Video and audio recording in city offices

Number: INFORMAL

Date: April 07, 2004

Mr. Patrick W. Gilligan
Ocala City Attorney
1531 Southeast 36th Avenue
Ocala, Florida 34471

RE: SECURITY OF COMMUNICATIONS–PRIVACY–MUNICIPALITIES–PUBLIC BUILDINGS–video and audio recordings of citizens transacting business at city offices. ss. 934.02, 934.03, Fla. Stat.

Dear Mr. Gilligan:

On behalf of the Ocala City Council, you ask whether the City of Ocala may legally make video and audio recordings of citizens transacting business at city offices for security and monitoring purposes.

According to your letter, many of the municipal offices conduct business with its citizens, receiving money from citizens for the payment of fees, utility bills, or various municipal services. At times, some of these offices may have large sums of cash on hand. You state that there have been instances in which citizens have been disruptive or made threats of violence against city employees. As a security measure, the city is interested in equipping municipal offices with a continuous monitoring video camera and audio recording devices. You have expressed your concern about the city's ability to take such action in light of the provisions of Chapter 934, Florida Statutes, the Security of Communications Law.

Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in the area of oral and wire communications. The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern to protect the privacy rights of the state's citizens:

"To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused."[1]

Section 934.03(1), Florida Statutes, generally makes it unlawful for a person to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication.[2] "Oral communication" is defined by section 934.02(2), Florida Statutes, as

"any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication."

The Florida Supreme Court has interpreted the test set forth in this definition as substantially the same test used in a Fourth Amendment right-to-privacy analysis.[3] For a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication and that expectation of privacy must be recognized by society as reasonable under the circumstances.[4] As stated by the Supreme Court of Florida in *State v. Inciarrano*,[5]

"This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982, 101 S.Ct. 1519, 67 L.Ed.2d 818 (1981). . . . To prevail Inciarrano must not only have had a subjective expectation of privacy, but also his expectation under the circumstances must have been one that society is prepared to recognize as reasonable."

Such a determination, therefore, will depend upon the particular facts. The courts have considered such factors determining whether intercepted communication qualifies as "oral communication" protected under security of communication statutes to include the location in which the conversation or communication occurs, the manner in which the communication is made, and the kind of communication.[6]

You question whether a reasonable expectation of privacy can exist in a public building. You cite, for example, *Inciarrano* in which the Court held that where the defendant went to the victim's office with the intent to do him harm, the defendant had no reasonable expectation of privacy; thus, a tape recording made by the victim that recorded the conversation between the victim and the defendant regarding a business deal in which the victim no longer wanted a part, the sound of a gun being cocked, shots being fired, and the victim falling from his chair to the floor did not fall within the statutory proscription of security of communications statutes.[7]

The courts interpreting the Fourth Amendment to the United States Constitution have held that a citizen has a significantly lower legitimate expectation of privacy in a place of business open to the public than in the privacy of his or her home.[8] That is not to say, however, that conversations occurring in public areas can *never* be made with an expectation of privacy. For example, as the court in *Brandin v. State*[9] stated:

"The effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented . . . . *For the Fourth Amendment protects people, not places*. What a person *knowingly* exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."

As noted above, the determination of whether a reasonable expectation of privacy exists will depend upon the particular facts. The fact, however, that a conversation occurs in a public building does not preclude a reasonable expectation that the conversation is private and will not be recorded.

This office is unaware of any decision by a court of this state upholding the audio recording of conversations occurring in a public building simply by virtue of the fact that the conversation occurred in a public building, nor has any such decision been brought to the attention of this office. While this office is sensitive to the security concerns of the city, this state has long recognized the privacy rights of its citizens.[10] Accordingly, this office cannot conclude that the audio recording of conversations occurring in municipal offices would generally be permissible. The city may wish to seek a judicial determination of its authority in this matter.

