ALAN WILSON
ATTORNEY GENERAL

June 21, 2011

Larry W. Powers, Director
Spartanburg County Detention Facility
950 California Avenue
Spartanburg, SC 29303-2184

Dear Mr. Powers:

In a letter to this office, you question whether pursuant to South Carolina's Freedom of Information Act ("FOIA"), S.C. Code Ann. §§30-4-10 *et seq.*, are inmates' personal telephone calls subject to disclosure. You next question whether under the FOIA, is security footage from a jail's booking area and/or other areas within a jail subject to disclosure.

Law/Analysis

As referenced in a prior opinion of this office dated July 19, 2010:

> [t]he Freedom of Information Act . . . was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions. A number of amendments have been made to FOIA over the years. . . (See S.C. Code Ann. §§30-4-10 *et seq.*). . . The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble to FOIA set forth in S.C. Code Ann., Section 30-4-15, provides as follows:
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> > [t]he General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

The opinion noted that on numerous occasions, in construing the FOIA, we have emphasized emphasized the Legislature's expressed policy of openness in government, as articulated in §30-4-

§30-4-15. For example, in an opinion of this office dated November 6, 2007, we reiterated this emphasis as follows:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. Bankers' Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News & Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C. App. 37, 223 S.E.2d 580 (1976). See also, Evening Post Publishing Co., v. City of North Charleston, 363 S.E. 452, 611 S.E.2d 496 (2005) [FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government]; Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) ["FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature."].

Our courts have stressed, "[t]he essential purpose of the FOIA is to protect the public from secret government activity." Campbell v. Marion County Hospital District, 354 S.C. 274, 580 S.E.2d 163, 166 (Ct. App. 2003).

Generally, pursuant to §30-4-30(a), "[a] any person has a right to inspect or copy any public record of a public body except as provided by §30-4-40, in accordance with reasonable rules concerning time and place of access." The term "public body" is defined by §30-4-20(a) as:

> . . . any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South

> Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.
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> Consistent with such, in the referenced opinion of this office dated July 19, 2010, it was concluded that a jail or detention center would be considered a "public body" for purposes of the FOIA. See also Burton v. York Co. Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) [holding a sheriff's office is deemed a "public body" pursuant to the FOIA]. Support for such conclusion is also found in the determination by the South Carolina Supreme Court that a jail book and log are public information. In Florence Morning News, Inc. v. Building Comm'n of the City and County of Florence, 265 S.C. 389, 218 S.E.2d 881 (1975), the court affirmed the lower court's finding that the jail book was a public record within the meaning of the FOIA and further determined that any interested person had a statutory right to inspect and copy the original jail book rather than a copy of the daily entries.

As addressed in the July 19, 2010, opinion, the public's access to law enforcement records is specifically addressed by the FOIA. Section 30-4-50(A) provides that certain categories of such records:

> . . . are specifically made public information subject to the restrictions and limitations of Sections 30-4-20, 30-4-40 and 30-4-70 of this chapter. . . [including]. . . (8) reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. Where a report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the report.

An opinion of this office dated January 24, 1990, determined that "[a]rrest warrants have been deemed disclosable under the Freedom of Information Act." An opinion of this office dated January 10, 2002, referencing the latter opinion, also stated that "[a]rrest warrants, once served, are generally public information. . . ." That opinion further concluded that, "[a]s an arrest warrant which has been served is public information and the information that is the subject of the warrant is public information, it makes no sense that the arrest warrant itself is banned from publication prior to service on the offender."

Certain information is specifically statutorily exempted from disclosure, such as §§30-4-20, 30-4-40, 30-4-70, or others as noted above. As stated in the previously-referenced January 24, 1990, opinion of this office:

> . . . Section 30-4-40(a)(2) exempts from disclosure such information which is "of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. . . ." Determinations must be made on a case-by-case basis that personal privacy would be unreasonably invaded by a particular disclosure. Additionally, the Freedom of Information Act exempts from disclosure those matters "specifically exempted from disclosure by statute or law." Section 30-4-40(a)(4).

Pursuant to §30-4-40 (a)(3), specifically exempt from disclosure are:

> [r]ecords of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:
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> (A) disclosing identity of informants not otherwise known;
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> (B) the premature release of information to be used in a prospective law enforcement action;
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> (C) disclosing investigatory techniques not otherwise known outside the government;
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> (D) by endangering the life, health, or property of any person; or
>
> (E) disclosing any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial.

