

UDC 343.1

DOI <https://doi.org/10.32849/2663-5313/2022.11.09>**Hryhorii Denysenko,***PhD in Law, Postdoctoral Student, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, szrukraine@ukr.net***ORCID:** orcid.org/0000-0003-4132-8195**Mykola Pohoretskyi,***PhD in Law, Researcher, Scientific Institute of Public Law, 2a, H. Kirpa street, Kyiv, Ukraine, postal code 03055, pognikolay@gmail.com***ORCID:** orcid.org/0000-0003-2888-0911

Denysenko, Hryhorii, Pohoretskyi, Mykola (2022). Guarantees of non-disclosure of information constituting a secret and their role in ensuring rights of participants in criminal proceedings. *Entrepreneurship, Economy and Law*, 11, 52–57, doi:<https://doi.org/10.32849/2663-5313/2022.11.09>

GUARANTEES OF NON-DISCLOSURE OF INFORMATION CONSTITUTING A SECRET AND THEIR ROLE IN ENSURING RIGHTS OF PARTICIPANTS IN CRIMINAL PROCEEDINGS

Abstract. Purpose. The purpose of the article is to assess the criminal procedure rules relating to the protection of information constituting a secret at all stages of criminal proceedings, with due regard for the current requirements of criminal procedure law aimed at a prompt and impartial investigation to fulfil the tasks of criminal proceedings. **Results.** The article analyses regulatory guarantees of criminal procedure law and leading scholars' perspectives on the protection of information constituting the secret of criminal proceedings. The author studies the legal mechanism for protecting information at various stages of criminal proceedings with due regard to the requirements of the Criminal Procedure Code. It is determined that, given the current state of the national legislative process relating to the regulation of criminal procedural relations and the state of affairs in law enforcement bodies' performance, an important place in scientific research on criminal procedure is given to the protection of information constituting a secret of criminal procedure. The article highlights that the protection of information is considered as a set of various procedural rules which ensure the secrecy of investigation, contributing to the most effective achievement of tasks defined for criminal proceedings. **Conclusions.** It is concluded that the information subject to protection by criminal procedure legislation includes regulatory and legal provisions, prescribed by criminal and criminal procedure legislation in terms of protection, on disclosure without the appropriate permission of the investigating authorities and the prosecutor of information obtained in the course of criminal proceedings; procedural work of the actors of criminal proceedings that ensures the secrecy of investigation. Moreover, such information includes the procedural form of documents prepared to warn the participants in criminal proceedings about the inadmissibility of disclosing information from the investigation, violation thereof may entail criminal liability; the subject matter and scope of information obtained during the investigation, in respect of which the non-disclosure regime is established; the procedural status of all actors of the criminal process, namely in terms of their responsibilities, in the form of non-disclosure of information of the investigation; the fundamentals of criminal proceedings, which form the basis for investigation secrecy; the duration of the prohibition on disclosure of investigation information; the procedural possibilities of the investigation authorities and the prosecutor to take measures to ensure criminal proceedings to ensure non-disclosure of investigation information.

Key words: information, guarantees of non-disclosure of information, principles of protection, criminal procedure, criminal procedure legislation.

1. Introduction

The Constitution of Ukraine guarantees that confidential information about a person may not be collected, stored, used and dissem-

inated without his or her consent, except in cases specified by law, and only in the interests of national security, economic well-being and human rights.

According to part 3 of Article 14 of the CPC of Ukraine, which has been obtained as a result of interference with communication, may not be used otherwise than for solving the tasks of criminal proceedings, since any disclosure of information obtained during the pre-trial investigation may harm the human and civil rights guaranteed by the Constitution of Ukraine (Barannik, Nazarenko, 2011).

The disclosure of criminal proceedings may relate both to information on the status of the investigation, other secrets protected by law, and the personal life of participants in criminal proceedings, which ultimately has a significant impact on the course of criminal proceedings, deters the establishment of circumstances to be proved, and can also be considered as a way of humiliating the honour and dignity of a person (Yemelianov, 2013).

Therefore, given the current state of the national legislative process relating to the regulation of criminal procedural relations and the state of affairs in law enforcement bodies' performance, an important place in scientific research on criminal procedure is given to the protection of information constituting a secret of criminal procedure.