The videotaping of such offices without audio, however, would appear to be less intrusive to the privacy rights of individuals and would appear to accomplish substantially the same purpose. Moreover, as you note, such videotaping is not covered by the provisions of Chapter 934, Florida Statutes. It may be advisable, however, for the city to post signs within such building or offices advising the public that they are being videotaped.[11]

I trust that the above informal advisory comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] The Legislature also expressed its finding in s. 934.01(3), Fla. Stat., that "[o]rganized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." Toward that end, the Legislature has created certain exceptions for law enforcement agencies. *See, e.g.,* s. 934.03(2)(c), Fla. Stat., stating that "[i]t is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

[2] *See* s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. Any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred. *And see* s. 934.10, Fla. Stat., prescribing civil remedies. *See also* s. 934.06, Fla. Stat., prohibiting the use of such intercepted wire or oral communications as evidence. *Cf. State v. Mozo,* 655 So. 2d 1115 (Fla. 1995), citing *United States v. Nelson*, 837 F.2d 1519 (11th Cir.),

cert. denied, 488 U.S. 829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988) (actual "interception" of a communication occurs not where such is ultimately heard or recorded but where the communication originates).

[3] *See Mozo v. State*, 632 So. 2d 623 (Fla. 4th DCA 1994), *approved* 655 So. 2d 1115 (Fla. 1995); *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996).

[4] *Id. And see State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994). *Cf. State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (definition of "interception of private communications," in context of prohibition under Art. I, s. 12, Fla. Const., against such interception, is a function of one's reasonable expectation of privacy).

[5] 473 So. 2d 1272, 1275 (Fla. 1985).

[6] *See Stevenson v. State*, 667 So.2d 410 (Fla. 1st DCA 1996). *And see Department of Agriculture and Consumer Services v. Edwards*, 654 So. 2d 628 (Fla. 1st DCA 1995) (finding no justifiable expectation of privacy in statements due to number of persons present when statements were made, place chosen for persons present when statements were made, place chosen for interview, and very nature of interview).

[7] *And see Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996) (defendant had no reasonable expectation of privacy in a conversation that took place outside a van stopped in a public roadway in a known drug trafficking area); *Adams v. State*, 436 So. 2d 1132 (Fla. 5th DCA 1983), (audio and video recordings made by police officers in the course of a "sting" operation utilizing a storefront operation did not violate the defendant's right of privacy so as to preclude their admission into evidence, since the defendant came into the store and openly entered into a transaction with the undercover officer and he could have had no reasonable expectation of privacy in transacting his business in a place of business open to the public). *See also State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994), holding that recording of conversation between motorist and companion sitting in rear of police vehicle for safety and comfort reasons during consensual search of automobile did not violate statute since motorist had no reasonable expectation of privacy in a police car.

[8] *See, e.g., U.S. v. Reyes*, 595 F.2d 275 (5th Cir. 1979); *see also U.S. v. Glasgow*, 658 F.2d 1036 (5th Cir.1981); *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. 3d DCA 2000) (expectation of privacy in conversations conducted in a private home does not necessarily extend to conversations conducted in a business office where the intent of the speaker does not justify such an expectation). *Compare LaPorte v. State*, 512 So. 2d 984 (Fla. 2d DCA 1987), in which the court held that audio and video taping of women in a dressing room who were changing clothes for a "modeling-video" session violated s. 934.03, Fla. Stat., since the women did not know that they were being recorded and they had a reasonable expectation of privacy in the dressing room.

[9] 669 So. 2d 280, 282 (Fla. 1st DCA 1996), *quoting Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967).

[10] *See, e.g.,* Art. I, s. 23, Fla. Const.

[11] Implied consent may be inferred from surrounding circumstances indicating that the party knowingly agreed to the surveillance; the key question in such an inquiry is whether parties were given sufficient notice. *Cf. Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998). Implied consent may be obtained by the posting of prominent signs informing those who enter the nursing home that the premises are under video surveillance. *See, e.g.*, *Gillett v. State*, 588 S.W.2d 361 (Tex. Cr. App. 1979), (store customer had no reasonable expectation of privacy in a fitting room where posted sign stated that fitting rooms were under surveillance by female security); *Lewis v. Dayton Hudson Corporation*, 339 N.W.2d 857 (Mich. App. 1983) (customer had no reasonable expectation of privacy in fitting room where a sign informed customers that fitting room was under surveillance). *Compare Deal v. Spears,* 980 F.2d 1153, 1156 n. 5 (8th Cir. 1992) (employee's consent to tape recording of intercepted telephone calls could not be implied merely because employer warned employee that monitoring might occur); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582-84 (11th Cir. 1983) (employee's knowledge of employer's capability of monitoring private telephone conversations, by itself, could not be considered implied consent to such monitoring).