conclude that one of the most widespread among all The measures to ensure criminal proceedings are temporary access to things and documents. Analysis of applications for temporary access to things and documents submitted to courts in the period from 2014 to 2017 (245052 petitions in 2014, 134641 in 2015, 1 130979 in 2016, 257744 in 2017 [1]) indicates that the number of appeals to an investigating judge on its application does not decrease, and in comparison with the last years - only increases.

Analysis of publications that initiated the solution to this problem. The questions of application of measures for ensuring criminal proceedings were investigated in their writings by such scholars as: O. M. Humin, G. K. Kozhevnikov, L. M. Loboyko, V. O. Popelyushko, V. I. Slipchenko, L. D. Udalova, O. G. Shilo, O. Yu. Hablo and others, but the available scientific research does not cover all aspects of the institute of measures to ensure criminal proceed-

ings. Although the use of temporary access to things and documents has been repeatedly investigated in recent years since the entry into force of the CPC of Ukraine in 2012, some aspects of the aforementioned criminal proceedings have not been adequately researched.

Purpose of the article. This article is a new scientific result regarding the procedural possibilities of obtaining things and documents in criminal proceedings, including during the execution of a decision on temporary access to things and documents.

To achieve this goal, it is necessary to fulfill the following tasks: 1) analyze the procedural ways of obtaining things and documents in criminal proceedings and formulate their system; 2) to investigate the problematic issues that arise when applying temporal access to things and documents and suggest specific ways to resolve them.

Presentation of the main research material. System analysis of criminal procedural legislation and the study of the views of scholars on procedural possibilities for obtaining things and documents allowed us to conclude that the investigator as an independent procedural person can access things and documents in the following ways: 1) obtaining the necessary things or documents that will have proof value (voluntary reception); 2) the demand for things or documents (based on the request); 3) application of criminal proceedings - temporary access to things and documents; 4) conducting a search, during which the necessary documents or evidence necessary in a certain criminal proceeding will be seized.

Consider each of the above methods in detail.

In accordance with Part 2 of Art. 93 of the CPC of Ukraine, the prosecuting party carries out collection of evidence, including by obtaining from the bodies of state authority, local self-government, enterprises, institutions and organizations, officials and individuals the things, documents, information, expert opinions, conclusions of audits and acts of inspections [2]. That is, the investigator has the right to collect evidence, if the individual independently exercising his right to submit evidence, appeals to the investigator with a proposal to accept certain things or documents from him.

Obtaining of things and documents in this way occurs when the person is interested in providing things and documents that are relevant for the criminal proceedings and do not contain a secret protected by law, independently appeals to the investigator with the proposal to accept certain things or documents from him. Obtaining such things or documents, consider it necessary to file a protocol on the voluntary reception of things or documents, which should be drawn up in accordance with Article 104 of the CPC of Ukraine, with reference to Part 2 of Art. 93 and Part 2 of Art. 100 CPC of Ukraine. If, however, things or documents are obtained from participants in criminal proceedings that are endowed with such a right (victim, suspect, civil plaintiff, civil defendant, their representatives and legal representatives, defender), then also with reference to the relevant article where such right is regulated. Such a procedure for obtaining things and documents is the most simplified among all existing and is consistent with the CPC of Ukraine, which excludes in the future the adjudication of a judge against the inadmissibility of evidence obtained in this way.

The second method is also provided in Part 2 of Art. 93 CPC of Ukraine, namely: by requesting from the bodies of state power, bodies of local self-government, enterprises, institutions and organizations, officials and individuals the things, documents, information, conclusions of experts, conclusions of audits and acts of inspections.

The request is to bring a party, in writing or verbally, to the prosecution or defense of officials and citizens about the provision of written documents or items; fulfillment of requirements by addressees; acceptance by the parties of the prosecution and protection of objects and fixing this action in criminal proceedings, etc. [3].

Such a claim for things and documents is often carried out by sending a written request to the authorities, local authorities, enterprises, institutions and organizations, officials and individuals regarding the issuance of specific things or documents to the investigator.

