



Russian Law Enforcement Intelligence-Gathering Legislation: Problems and Ways to Address Them, Taking into Account the Experience of Some CIS Countries

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Abstract. *Introduction:* law enforcement practice and scientific research in the field of the theory of intelligence-gathering activities prove that current Russian intelligence-gathering legislation contains quite a few legal gaps and contradictions. The article provides a scientific analysis of a number of problematic issues concerning legal regulation of intelligence-gathering activities conducted in the Russian Federation, with an emphasis on the functioning of operational units of the penal system of the Russian Federation. *Aim:* to work out proposals to improve national intelligence-gathering legislation by reviewing intelligence-gathering legislation of CIS countries, analyzing the works of scientists on the theory of intelligence-gathering activities and regulatory framework for the work of operational units. *Methods:* comparative legal method, theoretical methods of formal and dialectical logic, specific scientific methods: legal-dogmatic method, interpretation of legal norms. *Results:* the article considers the inconsistency between the purpose of intelligence-gathering activities enacted in law and both the law enforcement practice and its legally defined tasks, the absence of a number of significant tasks, as well as the grounds for conducting intelligence-gathering activities by operational units of the penal system, the lack of legal regulation of the content of intelligence-gathering activities and their procedure. To prove the existence of these shortcomings, we analyze the most common intelligence-gathering measures such as questioning and inquiries. Having studied intelligence-gathering laws of several CIS countries we found some norms regulating intelligence-gathering activities in the penitentiary system, the use of which, in our opinion, is possible in Russian context. Based on this, we make proposals to improve legal regulation of intelligence-gathering activities, in particular, by disclosing the concept of each intelligence-gathering activity in the norms of intelligence-gathering law. *Conclusions:* the article develops and substantiates proposals for improving Russia's intelligence-gathering law and concludes that it is necessary to transform fundamentally the legislative regulation of intelligence-gathering activities in Russia by adopting the appropriate code.

Keywords: intelligence-gathering activities; intelligence-gathering measures; shortcomings; problems; intelligence-gathering law; theory of intelligence-gathering activities; intelligence-gathering code.

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Introduction

Many scientific works point out that current intelligence-gathering legislation has its flaws, among other things in the regulation of the foundations of intelligence-gathering activities (hereinafter also referred to as IGAs) – the implementation of intelligence-gathering measures (hereinafter also referred to as IGMs) [1; 2; 3; 17]. Scientists suggest what should be done to

improve intelligence-gathering law, but unfortunately their suggestions do not find legislative support. In 2015 an attempt was made to radically resolve the existing situation by adopting a new federal law – the intelligence-gathering code [7], but due to certain flaws in its draft version, the initiative was rejected at the stage of coordination with the interested ministries and departments – subjects of intelligence-gathering activities.

Based on the above, we consider it appropriate to embark on a brief analysis of major issues in intelligence-gathering legislation, considering these issues in relation to the activities of operational units of the penal system of the Russian Federation (hereinafter – RF penal system). First of all, we need to identify a terminological problem, the existence of which may affect the results of the court's legal assessment of the results of intelligence-gathering activities. We are talking about spelling. Unfortunately, even this aspect has difficulties that can cause legal implications. As we know, Federal Law 144-FZ of August 12, 1995 "On intelligence-gathering activities" [Russian: "Об оперативно-розыскной деятельности"] (hereinafter – Federal Law "on IGAs") contains the fundamental notion "оперативно-розыскная деятельность" [intelligence-gathering activities] in which the word "розыскная" is spelled with an "o". The specified variant of spelling is traditional and is used in all scientific and educational literature on IGAs published before the beginning of the 21st century. At the same time, in 2006, editor-in-chief of the journal *Operativnik* (syshchik) [Field Investigator (Detective)] Professor A.Yu. Shumilov, answering readers' questions, published an explanation of the reference service of the Russian language, according to which the spelling "розыскной" (with an "a") has been determined as normative by the Russian Spelling Dictionary of 1999 and by the Comprehensive Explanatory Dictionary of the Russian Language of 2001. One should spell the words "розыскной", "розыскник", "оперативно-розыскной" etc. with an "a". This publication initiated broad discussions among lawyers who were divided into supporters of the traditional spelling and the new version. The problem was complicated by the fact that the legislator retained the traditional spelling in the Federal Law "On IGAs" and began to use the new spelling in other laws. Thus, Article 12 of Federal Law 3-FZ of February 7, 2011 "On the Police" provides for the duty of the police to "carry out intelligence-gathering activities", where "intelligence-gathering activities" is spelled "оперативно-розыскная деятельность" with an "a" in the word "розыскная". Moreover, in 2014, Article 65 of Federal Law 229-FZ of October 2, 2007 "On Enforcement Proceedings" was supplemented by Part 1.1, which contained the term "исполнительно-розыскные действия" where the word "розыскные" was spelled with an "a". We consider it necessary to explain our own viewpoint on the correctness of spelling of this