For example, the review of publications by domestic and foreign scholars reveals that information protected by criminal procedure law in under focus in the studies by the following authors: Yu.P. Alenin, R.V. Barannik, A.M. Blahodarnyi, I.V. Bondar, S.L. Yemelianov, V.A. Hlukhoveria, H.H. Kamalov, L.M. Loboiko, Ye.D. Lukianchykov, A.I. Marushchak, S.I. Minchenko, M.A. Pohoretskyi, A.A. Rozhnova, S.M. Stakhivskiyi, V.I. Slipchenko, O.Yu. Tatarov, V.M. Tertyshnyk, L.D. Udalova, V.I. Farynnyk, M.S. Tsutskiridze, S.S. Cherniavskiyi, O.H. Shylo, D.O. Shumeiko, M.Ye. Shumylo, O.O. Yukhno, R.Ya. Yablonov, O.H. Yanovska, and others.

A significant contribution to the study of secrecy of criminal procedure was made by I.V. Konchakova, I.B. Korol, I.V. Kutazova, V.H. Lisohor, A.O. Liash and other scholars whose works addressed the issues under consideration.

However, scientific developments on the issue concerned are mostly focused on certain aspects of secrecy of criminal proceedings as a complex legal concept and have not been considered under the provisions of the CPC of Ukraine 2012.

Therefore, given the insufficient coverage and study in scientific works of prohibition of disclosure of criminal proceedings, prescribed by law, and the low efficiency of the process against the background of a constant increase in the number of criminal proceedings on

the fact of information disclosure, which indicates the low efficiency of documenting and investigating these criminal proceedings, the topic of research is of particular relevance.

The purpose of the article is to assess the criminal procedure rules relating to the protection of information constituting a secret at all stages of criminal proceedings, with due regard for the current requirements of criminal procedure law aimed at a prompt and impartial investigation to fulfil the tasks of criminal proceedings.

2. Ensuring the protection of secrets in criminal proceedings

The legal information reflected in the criminal procedure legislation is related to the provisions of the Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine), which substantiates the mechanism for implementing orders on non-disclosure of certain information at various stages of the criminal procedure.

It should be noted that certain elements may act as procedural guarantees to ensure the secrecy of criminal proceedings (Yemelianov, 2013).

For example, public officials and bodies, when provided with criminal procedural guarantees, can ensure the possibility of performing their duties and further use of the specified powers in order to fulfil the tasks of criminal proceedings, while other participants in criminal proceedings may use procedural means to protect their rights, freedoms, information and legitimate interests (Criminal Code of Ukraine, 2001).

According to the criminal procedure legislation, information subject to protection and non-disclosure includes regulatory and legal prescriptions and justification of legal prohibitions that cannot be disclosed without the relevant permission of the investigating authorities and the prosecutor, as well as information obtained in the course of criminal proceedings, which is reflected in the relevant provisions of criminal and criminal procedure legislation; procedural work of the actors of criminal proceedings, which provides for secrecy during the investigation, including pre-trial investigation; a procedural form of documents created to warn participants in criminal proceedings about the inadmissibility of disclosing information from the investigation (in case of disclosure of such information, criminal liability may result); the subject matter and scope of information obtained during the investigation, which is also subject to non-disclosure; the procedural status of all participants in the criminal proceedings (this concerns their procedural obligation to keep pre-trial investigation information confidential); legal principles of criminal pro-

ceedings that substantiate the basis for ensuring state secrecy in relation to the investigation procedure; the duration of the prohibition on disclosure of information in criminal proceedings; procedural possibilities of the investigating authorities and the prosecutor to apply measures related to ensuring criminal proceedings to implement provisions specified by the CPC of Ukraine (Chyzhmar, 2019).

When ensuring the protection of secrets in criminal proceedings, criminal procedure legislation primarily guarantees the protection of information in criminal proceedings that is expressly prohibited by law. For example, this applies to the professional secrecy of a defence counsel, the secret of confession, medical confidentiality, the secrecy of the conference room, etc.

The CPC of Ukraine, Part 8, Article 224, provides for that such information may be the basis for suspicion or accusation that a person, his/her close relatives or family members have committed a criminal offence.

For example, this also applies to officials who perform covert investigative (detective) actions and persons who may confidentially cooperate with the authorities conducting pre-trial investigations (Criminal Code of Ukraine, 2001).

Following the scientific works by R.V. Barannik and P.H. Nazarenko, the secrecy of criminal procedure is the category of professional secrets, as it follows from the content of criminal procedure activities (Barannik, Nazarenko, 2011).

With regards to the same issue, A.O. Liash notes the need to supplement Article 222 of the CPC of Ukraine with part 3, which states that disclosure of information relating to the private life of a participant directly involved in criminal proceedings is not allowed without the relevant written consent (Liash, 2013).