In our opinion, this method also has the right to exist, but we believe that it is appropriate to use it only in cases where things and documents do not contain a secret protected by law and there are reasons to believe that the destruction or change of the necessary for the criminal proceedings of things or documents, will not happen.

Thus, for example, if the owner of the right to investigate a criminal proceeding of things and documents is a party to protection, then this method is not very effective, since in many cases the person either refuses to give the official authorized to carry out the pre-trial investigation to the official the requested items and documents, or may even their destroyed if they contain evidence of her guilt in committing a criminal offense.

Consequently, from the above definition, we can conclude that a claim may be applied in such cases if: 1) it is known from whom or where exactly the things or documents are stored; 2) they do not contain a secret protected by law; 3) there is no threat that things or documents will be destroyed or damaged.

The third way is to get things and documents through the application of criminal proceedings in the form of temporary access to things and documents.

To date, the CPC of Ukraine has not provided a clear list of objects, which may be granted temporary access, and which should be obtained by soliciting or obtaining from the state authorities, local self-government bodies, enterprises, institutions and organizations, officials and individuals (Part 2, Article 3, Article 93 of the CPC) [4]. But, given the content of the provisions of Part 1 of Art. 86, parts 2 and 3 of Art. 93 CPC, the application by the party of criminal proceedings of such a method of gathering evidence as the receipt of things or documents (Part 7 of Article 163 of the CPC) during the temporary access to things and documents may be exercised in the following cases: 1) the person in whose possession things or documents do not wish to voluntarily transfer them to a party to criminal proceedings or there is reason to believe that it will not make such a transfer voluntarily upon receipt of the corresponding request or attempt to change or destroy the relevant items or documents; 2) things and documents, according to Art. 162 CPCs contain a law-protected secret, and such extraction is necessary to achieve the purpose of the application of this measure of protection. In other cases, a party to criminal proceedings may claim and receive things or documents provided they are voluntarily provided by the owner without the use of the procedure provided for in Chapter 15 of the Criminal Procedure Code [5].

Thus, the ability to claim things and documents without the use of temporary access associated with their voluntary provision by the owner, as well as the lack of reason to believe that the owner of things and documents will try to change or destroy the relevant things or documents after receiving the request. Therefore, in order to appeal to an investigating judge, a court with temporary access to things and documents will have reasonable suspicion of the investigator about the possibility of changing or destroying things or documents by the person in whose possession they are or information that things and documents contain information that constitute a secret protected by law.

According to Art. 162 of the CPC of Ukraine, the secret protected by law includes:

1) information held by the media or journalist and provided to them on condition of non-disclosure of the authorship or source of information. In accordance with Part 3 of Art. 25 of the Law of Ukraine "On Information", the journalist has the right not to disclose the source of information or information that allows the establishment of sources of information, except when it is obliged to this decision by the court on the basis of the law [6].

2) information that may constitute a medical secret. According to Part 1 of Art. 40 "Fundamentals of Ukrainian legislation on health care", medical workers and other persons who have become aware of illness, medical examination, examination and their results, intimate and family aspects of a citizen's life in connection with performance of professional or official duties , do not have the right to disclose this information, except cases provided by legislative acts [7].

3) information that may constitute a secret of the commission of notarial acts. In accordance with Part 1 of Art. 8 of the Law of Ukraine "On Notary", a set of information obtained during the performance of a notarial act or appeal to the notary of the person concerned, including the person, his property, personal property and non-property rights and duties, etc., constitute a notarial secret [8].

4) confidential information, including those containing commercial secrets. According to Part 2 of Art. 21 of the Law of Ukraine "On Information" confidential is information about an individual, as well as information access restricted to a natural or legal person, other than the subjects of power [6]. And also, according to Art. 505 of the Civil Code of Ukraine, information classified as secret is classified in the sense that it is generally or in a certain form and in aggregate of its constituents is unknown and not readily accessible to persons who normally deal with the type of information to which it in this regard, has a commercial value and was subject to appropriate measures to preserve its secrecy by the person who legally controls this information [9].