word: based on the opinions of experts in the field of both the Russian language [10] and jurisprudence [19] we consider the spelling "оперативно-розыскной" (with an "a") preferable, but it is possible to use it only after appropriate amendments have been made to the Federal Law "On IGAs".

Problematic issues of modern legislative regulation of the goals and objectives of intelligence-gathering activities

The main postulate of modern intelligence-gathering activities is their goal, which is defined in Article 1 of the Federal Law "On IGAs"; the goal is to protect a person and a citizen, society and the state from criminal encroachments. Analyzing other norms of the Federal Law "On IGAs", as well as the current practice of operational units, we have to state that the modern purpose of IGAs is much broader than the specified one. Thus, a thorough study of Article 2 of the Federal Law "On IGAs" entitled "Tasks of intelligence-gathering activities" gives us, in addition to tasks related to combating crime, the search for missing persons, obtaining information about events or actions (omissions) that pose a threat to the security of the Russian Federation, the establishment of property subject to confiscation. We emphasize that we have no doubt about the importance and significance of these tasks, but we cannot help but point out the discrepancy we have identified.

Thus, considering the legislative regulation of the problems of modern intelligence-gathering activities in the Russian Federation, we should note that the list specified in Article 2 of the Federal Law "On IGAs", not only reflects actual law enforcement practice approved by courts' rulings, but also contradicts several articles of the Federal Law "On IGAs" and other effective federal laws. We consider it appropriate to emphasize once again that the above list is concise and it includes tasks aimed at combating crime, searching for different categories of persons (among which, however, there are no convicts), gathering information about the events or actions (omissions) that pose a threat to Russia's security, as well as the task of establishing the property that is subject to confiscation, the last task being uncommon for most law enforcement agencies.

Substantiating the above theses, we find it necessary to touch upon the following aspects. First, the grounds for conducting intelligence-gathering activities, given in Article 7 of the Federal Law "On IGAs", are much broader than these tasks and include grounds that are actu-

ally related to the listed tasks, and those that go beyond them. So, in our opinion, the grounds provided for in Parts 2 and 3 of Article 7 of the Federal Law "On IGAs" do not correspond to Article 2 of the Federal Law "On IGAs". They deal with intelligence-gathering verification work, which consists in collecting information about the reliability of various categories of persons, as well as checking the information provided by citizens who are filling the positions or applying for a number of positions in the state, municipal and other services.

Another problem, in our opinion, lies in the contradiction between the Federal Law "On IGAs" and Article 84 of the RF Penal Enforcement Code that sets forth the tasks of intelligence-gathering activities in correctional institutions. We think that significant differences from the Federal Law "On IGAs" contain the problem of ensuring personal safety of various categories of persons, combating violations of the prison regime, and search for escaped convicts. At the same time, we should emphasize that violations of the established procedure for serving a sentence are not crimes, therefore, the task of combating them is not provided for in Articles 1, 2, 7 of the Federal Law "On IGAs", which makes it impossible to conduct intelligence-gathering measures to address this task. Thus, there is a situation in which there is a "target" (violations of the established order of serving a sentence), there is a need to "fire" (Article 84 of the RF Penal Enforcement Code), there is a "weapon" (IGAs), but there is no "ammunition" (reasons to conduct IGMs).

