ESI Preprints **Not Peer-reviewed**

Execution of Requesting a Document or Information from Computer data by Defence Party

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Doi: 10.19044/esipreprint.12.2023.p537

Approved: 10 December 2023
Posted: 12 December 2023

Cite As:
Latsabidze G. (2023). *Execution of Requesting a Document or Information from Computer data by Defence Party.* ESI Preprints. https://doi.org/10.19044/esipreprint.12.2023.p537

Abstract

The purpose of this investigation was to determine whether the principle of equality and adversarial proceedings is genuinely protected when a lawyer files a motion with a court. The court is then granted the right to request documents or information from both the prosecution and the defense. However, there is concern that the prosecution, in enforcing the law, may contain a flaw that threatens to violate the principles of adversarial proceedings and equality between the parties. On May 24, 2022, the Criminal Procedure Code of Georgia (hereafter – GCPC) was amended. With a motion to request documents or information, the court can now apply to both the prosecution and the defense parties. Nevertheless, the concern remains that the prosecution's enforcement of the law may create an imbalance, jeopardizing the principles of adversarial proceedings and equality. This amendment extends the general rule of conducting investigative actions to include the request for documents or information. Consequently, the rules governing the execution of such requests have also undergone changes. The paper will examine the court's practices and conclude whether the principles of equality of arms and adversarial proceedings are violated.

Keywords: Equality and Adversarial principle, Requesting a Document or Information

Introduction

Computer data is important and needs protection by the states, as evidenced by the Convention on Cybercrime adopted in Budapest on November 23, 2001, which Georgia ratified in 2012. Accordingly, to protect computer data, regulations appeared in the GCPC, requiring compliance with certain rules when obtaining information contained in computer data.

In the first edition of Article 136 of the GCPC, the legislator defined only the authority of the prosecutor in the event of a justified assumption about the storage of information or documents important for the criminal case in a computer system or computer data storage device. The subject of Article 136 of the GCPC was not represented by the defense party, and in one of the criminal cases, the defense party requested to remove the video tape from the video cameras and pointed out that the cameras, from which public control was exercised over everything in general, were public information, to which access not only the lawyer but all the people concerned should have.

However, the Investigative Board of the Court of Appeal explained, contrary to the request of the defense, that the seizure was carried out in accordance with the rules and procedures established for ordinary investigative action, following the regulations provided for in Article 112 of the GCPC and other special articles, while the request for information was carried out according to the regime established for covert investigative action, in accordance with Articles 1432-14310 of the GCPC.

The limitation of the right of the defense party to request a document or information from computer data was appealed to the Constitutional Court and was declared unconstitutional by the decision of the Constitutional Court. After this decision of the Constitutional Court, the practice of common courts developed in two ways. In one of the criminal cases, the prosecutor wanted to obtain the information that was recorded on the cameras following the general rules for the investigation, but the judge of the district court did not approve the request and explained that the party should apply for specific information in accordance with Article 136 of the GCPC. In the second case, when the prosecution obtained information from the computer system with Article 136 of the GCPC, the judge did not approve the request and explained that the party should apply with the general rules for the investigation.

Ultimately, according to the investigation panel of the Appeal Court, the practice developed in such a way that the defense and the prosecution were given the opportunity to request a document or information from a computer. However, the problem remained that a party could not request a document or information stored in a computer system because it was covered by the undercover investigative action requirement, which meant that the

investigation in the case had to be qualified to obtain a judge's permission to conduct an undercover investigation was necessary. In order to correct the shortcomings, a number of changes were made to the GCPC to refine the investigative activities related to computer data. After the change has been made, the court can apply to both the prosecution and the defense with a request to request a document or information, and request a ruling on the request for information, although the prosecution will enforce it.

Literature Review

Subject of information request

The subject of GCPC Article 136 was not represented by the defense party. In the first edition of Article 136 of the GCPC, the legislator defined that there is a reasonable cause to believe that information or documents essential to the criminal case are stored in a computer system or on a computer data carrier; the prosecutor may file a motion with a court, according to the place of investigation, to issue a ruling requesting the provision of the relevant information or document.

Decision No. 1/1/650,699 of the Constitutional Court of Georgia dated January 27, 2017, Georgian citizen - Nadia Khurtsidze and Dimitri Lomidze against the Parliament of Georgia. According to the decision of the Constitutional Court, the normative content of the first and fourth parts of Article 136 of the GCPC was declared unconstitutional in relation to Article 40, Paragraph 3 and Article 42, Paragraphs 1 and 3 of the Constitution of Georgia.

After this decision of the Constitutional Court, the practice of common courts developed in two ways. In one case, in one of the criminal cases, the prosecutor wanted to obtain the information that was recorded on the cameras, following the general rule established for the investigation, but the district court judge did not approve the request. The prosecutor appealed this ruling to the investigative board of the Tbilisi Court of Appeal.