5) information that may constitute bank secrecy. Information about the activities and financial condition of the client, which became known to the bank in the course of customer service and the relationship with it or third parties in the provision of bank services, is a bank

secret [10].

6) personal correspondence and other personal records. The Constitution of Ukraine guarantees each prohibition on interference in his personal and family life; ensures observance of the secrecy of correspondence, telephone conversations, telegraph and other correspondence; Prohibition of the collection, storage, use and distribution of confidential information about a person without his consent [11].

7) information contained in operators and telecommunication providers, communications, subscribers, provision of telecommunication services, including receiving services, their duration, content, routes, etc. In accordance with Part 1 of Art. 9 of the Law of Ukraine "On Telecommunications", the protection of the secrecy of telephone conversations, telegraph or other correspondence transmitted by technical means of telecommunications, and information security of telecommunication networks are guaranteed by the Constitution and laws of Ukraine [12].

8) personal data of a person who is in her personal possession or in the database of personal data that is owned by the owner of personal data. The grounds, procedure for accessing and using personal data about a person or obtaining information from existing databases is determined by the Law of Ukraine "On Protection of Personal Data" [13];

9) state secrets. State secret is a kind of secret information that includes information in the field of defense, economy, science and technology, external relations, state security and law and order protection, the disclosure of which may harm the national security of Ukraine and recognized in accordance with the procedure established by the Law of Ukraine "On State Secrets ", Are state secrets and are subject to state protection [14]. The only national classifier of such information is the set of information constituting state secrets [15] [16].

The procedural procedure for the temporary access to things and documents is as follows:

1) the parties, observing the requirements of Art. 160 CPC of Ukraine filed a petition to the investigating judge, court, about the necessity of the application of this measure of protection;

2) an investigating judge, the court carries out a judicial challenge of the person in possession of the necessary things and documents, except in the case of a party to criminal proceedings who has requested to prove the existence of grounds for believing that there is a real threat of change or destruction of things or documents;

3) examination by the investigating judge, court investigating petition for temporary access to things and documents, during which the party to the criminal proceedings who has applied must prove: - that the things or documents to which temporary access is requested: a) are or may be in the possession the relevant natural or legal person; b) by themselves or in combination with other things and documents of the criminal proceedings in connection with which the petition is filed, are essential for the establishment of important circumstances in the criminal proceedings; c) do not constitute themselves or do not include things and documents that contain a secret protected by law. In the case of filing a petition concerning things and documents containing a secret protected by law - a) the possibility of use as evidence of the information contained in these speeches and documents; b) the inability to prove in other ways the circumstances which are supposed to be brought with the help of these things and documents; c) in the case of access to documents containing information constituting a state secret, the presence of the corresponding permission of the person submitting the petition. In the case of a request for the seizure of things and documents, the party to the criminal proceedings must prove that: a) without such a seizure, there is a real threat of change or destruction of things and documents; b) such extraction is necessary to achieve the purpose of access to things and documents.

4) The decision of the investigating judge, the court to order temporary access to things and documents that must comply with the requirements of Article 164 of the CPC of Ukraine, or - to refuse to comply with the relevant petition.

5) Implementation of the decision on temporary access to things and documents. Upon receipt of the decision, the investigator can temporarily access things and documents. A person specified in the decision of the investigating judge, the court on temporary access to things and documents as the owner of things or documents, is obliged to grant temporary access to the court specified in the decision specified in the decisions and documents to the person indicated in the corresponding decision of the investigating judge.

The fourth way of obtaining things and documents may be applied by the party to crim-

inal proceedings in the case:

1) the removal of the things and documents specified in the decision of the investigating judge on the conduct of the search;

2) temporary seizure of things and documents during a search, inspection or search of a person during detention. A search may be carried out as a result of failure to comply with the decision on temporary access to things and documents. In this case, according to Art. 166 of the Criminal Procedure Code of Ukraine, an investigating judge, the court, at the request of the party to the criminal proceedings, which has been granted the right to access to things and documents on the basis of a ruling, has the right to decide on a permit for search in accordance with the provisions of the CPC of Ukraine with a view to finding and removing said things and documents.

