Law Enforcement, recording of telephone calls

Number: AGO 2012-07

Date: January 26, 2012

Subject:
Law Enforcement, recording of telephone calls

Chief J. Philip Thorne
Springfield Police Department
3529 East 3rd Street
Springfield, Florida 32401

RE: SECURITY OF COMMUNICATIONS – LAW ENFORCEMENT – TELEPHONE CALLS – RECORDING – INTERCEPTION – circumstances under which municipal police department authorized to record all incoming and outgoing telephone calls. Ch. 934, Fla. Stat.

Dear Chief Thorne:

As the Chief of Police for Springfield, Florida, you have asked for my opinion on substantially the following questions:

1. Pursuant to Chapter 934, Florida Statutes, if a telephone call to the Springfield Police Department is initially answered with a verbal notice that the line is recorded, is a periodic, audible beep sufficient notice to a caller who has been transferred that the telephone line he or she is speaking on is recorded or is the police department obligated to further notify the caller that the transferred call is being recorded?

2. Pursuant to Chapter 934, Florida Statutes, is the Springfield Police Department required, when an agency employee makes a call outside the department on agency equipment, to notify the person receiving the call that the line is recorded or must the department purchase and maintain non-recorded phone lines for outgoing calls?

In sum:

1. Once a caller has been given notice that his or her telephone call into the Springfield Police Department is being recorded, a periodic, audible beep would appear to be sufficient notice to that caller that a transferred call continues to be recorded.

2. Pursuant to Chapter 934, Florida Statutes, the Springfield Police Department must request permission from the recipient of any outgoing call from the police department which the department intercepts and records unless such outgoing call is placed to the telephone number from which an emergency assistance call was made in order to obtain information required to provide requested emergency services.

According to your letter, the Springfield Police Department has a generally advertised telephone

number for citizens to call and report crimes, ask questions, and seek service. This phone system consists of five sequential lines that automatically "roll-over" from the primary number to the next if the previous number is busy. All of these lines are digitally recorded. Although you state that life-saving information or evidence to further a criminal investigation may be relayed on these lines, you have not asked about or asserted that this is a 911 number or a public safety answering point.[1] Rather, your questions relate generally to the provisions of Chapter 934, Florida Statutes, Florida's Security of Communications law.

Question One

Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in oral and wire communications.[2] The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern for protecting the privacy rights of the state's citizens. In enacting Chapter 934, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."[3] In enacting Chapter 934, Florida Statutes, the Legislature stated that

"[t]o 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."[4]

Section 934.03(1), Florida Statutes, generally makes it unlawful to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication.[5] "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.[6] Thus, 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.[7] As stated by the Florida Supreme Court in *State v. Inciarrano*,[8]

"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." (emphasis in original)

Such a determination, therefore, will depend upon the particular facts. The courts have considered such factors in determining whether intercepted communications qualify 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.[9] Thus, the test to be applied in determining whether a conversation will qualify as an "oral communication," protected by Chapter 934, is two-pronged: 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.[10]

Florida's Security of Communications law recognizes several exceptions to the general prohibition against interception of communications for law enforcement agencies. Section 934.03(2)(c), Florida Statutes, provides that:

"It 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."

The statute also recognizes that it is lawful under the act for an employee of "a law enforcement agency as defined by s. 934.02(10) . . . with published emergency telephone numbers" or "[a]n agency operating an emergency telephone number '911' system established pursuant to s. 365.171"

"to intercept and record incoming wire communications; however, such employee may intercept and record incoming wire communications on designated '911' telephone numbers and published nonemergency telephone numbers staffed by trained dispatchers at public safety answering points only. It is also lawful for such employee to intercept and record outgoing wire communications to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested."

However, you have not suggested that either of these exemptions applies to your situation and this office has not been presented with any factual material suggesting that either exemption applies.

The statute recognizes the authority of a law enforcement agency with published emergency telephone numbers or "911" capabilities to intercept and record incoming and certain outgoing wire communications so long as those answering the telephones are trained dispatchers at public safety answering points. As a penal statute, Chapter 934, Florida Statutes, must be

narrowly construed such that the enumeration of limited exceptions to its coverage may be inferred to mean that no other exceptions are intended.[11]

The statute also includes a consent exception to the prohibition against interception of wire communications. Section 934.03(2)(d), Florida Statutes, states that it is lawful under sections 934.03- 934.09, Florida Statutes, "for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception." This provision would appear to control your situation. According to your letter, "[u]pon answering a call from any of the outside lines, employees answer with the following greeting: 'Springfield Police; this line is recorded; how may I help you?'" Further, your system, after the transfer of the call to the requested party and during the course of the conversation with the citizen, provides an audible beep to alert the caller that the line continues to be recorded. It is my opinion that these notices to the caller may be sufficient to alert him or her that the communication in which they are involved is being recorded and to imply consent on their part to any continued interception and recording of the conversation.[12]

Thus, it is my opinion that, having alerted the caller that the call is being recorded, a periodic, audible beep is sufficient notice to a caller to the Springfield Police Department that a transferred call continues to be recorded and could be understood to constitute consent for the communication to be recorded as provided in section 934.03(2)(d), Florida Statutes.[13]

Question Two

You have also asked whether, when an employee of your agency makes an outgoing call on an intercepted and recorded telephone line, the police department is required to notify the recipient of that call that the line is a recorded line in order to comply with Chapter 934, Florida Statutes.