The sole provision that we have located which relates specifically to the question of whether prisoner records are public information is §24-21-640, which states that "[a]ny part or all of a prisoner's in-prison disciplinary records and, with the prisoner's consent, records involving all awards, honors, earned work credits and educational credits, are subject to the Freedom of Information Act as contained in Chapter 4 of Title 30."

With such background in mind, with regard to your specific question of whether under the FOIA, are inmates' personal telephone calls subject to disclosure, until a court specifically rules on such question, we can only advise as to how we believe the law should be interpreted.

In an opinion dated September 22, 2004, the Arkansas Attorney General specifically addressed the question of whether tape recordings of inmate telephone calls are subject to disclosure under that State's FOIA. The opinion determined that, inasmuch as taped recordings of inmate telephone calls would be included within the definition of "public records" for purposes of the FOIA, such must be disclosed unless they were otherwise specifically exempt from disclosure. It was noted that certain tape contents of telephone conversations could fall within certain exemptions, such as exemptions for medical records, taped conversations that a part of an ongoing law enforcement investigation, or where a specific right to privacy supersedes statutory requirements of the FOIA. Also, it was determined that the matter of disclosure would be dependent in part on detention regulations. See also Op. Ark. Atty. Gen., February 23, 1998. South Carolina has similar exclusions. See, *e.g.*, §30-4-40(a)(2) [exempts from disclosure such information which is "of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. . . ."); §30-4-40(a)(3) (exempts from disclosure "[r]ecords of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency. . . [in the manner indicated]").

In State v. Templeton, 142 N.M. 369, 165 P.3d 1145 (2007), the New Mexico Court of Appeals dealt with the question of whether a defendant's act of speaking in code as he was making a telephone call from the booking area established consent to the monitoring of his telephone conversation so as to come within an exception of that State's Abuse of Privacy Act. The court, citing its previous decision in State v, Coyazo, 123 N.M. 200, 936 P.2d 882 (1997), noted that:

> [i]n determining whether Defendant's telephone calls were recorded in violation of the Abuse of Privacy Act, the dispositive question in the present present case is whether Defendant consented to the recording. See §30-12-§30-12-1(E)(3); see also Coyazo, 1997-NMCA-029, ¶ 9, 123 N.M. 200, 936 P.2d 882 (recognizing that a party's " prior consent " to the recording or or monitoring of communications constitutes an exception to the Abuse of of Privacy Act). In Coyazo, our Court recognized that an individual's prior prior consent under the Abuse of Privacy Act can either be express or implied. 1997-NMCA-029, ¶ 11, 123 N.M. 200, 936 P.2d 882. In considering whether an individual's prior consent can be implied, we further acknowledged in Coyazo that "proof of an individual's consent may may be shown by circumstantial evidence." Id. ¶ 13. Additionally, we stated stated that because "[t]he New Mexico Abuse of Privacy Act is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 1968, 18 U.S.C. §§2510 to 2522 (1994), . . . we find federal case law interpreting the 'prior consent' requirements of the Federal Act instructive." instructive." Coyazo, 1997-NMCA-029, ¶ 10, 123 N.M. 200, 936 P.2d 882;