Also, the search may be conducted in order to find specific things and documents and to appeal to the investigating judge with a petition for temporary access to things and documents.

In our opinion, the latest version of the search to find specific things and documents is more tactically correct. Since, if the prosecution party has evidence, that the owner of the things and documents containing information relevant to the criminal proceedings may hide or destroy them, then request the application of a criminal proceedings - temporary access to things and documents is not appropriate The owner of things or documents, despite his obligation to provide them, may refuse to do so. If, however, even after this, the investigating judge is asked to search for a search, the question arises: will the expediency of conducting further investigative investigations if the suspect already knows about the need for the party to accuse the access to certain information contained in speeches and / or documents? We believe that no, after all, the person, before receiving the decision of the investigator on the search, there is a certain time that gives him the opportunity to destroy certain things or documents.

Based on the above, we can draw the following **conclusions**: 1) to the system of procedural ways of obtaining things and documents in criminal proceedings include: voluntary provision of investigator's things and documents; Demand of things and documents on the basis of a request; obtaining of things and documents within the limits of execution of the decision on temporary access to things and documents; seizure of things and documents during a search; 2) the voluntary provision of speeches and documents is proposed to be drawn up by a protocol on the voluntary reception of things or documents, in accordance with Article 104 of the CPC of Ukraine, citing Part 2 of Art. 93 and Part 2 of Art. 100 CPC of Ukraine. If things or documents are obtained from the participants in criminal proceedings that are endowed with such a right (victim, suspect, civil plaintiff, civil defendant, their representatives and legal representatives, defender) - also with reference to the relevant article where such right is regulated; 3) the grounds, conditions and procedural procedure for the temporary access to things and documents in criminal proceedings are determined.

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Summary

The work is devoted to the investigation of procedural ways of obtaining things and documents in criminal proceedings. The article analyzes the grounds, conditions and procedural procedure for obtaining things and documents within the framework of the execution of the decree on temporary access to things and documents.

***Keywords**: receipt of things and documents, measures to ensure criminal proceedings, temporary access to things and documents, criminal proceedings.*

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TAKING INTO ACCOUNT FOR THE RELATIVE SEVERITY OF PENALTIES IN THE CRIMINAL LEGISLATION OF UKRAINE AND GEORGIA: A COMPARATIVE ANALYSIS

Рябчинська О. УРАХУВАННЯ ПОРІВНЯЛЬНОЇ СУВОРОСТІ ВИДІВ ПОКАРАНЬ В КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ УКРАЇНИ ТА ГРУЗІЇ: ПОРІВНЯЛЬНИЙ АНАЛІЗ. Проаналізовано актуальні питання реалізації властивостей системи покарань в процесі правозастосовчої діяльності. Акцентовано на тому, що відсутність чіткої регламентації порядку заміни основного виду покарання на більш м'який його вид породжує проблему вибору покарання з множинності м'якших видів, по якій простежуються різні теоретичні підходи.

Відзначено схожість систем покарань, встановлених в кримінальному законодавстві України та Грузії, а також і основних положень, що регламентують певний механізм реалізації їх системоутворюючих ознак при призначенні покарань і вирішенні інших питань, пов'язаних з кримінальною відповідальністю.

***Ключові слова:** система покарань, види покарань, ознаки системи покарань, заміна покарання, більш м'який вид покарання, призначення покарання.*

Formulation of the problem. The system of punishments in Ukraine, including various punishments in content and nature, makes it possible to ensure both the differentiation of criminal responsibility and individualization, and the justice of punishment in accordance with the gravity of the crime and the identity of the perpetrator. In the Ukrainian criminal law doctrine, the following basic features of the punishment system are traditionally distinguished: the punishment system is established only by law, that is, no punishment can be freely determined; its type, size, order and grounds for application can be determined only by law; the list of penalties forming the system is mandatory for the court; the list of penalties included in the system is