The opinion about the need to eliminate this shortcoming was formed by a number of scientists who study intelligence-gathering problems. This issue is not new: back in 1994, N.N. Vasil'ev and A.F. Kvasha wrote about it, proposing to supplement Article 7 of the Federal Law "On IGAs" with a part that establishes such a basis for conducting intelligence-gathering activities as the need to obtain information, the use of which ensures legal order and legality in penitentiary institutions; Professor K.K. Goryainov spoke about it in 2006, [4]; in 2012, Professor V.M. Atmazhitov pointed out that "combating crime is indeed the most important, but not the only component of the goal of such activities. In the process of their implementation, tasks that go beyond the direct fight against crime are often solved as well. Such tasks, in particular, include ... maintaining the regime established by the penal enforcement legislation in correctional institutions..." [2]. However, the

situation has not changed over the years. Thus, we can say that at present, with regard to the legal framework for the activities of operational units of the penal system, there is a situation where there is a task, but there is no legislatively defined mechanism to address the task.

Moreover, a similar problem arises in the implementation of the provisions of Article 18.1 of the RF Penal Enforcement Code; according to this article, IGAs in the execution of non-custodial sentences are conducted by operational units of the RF penal system on their own or in cooperation with other actors of IGAs, and the search for those who evade such punishment is conducted by operational units of the RF penal system. Based on the absence of other norms, in accordance with the Federal Law "On IGAs", it is obvious that IGAs in relation to this category of convicts can be carried out only to detect, prevent and solve crimes; as for the evasion of a convict from serving the main non-custodial sentence, it is not considered a crime. The exception, in accordance with Article 314 of the RF Criminal Code, is malicious evasion from serving a custodial sentence.

Exploring ways to solve this problem, we decided to turn to the intelligence-gathering legislation of a number of CIS countries, since after the collapse of the USSR the constituent republics each went their own way in the field of legislative regulation of IGAs, having gained noteworthy experience.

Considering the norms of the Law of the Republic of Kazakhstan dated September 15, 1994 No. 154-XIII "On intelligence-gathering activities", we find that the tasks of IGAs in this country are much broader than those provided for by Russian intelligence-gathering law, and they are aimed not only at combating crime. Thus, one of their tasks is to ensure the observance of the established regime and security of individuals in penitentiary institutions. In addition, a positive aspect of Kazakh intelligence-gathering legislation is that it contains such tasks that in Russia are either enshrined in laws other than the Federal Law "On IGAs" (for example, ensuring the safety of convicts), or are not regulated at all (ensuring the protection of state or other legally protected secrets, including commercial ones, etc.) [9].

The tasks defined by intelligence-gathering legislation of the Republic of Belarus also deserve our attention. In contrast to similar Russian norms, they provide for the following aspects that are relevant in Russia as well: searching for convicts, identifying unidentified

corpses, establishing personal data of citizens who cannot provide information about themselves, ensuring the safety of confidants, their relatives, and other citizens in accordance with the law, carrying out intelligence-gathering verification work mentioned above, as well as protecting state secrets [8]. What we have said above proves that Belarusian law provides for tasks that are largely related to the grounds for conducting an IGMs contained in the Federal Law "On IGAs", but are not included in the list of tasks that IGAs in Russia are dealing with. At the same time, the Belarusian lawmaker does not legally define the task of IGAs to ensure the established regime in correctional facilities.

We have analyzed intelligence-gathering legislation of the Republic of Azerbaijan, Republic of Kyrgyzstan, Republic of Moldova, Republic of Tajikistan and we have found out that the lists of IGAs tasks set by the relevant laws are somewhat broader than those in Russia: in most cases, they include searching for missing citizens, protection of the state border, countering the intelligence and subversive activities of special services of foreign countries, etc. However, the task of ensuring the established regime in correctional institutions is not contained in intelligence-gathering legislation of these countries (with the exception of the law "On IGAs" of the Republic of Armenia, under which one of the aims of IGAs is protection from *illegal* (emphasis added. – A. A.) encroachments, and one of their tasks¹ is to ensure smooth operation of penal institutions").

Gaps in the legal regulation of intelligence-gathering activities

Continuing the analysis of the norms of current intelligence-gathering law, we cannot but look into the provisions of Article 6 "Intelligence-gathering measures" of the Federal Law "On IGAs". Part 1 contains an exhaustive list of IGMs that are allowed to be conducted in the Russian Federation, but it does not include either the concept of an intelligence-gathering measure or the interpretation of the content of the listed IGMs. As a result, one gets an opportunity to interpret the law "On the IGAs" arbitrarily in terms of understanding ways to implement IGAs, as in accordance with Article 1 of the Federal

¹ Article 4 of the law "On intelligence-gathering activities" of the Republic of Armenia is headlined "The goals of intelligence-gathering activities". However, given that the goal is formulated in Article 3 of the law under consideration, and that Article 4 includes 16 items, and taking into account possible inaccuracies of translation, we considered it permissible to use (similar to Russian intelligence-gathering law) a more accurate term such as "tasks".