In addition, according to the scientist, the information that may be discovered during a search, inspection or other investigative (detective) action, circumstances relating to the personal life of persons directly residing or temporarily staying in the premises or other places where such actions are carried out, are subject to protection. It is for this reason that this provision can specify the directions of formation of the basic principles of non-interference with private life.

A.O. Liash marks that this provision should be set out in Article 15 of the CPC of Ukraine, and not in Article 222, which is more universal and may apply to any information in certain specific cases obtained during criminal proceedings. Moreover, the information constituting the secrecy of criminal proceedings can be obtained not only during investigative (search) actions (Liash, 2013).

It is envisaged that the decision of the investigator or prosecutor regarding the need to ensure the protection and non-disclosure of information at all stages of criminal proceedings shall be recorded by a resolution in accordance with the approved requirements of the CPC of Ukraine, Article 110, parts 3, 5-7, in which they specify the time, purpose and scope of such disclosure.

Therefore, employees who carry out their activities in investigative units to implement the approved provisions specified in the CPC of Ukraine, Article 222, part 2, consider it necessary to record such warning in the form of a "Protocol of warning on the inadmissibility of disclosure of pre-trial investigation information", which indicates the fact that the person is familiar with the direct content of Article 222 of the CPC of Ukraine regarding the inadmissibility of disclosure of information of criminal proceedings, and in accordance with Article 387 of the Criminal Code of Ukraine - regarding criminal liability for disclosure of information of pre-trial investigation or inquiry (Tetarchuk, Diakiv, 2019).

3. Information constituting a state secret in criminal proceedings

Further comprehensive study of protection and non-disclosure of information in the course of criminal proceedings require focusing on exactly what concerns secrecy guarantees in criminal procedure legislation and should be considered in the general system of provisions. Therefore, this issue is worth a closer look.

For example, the issues related to ensuring the non-disclosure of criminal proceedings are correlated in the criminal procedure legislation with the issues of ensuring the secrecy of pre-trial investigation.

We agree with L.D. Udalova that "criminological support for keeping the secrecy of pre-trial investigation includes complex interrelated organisational and tactical measures, which has an impact on the entire criminal procedure" (Udalova, 2009).

According to Article 222 of the CPC of Ukraine, such information is directly protected by law and may be disclosed only with the appropriate permission of the investigator or prosecutor to the extent deemed possible. Moreover, part 2 outlines cases in which "the investigator or prosecutor shall warn persons who have become aware of information of the pre-trial investigation in connection with their participation in it, of their obligation not to disclose such information without his/her permission, and their illegal disclosure shall entail criminal liability established by law" (Udalova, 2009).

Considering that the main objectives of criminal proceedings are provisions that

may reflect the results of criminal proceedings, namely, protection of an individual, the whole society and the state from criminal offences, appropriate protection of the rights, freedoms and legitimate interests of participants in criminal proceedings, we should agree with M.A. Pohoretskyi that in this case Article 222 of the CPC of Ukraine should be titled "Secrecy of pre-trial investigation information".

Furthermore, these legal provisions are outlined in Article 222 of the CPC of Ukraine and are closely related to the relevant provisions of the CPC of Ukraine, which make appropriate mechanisms for the implementation of the prescriptions relating to non-disclosure of pre-trial investigation information. Moreover, their elements are directly procedural guarantees for the protection and secrecy of pre-trial investigation.

Criminal procedural guarantees can provide public authorities and officials with a direct opportunity to perform their duties and use such powers to fulfil the tasks of criminal proceedings, and other participants in criminal proceedings – to use procedural means to protect their rights, freedoms and legitimate interests (Kytsan, 2008).

In addition to the protection of information relating directly to criminal proceedings, it should be noted that criminal procedure legislation protects information constituting a state secret, and accordingly, it shall be conducted in compliance with all the requirements of the secrecy regime.

It should be noted that procedural decisions should not contain information that may constitute a state secret. Before such information is included in criminal proceedings, it is necessary to check whether the person has an appropriate security clearance, drawn up and signed in the appropriate form, which can provide access to classified information of the relevant category of classified information and its material carriers.

Moreover, a suspect or accused person may participate directly in criminal proceedings without the appropriate security clearance, as set out in Article 28 "Duties of a citizen to keep state secrets" of the Law of Ukraine "On State Secrets", but all persons shall be warned of criminal liability for disclosure of information constituting a state secret (Kytsan, 2008).