As discussed above, in enacting Chapter 934, Florida Statutes, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."[14] Chapter 934 authorizes the interception and recording of outgoing wire communications "to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested[;]"[15] and "when all of the parties to the communication have given prior consent to such interception."[16]

Thus, to be lawful under sections 934.03-934.09, Florida Statutes, the Springfield Police Department must request permission from the recipient of any outgoing call from the police department which the department intercepts and records unless such outgoing call is placed to the telephone number from which an emergency assistance call was made in order to obtain information required to provide requested emergency services.

Finally, I would note that any recordings of telephone conversations made by the Springfield Police Department in the usual course of business would be public records subject to the inspection, copying, and retention requirements of Chapter 119, Florida Statutes. Any such public records would likewise be subject to the exemption and confidentiality provisions of the

Public Records Law.[17]

Sincerely,

Pam Bondi
Attorney General

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[1] A "public safety answering point" is defined in s. 365.172(3)(a), Fla. Stat., as "the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls." I would note that the Florida Emergency Communications Number E911 State Plan indicates that the Panama City Police Department and the Bay County Sheriff's Department operate the primary safety answering points in Bay County with two secondary answering points (the Bay Medical Center EMS and the Bay County Emergency Operations Center) and that "[c]alls for law enforcement agencies are transferred or relayed by telephone or radio." *See* s. 9.3., p. 37, State of Florida E911 Plan, revised 10/18/2010.

[2] *See* s. 934.01, Fla. Stat., reflecting the legislative findings for enactment of Ch. 934, Fla. Stat.

[3] Section 934.01(2), Fla. Stat.

[4] 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."

[5] *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 the call is ultimately heard or recorded but where the communication originates).

[6] *See State v. Mozo, id.* at n.5; *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996).

[7] *Id. And see Jackson v. State*, 18 So. 3d 1016 (Fla. 2009), *cert. denied*, 130 S.Ct. 1144

(2010); *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).

[8] 473 So. 2d 1272, 1275 (Fla. 1985).

[9] *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).

[10] *And see State v. Smith*, 641 So. 2d 849 (Fla. 1994).

[11] Under the rule "*expressio unius est exclusio alterius*," a statute enumerating the things upon which it operates is ordinarily to be construed as excluding from its operation those things not expressly mentioned. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944). *And see Copeland v. State*, 435 So. 2d 842 (Fla. 2d DCA 1983), *pet. for review denied*, 443 So. 2d 980 (Fla. 1983), concluding that portions of the Security of Communications Act authorizing interception of wire or oral communications are statutory exceptions to federal and state constitutional rights of privacy and must be strictly construed. *And see* Ops. Att'y Gen. Fla. 02-56 (2002) and 76-195 (1976).

[12] This office would suggest that a distinction can be made between notifying a caller that their *entire call* is being recorded and that the particular *telephone line* is being recorded. The former would appear to more clearly alert a caller to the fact that a transferred call continues to be recorded.

[13] *Cf. U.S. v. Horr*, 963 F.2d 1124, 1126 (8th Cir. 1992) (defendant implicitly consented to monitoring by using the telephone after receiving notice of monitoring) and *McWatters v. State*, 36 So. 3d 613 (Fla. 2010) (no reasonable expectation of privacy in calls made after defendant was advised that call was subject to monitoring and recording).

[14] Section 934.01(2), Fla. Stat.

[15] Section 934.03(2)(g), Fla. Stat.

[16] Section 934.03(2)(d), Fla. Stat. *And see* Op. Att'y Gen. Fla. 02-56 (2002).

[17] *See, e.g.*, s. 365.171(12), Fla. Stat., relating to recordings obtained by public agencies for providing services in an emergency and the information contained therein which may be confidential and exempt from the Public Records Law; s. 119.071(2)(c)1., Fla. Stat., exempting active criminal information and active criminal investigative information from public inspection; and s. 119.071(2)(j)1., Fla. Stat., authorizing certain victim information to be maintained as confidential if the victim of the crime requests, in writing, the confidentiality of that information.