Law "On IGAs" IGAs are implemented by carrying out IGMs. I.D. Shatokhin and A.E. Chechetin point out that one of the common problems raised in citizens' appeals to the Constitutional Court of the Russian Federation is the uncertainty of the rules governing the conduct of the IGMs, primarily Article 6 of the Federal Law "On IGAs" [15, p. 64].

Speaking about intelligence-gathering legislation of CIS countries we note that the laws of Kazakhstan and Tajikistan disclose the content of each IGM in Article 1, which provides definitions of the main concepts (we note that, in our opinion, a similar article would be very much in demand in Russian intelligence-gathering law). The law "On intelligence-gathering activities" of the Republic of Kyrgyzstan defines the basic concepts, including the content of IGMs, in Article 2. The laws "On intelligence-gathering activities" of the Republic of Armenia and Republic of Belarus reveal the content of IGMs in the corresponding norms dealing with IGMs.

The problem concerning the absence of legislative definitions of IGMs has been repeatedly raised in the scientific press [13; 20]; however, despite this, the legislator ignores it. We note that the complete lack of regulation of IGMs entails questions that are answered exclusively by law enforcement and judicial practice; this cannot be permissible in such a significant area, which is associated, among other things, with the restriction of human and civil rights and freedoms.

When studying the IGM such as questioning, which goes first in Part 1 of Article 6 of the Federal Law "On IGAs", the following questions arise: is it possible to conduct a questioning without the consent of the interviewee? is it necessary to explain to the interviewee the content of Article 51 of the Constitution of the Russian Federation? should the participation of a lawyer (defender) be ensured if the interviewee insists on their participation? is it possible to use the results of a questioning as evidence in criminal proceedings? In addition, we should recall that IGAs, according to Article 1 of the Federal Law "On IGAs", can be carried out publicly and secretly, and therefore we shall supplement the list with the following question: is it possible to conduct a questioning indirectly? This problem is not far-fetched, but has a direct practical significance, since in the modern world both video communication and the exchange of text and image messages using special computer programs (Skype, Zoom, Viber, WhatsApp, etc.) are possible. Thus, is real-time text messaging

a questioning? with pauses between lines of up to several hours? does one of the interviewees have the right to provide the materials of such a questioning as evidence, without having a court decision to conduct the questioning?

Once again, we emphasize that in answering these questions, we only express the author's point of view, whereas, in our opinion, comprehensive conclusions on this issue should be contained in intelligence-gathering legislation. So, we believe that conducting a public questioning is possible only with the consent of the interviewee, expressed orally or in writing. At the same time, Article 51 of the Constitution of the Russian Federation must be explained to the interviewee, but only if the questioning is conducted without encoding the purpose and is made out by a written explanation of the person or recorded using video and audio equipment. Only if these conditions are met, in our opinion, the questioning materials can be subsequently used in criminal proceedings. If the interviewee insists on the participation of a lawyer (defender) in the interview, then this participation should be ensured, as well as in cases that do not involve the introduction of the results of a questioning in the criminal procedure (only at the initiative of the interviewee). Answering the next question, we should repeat that due to the development of communication technologies it is currently unacceptable to reduce the questioning only to a conversation (and even more so to a direct conversation), based on the understanding of conversation as interpersonal speech communication. In this case, such forms of communication as dialogues conducted using social media, e-mail, text messaging, specialized computer programs that provide visual and auditory communication of interlocutors who are at different places, as well as other forms of communication that enable written communication of users, remain outside the field outlined by many existing definitions of the questioning in the scientific literature. As for the use of the materials of an indirect questioning as evidence, it should be recognized that in the absence of a written consent of the interviewee, it is currently necessary to obtain a court decision to conduct it (no matter how unusual this may sound for law enforcers). The problem is that, in accordance with the decision of the Constitutional Court of the Russian Federation, "any information transmitted, stored and established with the help of telephone equipment is considered to be information constituting... the secret of telephone conversations" [11]. Given

that the vast majority of so-called messengers are used on devices that are used for telephone conversations, we come to the conclusion that the content of such a questioning is the secret of telephone conversations. At the same time, we point out that the possibility of using as evidence the results of the survey, including an indirect survey and a survey conducted by an operational officer without disclosing the affiliation with operational units, should be enacted in intelligence-gathering law.

