





Inadmissibility of Information Disclosure concerning the Implementation of the Operational-search Activity: Shortcomings of Legal Regulation

Maxim Leonidovich Rodichev¹^a, Alexander Nikolaevich Litvinenko²^b,
Ardak Maratovich Karl³^c and Timur Chingizovich Akhmedov⁴^d

¹Department of operational-search activity of internal affairs bodies, St. Petersburg University of the MIA of Russia, St. Petersburg, Russia

²Department of economic security and social economic management, St. Petersburg University of the MIA of Russia, St. Petersburg, Russia

³Department of operational-search activity, Kostanai academy of the MIA of the republic of Kazakhstan, Kostanai, Kazakhstan

⁴Department of economic security and social economic management, St. Petersburg University of the MIA of Russia, St. Petersburg, Russia

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Abstract: The issue of information disclosure concerning the implementation of the operational-search activity is extremely relevant for modern legal practice, as this information disclosure significantly affects the rights and freedoms of the person and citizen, legitimate interests of society and the state. In 2020, the Federal Law “Concerning the operational-search activity” was supplemented by Clause 12.1 “Inadmissibility of information disclosure concerning the implementation of the operational-search activity.” In connection with this circumstance, there was an interest in the investigation of the issue of information disclosure concerning the implementation of the operational-search activity as to the extent to which the legislative novel is able to solve the existing problems in this area. The purpose of the investigation was to analyze the rules of Clause 12.1 “Concerning the operational-search activity” and to identify the shortcomings of legal regulation contained. The investigation identified existing law enforcement problems and formulated proposals for changes to the Federal Act “Concerning the operational-search activity”.


1 INTRODUCTION


December 30, 2020 the Federal Act “Concerning the operational-search activity” (hereinafter referred to as the FA “Concerning the OSA”) was supplemented by Clause 12.1 “Inadmissibility of information disclosure concerning the implementation of the operational-search activity.”


The issue of information disclosure concerning the implementation of the operational-search activity


(hereinafter referred to as the OSA) is extremely relevant for modern legal theory and OSA practice, as this information disclosure significantly affects the rights and freedoms of the person and citizen, legitimate interests of society and the state.

The issues of ensuring individual rights in the implementation of the OSA were considered in the works of Gusev V.A. and Lugovik V.F. (Gusev, V. A., Lugovik, V. F., 2019), Chechetin A.E. (Chechetin, A. E., 2020, Chechetin, A. E., 2020,

^a <https://orcid.org/0000-0002-9334-0682>

^b <https://orcid.org/0000-0003-0599-4027>

^c <https://orcid.org/0000-0002-8258-1915>

^d <https://orcid.org/0000-0003-1366-030X>

Shatokhin, I. D., Chechetin A. E., 2020), Shatokhina I.D. (Chechetin, A. E., Shatokhin, I. D., 2019), Zhelezniak N.S. (Zhelezniak, N. S., 2019. Zhelezniak, N. S., 2018. Zhelezniak, N. S., 2021.), Shashina D.G. (Shashina D.G., 2020), Katkova S.V. (Katkov S. V., Kornaukhova N. G., 2019) and Shkabina G.S. (Shkabin, G. S., 2017).

Among foreign researchers, it should be noted S. Gearty (Gearty, S. 2006), E. Neumayer (Neumayer, E. 2005), M. Nussbaum (Nussbaum, M., 2007), D. Tasiulas (Tasiulas, D., 2020) , A. Wallace (Wallace, A., 2020) и K. Stoeckl (Stoeckl, K., 2020), whose works concerning the issue of ensuring individual rights are cited most often.

The novelty of our investigation is stipulated to the small number of open scientific publications devoted to the norms of Clause 12.1 of the FA "Concerning the OSA", including scientific and practical comments to this clause.

The hypothesis of the investigation is the assumption that the modern legal regulation of the inadmissibility of information disclosure concerning the implementation of the OSA is imperfect and can cause significant problems of the law enforcement.

The purpose of the investigation is to analyze the rules of Clause 12.1 of the FA "Concerning the OSA" and to identify the shortcomings of legal regulation contained.

Achievement of this goal presupposes the solution of such tasks as the investigation of the theoretical and legal foundations, as well as the existing practice of information disclosure concerning the implementation of the OSA.

2 MATERIALS AND METHODS

During the course of our investigation, we conducted an analysis of the rules of the FA "Concerning the OSA" as well as the acts of the prosecutor's response to violations of legislation, which were made as a result of the disclosure concerning the implementation of the OSA.