> 882; see State v. Manes, 112 N.M. 161, 165, 812 P.2d 1309, 1313 (Ct. App. App. 1991).
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> In the prison context, implied consent is typically found where an inmate has been given notice that his or her phone calls may be monitored. Coyazo, 1997-NMCA-029, ¶¶ 13-15, 123 N.M. 200, 936 P.2d 882 (citing and discussing cases). Adequate notice has been found to include signs near telephones indicating that calls may be monitored, information in orientation or prison handbooks provided to inmates, prison lectures or discussions regarding monitoring policies, forms signed by inmates consenting to monitoring procedures, recordings on telephones that indicate the monitoring policy prior to the placing of a call, and/or notice provided in the Code of Federal Regulations. See United States v. Friedman, 300 F.3d 111, 122 (2nd Cir. 2002); United States v. Horr, 963 F.2d 1124, 1126 (8th Cir.1992); United States v. Rivera, 292 F.Supp.2d 838, 840-44 (E.D. Va. 2003). But see United States v. Daniels, 902 F.2d 1238, 1245 (7th Cir.1990) (stating that to conclude that "a provision in the Code of Federal Regulations which says that inmates' phone calls may be monitored" constitutes notice to prison inmates "is the kind of argument that makes lawyers figures of fun to the lay community, and although a respected sister court has accepted it, we place no weight on it." (citation omitted)). An inmate's decision to make a telephone call after receiving notice in one of the above methods has been construed as an implied consent to the monitoring. Rivera, 292 F.Supp.2d at 844 (holding that the defendant "plainly consented to the recording and monitoring of his telephone calls at both facilities because he used the telephone after receiving notice that his calls would be recorded and/or monitored"); see Coyazo, 1997-NMCA-029, ¶¶ 3, 16, 123 N.M. 200, 936 P.2d 882 (concluding that the defendant consented to the recording and monitoring of his telephone calls where signs posted next to prison phones indicated that calls may be monitored or recorded). But see United States v. Cheely, 814 F.Supp. 1430, 1443 (D. Alaska 1992) (disagreeing that the act of making a telephone call after receiving notice that the call may be monitored indicates consent to the monitoring on the grounds that acquiescence is not the same as consent), aff'd, 36 F.3d 1439 (9th Cir.1994).

Templeton, 165 P.3d at 1149.

In an opinion of this office dated June 10, 1997, we referenced as follows:

[i]n U.S. v. Van Poyck, 77 F.3d 285 (9th Cir. 1996), a pretrial detainee, upon arrival at jail called a number of his friends and made incriminating statements on the telephone. He had signed a form in which he consented to the routine monitoring and taping of his phone calls. The detainee challenged this recording policy as in conflict with the Fourth Amendment and the federal Wiretap statute. The Court held, however, that "no prisoners should reasonably expect privacy in his outbound telephone calls." Reasonable security concerns justified such a policy and the Court found that Van Poyck had waived any privacy concerns by signing the consent form. No violation of the Electronic Communications Privacy Act occurred, concluded the Court, because of two specific exceptions to the Act. The "law enforcement" exception enables law enforcement personnel to intercept communications when acting in the ordinary course of their duties; the interception of outbound prisoner calls was a part of such duties, held the Court. Moreover, if a person consents to the surveillance, the Act is not implicated; here, said the Court, Van Poyck consented to the interception because

> MDC posted signs above the phones warning of the monitoring and taping. Furthermore Van Poyck signed a consent form and was also given a prison manual a few days after his arrival. . . . [t]hese facts indicate that Van Poyck impliedly consented to the taping of his phone calls . . . .

> In Griggs-Ryan v. Smith, 904 F.2d 112 (1st Cir. 1990), a tenant brought an action against his landlady for the alleged wrongful taping of incoming telephone calls and dissemination to the police of information regarding an apparent drug transaction. The landlord had been plagued by obscene phone calls. Upon the advice of the police department, she began recording all incoming calls to tenants through her answering machine. Because she suspected a friend of making the obscene calls, she informed the plaintiff on several occasions of the policy of recording incoming calls.

The Court held that the plaintiff had consented to the monitoring of his call. Its analysis left no doubt that this consent overrode any expectations of privacy that plaintiff may have had:

> Griggs-Ryan [tenant], of course, cannot plausibly posit a claim of deficient notice. . . . Smith's blanket admonishment left no room for for plaintiff to wonder whether Jackson's call would be intercepted.

> There was no practice known to plaintiff which might have led him reasonably to believe that the call was beyond the scope of the admonishment. There was no discernible circumstance at the particular moment that might have led him reasonably to believe that that his call was an exception to the "all incoming calls recorded" rule rule or that the monitoring of it would be less than total. In short, Griggs-Ryan . . . had considerably more than a mere expectation that that his call might, or probably would, be monitored. In the face of express notice, it cannot be gainsaid that plaintiff impliedly consented consented to what later transpired.

Id. at 118. Accord., U.S. v. Sababu, 891 F.2d 1308 (7th Cir. 1989) [prison officials monitoring and taping conversations with prisoner].