Access to materials containing information that constitutes a state secret may be granted to defence counsels and representatives of the accused, suspect, victim and their representatives on legal grounds, an expert, translator, specialist, court reporter, as well as a court administrator who has been directly granted access to state secrets (Pohoretskyi, Hryniuk, 2016).

Such persons should have the rights and obligations provided for by the CPC of Ukraine, allowing for the circumstances recorded in the course of criminal proceedings.

The decision to grant access to classified information and media of such information shall be approved by signing an order or instruction in writing by the head of the pre-trial investigation body, prosecutor or court.

The victim, as well as his or her representatives, expert, specialist, translator, court reporter, court administrator, are strictly prohibited from making copies and extracts from information that may contain state secrets. If extracts are made for further criminal proceedings, such extracts shall be sealed by the person who made them in a manner that enables to disclose their contents.

Extracts shall be stored in accordance with the approved requirements of the secrecy regime in the relevant pre-trial investigation bodies or court and may be provided to the person who directly compiled them upon request or during the pre-trial investigation directly at the premises of the pre-trial investigation body or during the court proceedings, i.e. in the courtroom (Pohoretskyi, Hryniuk, 2016).

4. Conclusions

Therefore, the theoretical study conducted enables to argue that the protection of information constituting secrets of criminal procedure is to be regulated by criminal procedure legislation, while the guarantee of their non-disclosure is a system of legal provisions, in particular, of the CPC of Ukraine. This, in the general system, ensures the secrecy of criminal proceedings in the aspects specified in the legislation and enables to implement the tasks of criminal proceedings.

The information subject to protection by criminal procedure legislation includes regulatory and legal provisions, prescribed by criminal and criminal procedure legislation in terms of protection, on disclosure without the appropriate permission of the investigating authorities and the prosecutor of information obtained in the course of criminal proceedings; procedural work of the actors of criminal proceedings that ensures the secrecy of investigation.

Moreover, such information includes the procedural form of documents prepared to warn the participants in criminal proceedings about the inadmissibility of disclosing information from the investigation, violation thereof may entail criminal liability; the subject matter and scope of information obtained during the investigation, in respect of which the non-disclosure regime is established; the procedural status of all actors of the criminal process, namely in terms of their

responsibilities, in the form of non-disclosure of information of the investigation; the fundamentals of criminal proceedings, which form the basis for investigation secrecy; the duration of the prohibition on disclosure of investiga-

tion information; the procedural possibilities of the investigation authorities and the prosecutor to take measures to ensure criminal proceedings to ensure non-disclosure of investigation information.

References:

- Barannik, R.V., Nazarenko, P.H.** (2011). Osoblyvosti okhorony informatsii, shcho stanovytt taiemnytsiu u kryminalnomu sudochynstvi [Peculiarities of the protection of confidential information in criminal proceedings]. *Advokat - Advocate*, 4 (127), 15–18 (in Ukrainian).
- Chyzhmar, K.** (2019). Skladovi uspiikhy u kryminalnomu protsesi [Components of success in the criminal process]. Kyiv : Tsentr navchalnoi literatury (in Ukrainian).
- Kryminalnyi kodeks Ukrainy vid 5 kvitnia 2001 r. № 2341-III [Criminal Code of Ukraine dated April 5, 2001 No. 2341-III]. (2001). *rada.gov.ua*. Retrieved from <http://zakon4.rada.gov.ua/laws/show/2341-14> (in Ukrainian).
- Kryminalnyi protsesualnyi kodeks Ukrainy vid 13 kvitnia 2012 r. № 4651-VI [Criminal Procedure Code of Ukraine dated April 13, 2012 No. 4651-VI]. (2012). *rada.gov.ua*. Retrieved from <http://zakon2.rada.gov.ua/laws/show/4651-17> (in Ukrainian).
- Kytsan, Yu.I.** (2008). Aktualnist vyznachennia pidslidnosti kryminalnykh sprav [The relevance of determining the jurisdiction of criminal cases]. *Universytetski naukovi zapysky - University Scientific Notes*, 3, 292–295 (in Ukrainian).
- Liash, A.O.** (2013). Nedopustymist rozgholoshennia vidomosti dosudovoho rozsliduvannia [admissibility of disclosure of pre-trial investigation information]. *Chasopys Natsionalnoho universytetu «Ostrozka akademiia» - Journal of the National University "Ostroh Academy"*, 1(7), 1-14 (in Ukrainian).
- Pohoretskyi, M.A., Hryniuk, V.O.** (2016). Vyznachennia prokurorom pidslidnosti kryminalnoho provadzhenia [Determination by the prosecutor of the subjectivity of criminal proceedings]. *Visnyk kryminalnoho sudochynstva - Bulletin of Criminal Justice*, 3, 60–68 (in Ukrainian).
- Tetarchuk, I., Diakiv, T.** (2019). Kryminalne protsesualne pravo Ukrainy [Criminal procedural law of Ukraine]. Kyiv : Tsentr navchalnoi literatury (in Ukrainian).
- Udalova, L.D.** (2009). Taiemnytsia slidstva: deiki problemni pytannia [The mystery of the investigation: some problematic issues]. *Kryminalistyka u protydii zlochynnosti - Forensics in combating crime: materials of the conference*, 3, 76–78 (in Ukrainian).
- Yemelianov, S.L.** (2013) Taiemnytsia slidstva ta sudochynstva v Ukraini [The secret of investigation and judicial proceedings in Ukraine]. *Uchenye zapysky Tavricheskoho Natsionalnoho universytetu im. V.Y. Vernadskoho - Scientific notes of the Tavrichesky National University named after V.Y. Vernadsky*, 2–1 (Ch. 2), 310–316 (in Ukrainian).

