Security of Communication, recording in public building

Number: INFORMAL

Date: August 25, 2009

Mr. Dennis L. Kiah
Assistant Chief
Lynn Haven Police Department
108 East 9th Street
Lynn Haven, Florida 32444

Dear Mr. Kiah:

You ask whether a citizen may legally tape record a meeting with the mayor in the mayor's office without the mayor's knowledge. You state that a law enforcement officer was seated in the adjacent room and could hear parts of the conversation although it is not clear from your letter whether the participants in the meeting were aware that their conversation could be overheard. You have also attached a copy of a court order from the Fourteenth Judicial Circuit for Bay County dismissing a complaint in which an individual taped a conversation that occurred between the individual and the state attorney in the lobby of a public building.

Initially, I would note that requests for opinions must come from the head of the agency, accompanied by a memorandum of law prepared by the agency attorney. Moreover, opinions of this office are designed to address questions of law, not questions of fact or mixed questions of law and fact. In an effort to be of assistance, however, the following informal comments are offered.

Section 934.03, Florida Statutes, generally prohibits the intentional interception of the contents of an oral communication. Chapter 934 was enacted by the Florida Legislature in order to assure personal rights of privacy in the area of oral and wire communications.[1] 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."

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 Supreme Court of Florida 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, 67 L.Ed.2d 818, 101 S.Ct. 1519 (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, depends 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] This office has previously commented on the legality of making audio and video recordings of citizens transacting business at city offices.[7] In discussing whether a reasonable expectation of privacy may exist in a public building, this office noted the reduced expectation of privacy afforded a place of business open to the public as compared to the privacy of an individual’s home.[8]

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.[9] Moreover, the expectation of privacy would appear to be greater in a private office, albeit located in a public building, than in the lobby of a public building.

You may wish to discuss this attorney who advised the police department on legal issues. I hope, however, that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/

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[1] *See* s. 934.01, Fla. Stat., setting forth the legislative findings.

[2] *See* s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. *And see* s. 934.10, Fla. Stat., prescribing civil remedies.

[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] *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996). *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) (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); *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); *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.

[7] Informal Opinion to Mr. Patrick W. Gilligan, Ocala City Attorney, April 7, 2004.

[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. 3rd 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. 2nd DCA 1987) (audio and video taping of women in dressing room changing clothes for a "modeling-video" session violative of s. 934.03, Fla. Stat., since women were unaware they were being recorded and they had reasonable expectation of privacy in the dressing room).

[9] *See Brandin v. State*, 669 So. 2d 280, 281-282 (Fla. 1st DCA 1996) stating:

"We cannot agree with the state's assertion that conversations occurring in public areas can

never be made with an expectation of privacy. Common experience teaches that the opposite may often be true. . . . 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."

And see Migut v. Flynn, 131 F. Appx. 262 (11th Cir. 2005) (under Florida law, public places are not necessarily excluded from s. 934.03, Fla. Stat., except when the public place is a public meeting).