Courts have held that any expectation of privacy would be further eroded where notice of monitoring is clearly posted, or the monitoring equipment is in plain view. See, *e.g.*, United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980) [posted telephone rules provided inmates with reasonable notice that conversations were monitored]; People v. Clark, 125 Ill. App.3d 608, 466 N.E.2d 361, 365 (1984) [inmate had no reasonable expectation of privacy in jail conversation where jail intercom system clearly visible]; People v. Blehm, 44 Colo. App. 472, 623 P.2d 411, 413 (1980) [visitors' and prisoners' entrances to jail posted with notice that facility is equipped with audio and visual security systems].

Other courts have also specifically addressed the question of the availability of inmate telephone calls under a FOIA. See, *e.g.*, Smith v. U.S. Department of Justice, 251 F.3d 1047, 1049-1049-50 (D.C. Cir. 2001) (holding that prison authorities did not "intercept," consensually or otherwise, any communication within meaning of Title III of the Omnibus Crime Control and Safe Safe Streets Act when they routinely monitored and recorded inmate's conversation with his attorney, attorney, in case in which inmate chose not to use available unmonitored line, and thus the recordings were not subject to whatever limitations Title III places upon the disclosure of information that does result from a covered interception, and were not exempt from disclosure under under the Freedom of Information Act as specifically exempted by statute, as they were obtained by by "law enforcement officers" who "used," "in the ordinary course of [their] duties," some telephone telephone "instrument, equipment or facility, or [a] component thereof"); Benavides v. Bureau of Prisons, ___ F. Supp.2d ___ (2011 WL 1195800) (D. D.C. 2011) [Federal Bureau of Prisons failed failed to establish that it compiled recordings of inmates telephone conversations for law enforcement purposes, as would justify its withholding of one inmate's recorded telephone conversations with his attorney under Freedom of Information Act exemption protecting from disclosure records or information compiled for law enforcement purposes]; Milton v. U.S. Department of Justice, 596 F.Supp.2d 63, 66 (D. D.C. 2009) [holding that recordings of prisoner's prisoner's telephone conversations made from prison to third parties were exempt from disclosure, disclosure, under Freedom of Information Act, as personnel and medical files and similar files

disclosure of which would constitute clearly unwarranted invasion of personal privacy, since prisoner prisoner failed to tender signed waivers from third parties to conversations, and failed to offer public public interest rationale for overcoming third parties privacy interests]; Swope v. U.S. Department of Department of Justice, 439 F.Supp.2d 1, 6-7 (D. D.C. 2006) [holding inmate's interest in recordings recordings of his telephone conversations with third parties, in order to assist him in pursuing possible legal action against Bureau of Prisons, was private interest, and not the type of public interest necessary to overcome privacy interests supportive of Freedom of Information Act exemption for law enforcement records; recordings were unrelated to any allegations of government government misconduct]; Bent v. State, 46 So.3d 1047, 1049-50 (Fla. App. 2010) [holding audio recordings of telephone calls made from jail by defendants who were awaiting trial to persons other other than counsel were not "public records" subject to release to newspaper pursuant to its public public records request; maintaining that recordings of purely personal telephone calls had no connection to any official business of the county sheriff's office, and that releasing them would not not further the purpose of the Public Records Act].

An opinion of this office dated December 15, 2010, dealt with the question of use of cell phones by inmates within the State Department of Corrections and Corrections' access to information about the phone calls illegally made by inmates. This opinion concluded that:

> [i]t is the opinion of this Office that a court would likely conclude that while no express consent is provided, an inmate implicitly consents to the electronic or wire communication service provider using a pen register to monitor telephone activity. An inmate gives implied consent when he or she is informed of agency policies and procedures, specifically the prohibition regarding the possession and use of cell phones.
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> For example, the United States District Court for the Southern District of New York explained that the inmate "gave implied consent to such interception by continuing to use the phones after he was put on notice . . . . that the calls were being recorded and reviewed." U.S. v. Rittweger, 258 F. F. Supp.2d 345, 354 (2003). The court cites other cases that reached similar similar conclusions. See: U.S. v. Amen, 831 F.2d 373, 379 (2d Cir. 1987) 1987) (prisoners had notice of prison telephone interception system and thus thus their use of the telephones constituted implied consent to monitoring); monitoring); accord U.S. v. Workman, 80 F.3d 688, 693 (2d Cir. 1996) (finding consent even though appellant, having been warned of monitoring, monitoring, was not specifically told that use of prison telephones constituted consent or that monitoring could include recording); United States v. Willoughby, 860 F.2d 15, 19-20 (2d Cir. 1988) (implied consent given to monitoring and taping when prison gave ample notice that phones phones were taped and monitored and prisoner used phones; express