The empirical basis of the investigation was the mass media issues (hereinafter referred to as the news media) concerning the implementation of the OSA contained on the Internet. These issues were considered for the use in the news media of the OSA results, the legality of the said use, as well as the possibility of violations of the rights and freedoms of the person and the citizen, the legitimate interests of society and the state.

In addition, we have investigated scientific publications on the use of OSA results.

The investigation used a modelling method aimed at identifying possible problems with the application of the current version of Clause 12.1 of the FA "Concerning the OSA".

3 RESULTS AND DISCUSSION

FA "Concerning the OSA" is supplemented by the Clause 12.1 "Inadmissibility of information disclosure concerning the implementation of the operational-search activity" and it should be recognized as an attempt by the legislator to resolve a number of current problems, but it appears to be an attempt to fail.

The main drawback of the rule is the uncertainty of the concept for "Information concerning the implementation of the OSA".

The legislator does not disclose the concept in any way.

Incl. Part 1, Clause 12.1 of the FA "Concerning the OSA" declares prohibition only against information disclosure containing in requests sent to citizens and organizations during the implementation of the OSA.

Thus, the content of Clause 12.1 of the FA "Concerning the OSA" leaves open the question of what information the legislator proposes to prohibit - the information contained in requests sent to citizens and organizations in the OSA implementation process or any information concerning the implementation of OSA.

The content of such rules in Part 1 of the relevant clause involves determining the range of information that is prohibited.

For example, Part 1, Clause 161 "Inadmissibility of preliminary investigation data disclosure" of the Russian Federation Code of Criminal Procedure establishes: "Preliminary investigation data are not subject to disclosure, except in Parts of the second, fourth and sixth of this Clause".

Part 1, Clause 12.1 of the FA "Concerning the OSA" does not prohibit any information disclosure about the implementation of the OSA.

Despite the fact that Part 3, Clause 12.1 of the FA "Concerning the OSA" contains a reference to the prohibition on publicity of information concerning the implementation of the OSA, this does not give the right to broadly interpret the concept under review and to refer to it any information about the implementation of the OSA, since the purpose of Part 3, Clause 12.1 of the FA "Concerning the OSA" is to consolidate cases where the disclosure of relevant information is possible, the information provided in

the previous parts of Clause 12.1 of the FA "Concerning the OSA" should be understood under the information provided by the implementation of the OSA.

Moreover, according to an explanatory note to the legislative draft, which allows a better understanding of the idea of the legislator, "the supplementation to the Federal Act "Concerning the operational-search activity" is aimed at the inadmissibility of information disclosure contained in the requests, sent to citizens and organizations in the process of carrying out the operational-search activity, with the exception of information announced in an open court session, set out in complaints against decisions and actions of bodies carrying out the operational-search activity, as well as disseminated by authorized bodies in the news media, the Internet or in another public way" (Legislative system. Legislative draft No.1070431 7).

Thus, formally, Clause 12.1 of the FA "Concerning the OSA" contains a prohibition only concerning the information disclosure contained in the requests of the authorities implementing the OSA.

It should be noted that the rules of Clause 12.1 of the FA "Concerning the OSA" do not prohibit the information disclosure that may become known to citizens and organizations as a result of other law enforcement intelligence measures (hereinafter referred to as the OSA), including those conducted in a transparent form or containing disclosure elements.

The OSA practice shows that these measures, at a minimum, may include: a survey; collecting samples for comparative research; check purchase; observation of premises, buildings, structures, areas and vehicles; sting operation.

The introduction of a legal prohibition concerning the information disclosure that became known to citizens as a result of a single OSA - "inquiry" seems, to say the least, strange.

In addition, the above suggests that the title of Clause 12.1 of the FA "Concerning the OSA" does not correspond to its contents, as the rules of this article prohibit the information disclosure not concerning the implementation of the OSA, but only concerning the implementation of the "Inquiry" OSA in the form of referrals to citizens and organizations.

Clause 12.1 of the FA "Concerning the OSA" for the first time in domestic practice provides for the possibility of making public disclosure information concerning the implementation of the OSA by the body implementing the OSA, the investigator, the interrogator, the prosecutor or the court in the mass media (hereinafter referred to as the news media), on the Internet or in other public way.

It seems that the current practice of making public information disclosure concerning the implementation of the OSA raises doubts about its legality.

Firstly, in the course of making public disclosure information concerning the implementation of the OSA, the personal data of detainees, victims, and other persons are often disclosed, a video of the detention is presented with a demonstration of the appearance of objects and participants in the OSA, other information is disclosed, as a result of which their rights to immunity may be violated private life, personal and family secrets, protection of one's honor and good name, provided by Part 1, Clause 23 of the Constitution of the Russian Federation.