Григорій Денисенко,

доктор філософії в галузі 081 «Право», докторант, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, szrukraine@ukr.net

ORCID: orcid.org/0000000341328195

Микола Погорецький,

кандидат юридичних наук, науковий співробітник, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2а, Київ, Україна, індекс 03055, pognikolay@gmail.com

ORCID: orcid.org/0000-0003-2888-0911

ГАРАНТІЇ НЕРОЗГОЛОШЕННЯ ВІДОМОСТЕЙ, ЯКІ СТАНОВЛЯТЬ ТАЄМНИЦЮ, ТА ЇХ РОЛЬ У ЗАБЕЗПЕЧЕННІ ПРАВА УЧАСНИКІВ КРИМІНАЛЬНОГО ПРОЦЕСУ

Анотація. Мета. Метою статті є оцінка кримінальних процесуальних норм, що стосуються охорони відомостей, які становлять таємницю на всіх стадіях кримінального процесу, з урахуванням чинних вимог кримінального процесуального законодавства, що спрямовані на швидке й неупереджене розслідування для втілення завдань кримінального провадження. **Результати.** Стаття присвячена аналізу нормативних гарантій кримінального процесуального законодавства і поглядів провідних науковців стосовно охорони відомостей, які становлять таємницю кримінального процесу. Досліджено правовий механізм охорони відомостей на різних етапах кримінального провадження з урахуванням вимог Кримінального процесуального кодексу. Визначено, що за сучасним станом вітчизняного законотворчого процесу, який стосується питання регулювання кримінальних про-

цесуальних відносин і реального стану роботи правоохоронних органів, важливе місце в науковому дослідженні з питань кримінального процесу відводиться інституту охорони відомостей, які становлять таємницю кримінального процесу. Висвітлено, що під охороною відомостей розглядається сукупність різних процесуальних норм, які забезпечують таємницю проведення розслідування, що сприяє максимальному досягненню визначених завдань кримінального провадження. **Висновки.** Зроблено висновок, що до відомостей, які підлягають охороні кримінальним процесуальним законодавством, належать приписи нормативно-правового характеру, що регулюються кримінальним і кримінальним процесуальним законодавством в аспектах охорони, на розголошення без відповідного дозволу органів, які здійснюють розслідування, і прокурора інформації, яка отримана під час здійснення кримінального провадження; процесуальна робота суб'єктів кримінального провадження, що забезпечує режим таємниці розслідування. Серед іншого, до таких відомостей відносять процесуальну форму документів, що формуються для попередження безпосередньо учасників кримінального провадження стосовно недопустимості розголошення відомостей розслідування, в разі порушення чого може бути кримінальна відповідальність; предмет й обсяг інформації, яка отримана під час розслідування, щодо якої встановлюється режим нерозголошення; процесуальний статус усіх суб'єктів кримінального процесу, а саме в частині їхніх обов'язків, у формі нерозголошення відомостей розслідування; основи кримінального провадження, що формує основи формування таємниці розслідування; терміни дії заборони стосовно розголошення відомостей розслідування; процесуальні можливості органів розслідування й прокурора використати заходи забезпечення кримінального провадження для забезпечення нерозголошення відомостей розслідування.

Ключові слова: відомості, гарантії нерозголошення відомостей, засади охорони, кримінальний процес, кримінальне процесуальне законодавство.

The article was submitted 18.07.2022

The article was revised 08.08.2022

The article was accepted 29.08.2022