Investigative panel of the Tbilisi Court of Appeal explained that it was concluded that the normative content is the understanding of the norm, its essence, determination of its purpose and scope, and the norm is understood only through the normative content, by accessing and understanding it. There is no norm without the normative content, and on the contrary, the norm acquires its function thanks to the normative content. Accordingly, the norm and the normative content are the same concepts, but the norm is a fact, and the normative content is its understanding, adaptation to a specific situation. (Ruling No. 1g/757 of the Investigative Board of the Tbilisi Court of Appeal dated June 02, 2017). Accordingly, the investigation panel of the Court of Appeals considered that from the moment of publication of the decision on the website of the Constitutional Court, the

norms known as unconstitutional became invalid. The investigative board noted that with the decision of the Constitutional Court, this investigative action returned to its proper place in the system of procedural actions. The parties should be guided by the general rules established by the investigative action.

In the second case, investigative board when the prosecution obtained information from the computer system by extracting it in accordance with Articles 112, 119-120 of the GCPC, the judge of the investigative board of the Court of Appeal made a different interpretation of the decision of the Constitutional Court and indicated in the ruling that the special rule for removal is regulated by Articles 112, 119, 120 of the GCPC, and Article 136 of the GCPC is also a special (exceptional) norm that regulates the retrieval of information or documents important for criminal proceedings stored in a computer system or computer data storage. The party was given the opportunity to request a document or information from a computer medium. (Ruling No. 1g/960-17 of the Investigative Board of the Tbilisi Court of Appeal dated July 19, 2017.)

Finally, according to the investigation panel of the Appellate Court, the practice developed in such a way that the defense and the prosecution were given the opportunity to request a document or information from a computer by Article 136 of GCPC. After legislative change has been made, the court can apply to both the prosecution and the defense with a request to request a document or information, but the prosecution will execute the request, which the defense file a motion with a court. This contains a flaw and threatens to violate the principle of competition and equality between the parties. Fulfilling Information Requests According to the first part of Article 136 of the GCPC: "If there is a reasonable cause to believe that information or documents essential to the criminal case are stored in a computer system or on a computer data carrier, the prosecutor or the defense may file a motion with a court, according to the place of investigation, to issue a ruling requesting the provision of the relevant information or document. In the case of urgent necessity, investigative actions provided for by this article may be carried out on the basis of a prosecutor's resolution in accordance with the procedure determined by Article 112(5) of this Code." According to Section 41 of the same article, the general rule for conducting investigative action applies to the request for a document or information (Article 111 of the GCPC), The rule of investigative action conducted by a court decision (Article 112) and general provisions on drawing up the minutes of investigative action (Article 134).

Initially, court practice was developed in such a way that when the defense side applied to the court with a motion to request information and the court granted this motion, the author of the motion was responsible for

executing the request for information, and the court ordered the defense side to request information and execute the ruling. An example of this is the ruling of the investigative and pre-trial session judge of the Tbilisi City Court dated October 15, 2022, in case #22579, by which the motion of the defense side was satisfied and the defense side was given the right to subpoena the video recording in the mobile phone owned and in the possession of the witness. The execution of the judgment was assigned to the defense side, which was given a 30 (thirty-day) deadline to execute the judgment.

In the second case, according to the ruling of the investigative and pre-trial session judge of Tbilisi City Court on March 20, 2023, in case #6918-23, the petition of the defense side was satisfied, by which the defense side was given the right to request the pictures in the mobile phone owned and in the possession of the witness. However, in this case, the court did not order the defense of the author of the petition to execute the judgment, but the investigators of the main Investigation Division of the Tbilisi Police Department of the Ministry of Internal Affairs, who were not conducting the investigation of the given case. Also, in this ruling, the court ordered that the investigator should be selected by the head of the investigative body and his identity and contact information should be disclosed to the defense before conducting the investigative action requested by the petition.

Despite the fact that on the basis of the court's decision, the investigator conducts the investigation, who cannot be the same person who conducts the investigation of the given case, and the investigator must be selected by the head of the investigative body, This still does not reduce the risk that the prosecution will not know until the end of the investigation what information the defense is trying to request, because the investigators are people working in the same room and space.

Conclusion

Investigators, who work in the same space and in many cases in the same room, have very high risks that based on the request of the defense side, what information should be requested will become known to the investigator of the case. Also, the law does not contain firm legal regulations as to what legal responsibility will be imposed on a person who does not take measures to prevent information requested by the defense side from being disclosed to the prosecution side. It would be better for the legislator to give the defense itself the opportunity to request information in order to

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