It should be borne in mind that persons whose information about their detention was distributed in the news media, but who were not prosecuted, in accordance with Part 1, Clause 133 of the Code of Criminal Procedure of the Russian Federation, have the right to rehabilitation, including compensation for property damage, elimination of the consequences for moral harm and restoration of labor, pension, housing and other rights.

The problem is so long and acute that it was reflected in the submission of the Prosecutor General's Office of the Russian Federation on 30.11.2006 No. 7/2-10034k-2006 "Concerning the elimination of violations of Federal Law and the disclosure of the preliminary investigation data" This submission notes that the premature and uncontrolled data disclosure causes harm to the participants in criminal proceedings and contains a requirement "to take measures to protect information about the established circumstances of the case, about the evidence collected, about the tactics and methods of conducting an investigation, the persons who committed the crime, as well as about the applicants. and other participants in criminal proceedings, from unauthorized access and illegal distribution".

Unfortunately, the submission was largely ignored by the law enforcement intelligence and investigative bodies and had so far been one of the few acts of legislation devoted to the problem has been considering.

Secondly, the news media, in their issues, sometimes directly use the OSA results, which refers to information, materials, documents and other material media obtained in accordance with the FA "Concerning the OSA".

The consideration of news media issues allows us to conclude that most often the news media use such OSA results as audio and video recordings, photographs taken during the OSA, as well as

information received from employees of operational units.

The legislator is limited in its ability to use the OSA results: it can only be carried out for purposes expressly provided by the FA "Concerning the OSA".

There is no provision for the news media to use the OSA results by the FA "Concerning the OSA".

Thirdly, arbitrary dissemination of information concerning the implementation of the OSA can cause the negative consequences: information disclosure constituting a state secret; decoding of persons assisting operational units in the preparation and conduct of OSA; concealment of accomplices in criminal activity; loss of evidence; violation of rights and the emergence of threats to the legitimate interests of participants in criminal proceedings.

Taking into account this circumstance, it should be assumed that the distribution of information by the news media concerning the implementation of the OSA, before a criminal case is considered in court, it is advisable only for solving the tasks of the OSA: for example, to search for criminals or missing persons, to identify additional facts of criminal activity, to identify detained persons or found corpses, for carrying out operational combinations, as well as in other necessary cases.

Fourthly, the premature dissemination of information concerning the implementation of the OSA generates negative social processes, including doubts about the legitimacy of the OSA conducted and the unnecessary criticism of the bodies participating in the OSA. Given this circumstance, it appears that the distribution of information concerning the implementation of the OSA, for purposes not related to the immediate resolution of the objectives of the OSA, should be mainly after the conviction of the court.

4 CONCLUSIONS

So, the modern legal regulation of the information disclosure concerning the implementation of the OSA is imperfect and can cause significant problems of the law enforcement.

In order to avoid these problems, we present the following changes and supplementations to the FA "Concerning the OSA".

Firstly, Clause 12.1 "Inadmissibility of information disclosure concerning the implementation of the operational-search activity" should be stated as follows:

"Information concerning the implementation of the operational-search activity is not subject to disclosure, except in cases provided by this clause.

This information may be made public disclosure in order to solve the tasks of operational search activities, the body carrying out the operational-search activity, with the permission of its leader, and only to the extent that it will be considered permissible.

The prohibition for public information disclosure concerning the implementation of the operational-search activity does not apply to information that:

publicized in open court or made public during pre-trial proceedings with the permission of the investigator, the interrogator;

set out in statements, complaints and other documents when challenging the decisions or actions of the bodies (officials) carrying out the operational-search activity, investigator, interrogator;

is distributed by the body carrying out the operational-search activity, investigator, interrogator, prosecutor or court in the news media, on the Internet telecommunications network or other public way.

Disclosure of personal data by the body carrying out the operational-search activity is not allowed in order to prevent general offences.

When disclosing information concerning the implementation of the operational-search activity, the rights and freedoms of a person and a citizen to privacy, personal and family secrets should be protected.

For the transfer and disclosure of this information, officials of the authorities engaged in the operational-search activity, as well as persons to whom this information was entrusted in the conduct of the operational-search activity or became known by service or work, are liable under current law".

Secondly, in order to legalize the possibility of using the OSA results by the news media, including the possibility of demonstrating audio and video recordings, photographs taken during the OSA, it seems advisable to supplement Clause 11 of the FA "Concerning the OSA" by the rule providing the possibility of employing the OSA results to the news media.

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