Many questions arise when analyzing the content of the next IGM, making inquiries, contained in the Federal Law "On IGAs". The main ones are: how to understand the content of this measure? What legally establishes the duty of officials and citizens to respond to the requests of the subjects of IGAs? is a court order required to request information from banking organizations, healthcare institutions, notaries, tax authorities, or to study information contained in social media profiles with restricted access (and is this part of the IGM under consideration)?

Let us try and answer these questions. So, in our opinion, making inquiries is the study of operational information obtained in three ways, two of which can be considered classic due to their constant mention in the scientific literature: the study of information carriers to which there is permanent or temporary access, and sending requests to citizens and organizations. It should be particularly noted that this form was indirectly defined in Article 12.1 of the Federal Law "On IGAs", the content of which will be discussed below. At the same time, we would like to emphasize once again that our time is a time of constant technological progress, and domestic legislation and departmental acts do not always keep pace with it. Based on the above, we consider it necessary to highlight another form of conducting IGMs – the use of search queries in various electronic information networks, primarily on the Internet. The World Wide Web is a repository of a huge amount of data, access to which is a matter of skill and technology. At the same time, in our opinion, the use of technical and software tools to access a social media profile that is closed to all users forms part of a different IGM – obtaining computer information, for which judicial authorization is required.

Continuing the analysis of legal issues of making inquiries, we should point out the existing legal conflict. On the one hand, Article 8 headlined "Conditions for conducting intelligence-gathering activities" in the Federal Law

“On IGAs” provides an exhaustive list of citizens’ rights that may be restricted in the course of IGAs: the secrecy of correspondence, telephone conversations, postal, telegraph and other communications, the right to inviolability of the home. However, Part 5 of Article 26 “Banking secrecy” of Federal Law 395-1 dated December 2, 1990 “On banks and banking activities” contains an instruction that “certificates on transactions and accounts of legal entities and individual entrepreneurs, on transactions, accounts and deposits of individuals are issued on the basis of a *court decision* (emphasis added – A. A.) by a credit institution to officials of bodies authorized to carry out intelligence-gathering activities¹ while performing their functions of detecting, preventing and combating crimes”. According to the analysis of this norm we see that these data can only be provided if one of the four objectives of Article 2 of the Federal law “On IGAs” are solved, and are not provided if other problems are addressed, for example, the task of operational units of the penal system to combat violations of prison regime. The resolution of the existing conflict, in our opinion, is possible only by changing the norms of intelligence-gathering law. As for the legal regime of access to other closed information that constitutes medical, tax, notary and other types of secrets provided for by domestic legislation, its absence indicates the existence of a legal gap that can be eliminated only by making amendments to intelligence-gathering law. At the same time, to date, operational units mostly have access to this information, which is provided depending on the practice that has developed in a particular region.

We find it necessary to highlight one more significant aspect: Russian legislation does not contain sanctions for violating the norms of the Federal Law “On IGAs”. Officials who violate this law are subject to disciplinary liability or criminal prosecution (if the action contains its own components of the crime), whereas citizens in the same situation cannot be held liable; it indicates voluntary action of the latter in the field of intelligence-gathering relations. In this regard, the ban on disclosure of information on the implementation of intelligence-gathering activities introduced by the legislator on December 30, 2020 (Article 12.1 of the Federal Law “On IGAs”) is somewhat unjustified from a legal point of view: “The information contained in inquiries sent to citizens and organizations in

the process of carrying out intelligence-gathering activities is not subject to disclosure”². Moreover, due to the lack of a definition of the IGM such as “making inquiries” (and, possibly, at the will of the legislator), there is no obligation for citizens and organizations to respond to requests received from operational units.

Unfortunately, when considering each IGM, we can single out numerous legal issues, and therefore, having demonstrated this by two examples, we consider it necessary to draw the reader’s attention to another important aspect from the point of view of ensuring human and civil rights and freedoms – coercion during IGMs. Like some of the others listed above, this issue has been repeatedly raised by various scientists [5; 12, p. 62; 14; 18, p. 106], but has not found its legislative consolidation. The problem is the following: the number of law enforcers, pursuant to the provisions of Article 1 of the Federal Law “On IGAs” that states that IGAs may be conducted publicly and privately, organize transparent IGMs (of course, without the consent of the persons in respect of whom the IGMs are conducted). In some cases, this involves certain members of the public who perform the function of witnesses not provided for by the Federal Law “On IGAs”. The regulation contained in Part 2 of Article 15 of the Federal Law “On IGAs” provides for the procedure for registration of documents, objects, and materials seized during a public IGM, which allowed not only law enforcement officers, but also some scientists [16] to come to the conclusion on the legality of these actions. As a result, the investigative actions provided for by criminal procedure law are replaced by a surrogate that does not meet the requirements of legality. At the same time, it must be stated that the court does not prohibit this activity, but even accepts the information obtained in this way as evidence. We categorically reject this practice, agreeing with the unequivocally expressed position of professors A.E. Chechetin [14] and V.K. Znikin [5]: public IGMs cannot and should not replace investigative actions.

However, there may be cases in which it is necessary to conduct public IGMs, including those with the seizure of something. In our opinion, this is possible in two ways: if there is an unambiguous consent of the person or if a court order is obtained. In both situations, the rule of law requires the participation of individuals who can later testify in court about what they

¹ In Federal Law 395-1 dated December 2, 1990, the word “розыскной” and its derivatives are also spelled with an “o”.

² Provided that they do not contain information that constitutes a state secret.

saw and heard during the IGM. As already noted, current intelligence-gathering law does not provide for such participation, so law enforcers refer to these persons in different ways: present persons, members of the public, etc. We believe that it is necessary to legally define their status and functions when conducting public IGMs.

Findings

Summarizing all of the above, we note the following. Having analyzed the works of other researchers and on the basis of our own works, we identify only some of the problems in current intelligence-gathering law. Obviously, it is impossible to eliminate them by making one-time changes to the current Federal Law "On IGAs"; this work requires a comprehensive scientific approach to the development and adoption of a new law that would regulate numerous aspects of intelligence-gathering activities, without interfering with its tactics. Here it is necessary to maintain a balance of interests, on the one hand, making sure that law enforcement practice complies with the principles of legality and respect for human and civil rights and freedoms stated in the Constitution of the Russian Federation and the Federal Law "On IGAs" on the other hand; on the other hand – without depriving operational units of the opportunity to use intelligence-gathering forces, means and methods, and legally obtain evidence for subsequent use in criminal proceedings.

It seems that this can only be done through the development and adoption of a new law – the intelligence-gathering code. Such an attempt has already been made by Professor V.F. Lugovik [7]. The draft code he worked out was submitted to the State Duma of the Russian Federation, but it did not find support from the ministries and departments authorized to implement IGAs.

After conducting a subjective analysis of the current state of investigative legislation

we consider it possible to define the following negative trend: scientists, including those with significant expertise and authority, identify, substantiate and reflect important problems of legislative regulation of IGAs in the scientific literature. Moreover, in the course of scholarly debate, they develop meaningful solutions to the identified problems, which are published in professional journals. However, the legislator ignores these works, and the changes the legislator makes, as well as the strategy for developing intelligence-gathering law, are not made on a wide-scale basis and are closed from the scientific community. Thus, there is a gap between science and legislative practice, the lack of demand for existing scientific developments, which in the current conditions seems unacceptable.

Conclusions

Based on all of the above, using both the experience of intelligence-gathering legislation of CIS countries and the scientific works published earlier by various scientists, we consider it possible to assert that there is a need to significantly improve Russian intelligence-gathering law, primarily in terms of regulating intelligence-gathering activities. It seems that the main focus of this work should be based on the experience of intelligence-gathering activities, the results of prosecutor's inspections of their legality, the position of the courts in cases using the results of investigative activities, recent scientific developments in the field of legal regulation of IGAs, taking into account foreign experience.

We note that we do not in any way claim that our reasoning is peremptory. At the same time, once again drawing attention to the problems raised in this publication, we hope for the possibility of introducing long-overdue changes to Russian intelligence-gathering law.

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