> consent also found based on prisoner execution of consent form). U.S. v. Rittweger, 258 F. Supp. 2d 345, 354 (2003).
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> In U.S. v. Lindsey, 2010 WL 4822939, the United States District Court for the District of Minnesota explained that "Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511, prohibits warrantless interception of oral or wire communications and prevents admission of such recordings into evidence unless a specific exception in the Act applies." The court further explains that "[ijt is not unlawful, however, for law enforcement officials to 'intercept a wire, oral,or electronic communication, where . . . one of the parties to the communication has given prior consent." Lindsey, 2010 WL 4822939; 18 U.S.C. §25l1(2). In this case, the prisoner was made aware of the prison's policy to record or monitor all prisoner phone calls. Therefore, the court concluded that the prisoner implicitly consented to such monitoring by making the phone call. Lindsey, 2010 WL 4822939. See also, United States v. Hoff, 963 F.2d 1124, 1127 (D.Minn.1992); United States v. Morin, 437 F.3d 777, 780 (8th Cir. 2006) (holding that a prisoner handbook and signs informing defendant of call monitoring policy supported a finding of implied consent); Friedman v. United States, 300 F.3d 111, 122-23 (2d Cir. 2002) (holding that a sign stating that calls from jail cells would be recorded constituted sufficient notice to support a finding of implied consent).
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> Similar to the Lindsey case, the prisoners at Lieber Correctional Institution are made aware of the facility's prohibition against the possession and use of cell phones by inmates. Therefore a court could, and most likely would, logically conclude that the inmates have consented to such monitoring.

In responding to your second question, it must be resolved whether an area of a jail is considered to be a "public area."

In an opinion dated August 22, 2007, this office addressed the question of whether graffiti in a prison was considered to be in a public area so as to be prohibited by the Criminal Gang Prevention Act. We noted that in Hudson v. Palmer, 468 U.S. 517 (1984), the United States Supreme Court rejected an inmate's challenge on Fourth Amendment grounds to searches of his cell on the grounds that arbitrary searches violated an inmate's justifiable expectation of privacy in his prison cell. The Court stated that

> [a] right of privacy in traditional Fourth Amendment terms is fundamentally fundamentally incompatible with the close and continued surveillance of

> inmates and their cells required to ensure institutional security and internal internal order. We are satisfied that society would insist that the prisoner's prisoner's expectation of privacy always yield to what must be considered considered the paramount interest in institutional security.

Id., 468 U.S. at 527-528.

In our opinion dated December 15, 2010, we further recognized that:

> [w]hile "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259 (1987), it has been well recognized that these rights must be exercised with due regard for the "inordinately difficult undertaking" of administering and monitoring a secure correctional facility. Turner, 482 U.S. 78, 85. The rules and regulations set forth in [the Department of Corrections'] policy would undoubtedly be found legitimate as their purpose is expressly aimed at protecting and maintaining prison security and public safety. Pell v. Procunier, 417 U.S. 817, 823, 94 S.Ct. 2800, 2804 (1974).

See also Op. S.C. Atty. Gen., March 29, 2011 [advising that the South Carolina Department of Corrections may restrict incoming/outgoing information requests from inmates when officials have a reasonable basis to believe that inmate correspondence contains discussions of criminal activities or that the correspondence is being used in furtherance of illegal activities; censorship of inmate correspondence not only is reasonable, but it furthers the substantial governmental interest of preserving institutional security, safety, order, and rehabilitation].

We advised in the opinion of August 22, 2007, that inmates in prisons, jails or other detention facilities are in a situation whereby they have a lowered expectation of privacy generally. We stated:

> as determined in Brown v. Genesee County Board of Commissioners, 628 N.W.2d 471 (Mich., 2001), a jail is generally considered a public place. The court stated that:
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> > . . . a jail is open for use by members of the public. Family, friends, and attorneys may generally visit inmates. Members of the public may also enter a jail for other reasons, *e.g.*, to apply for a job or make a delivery . . . The fact that public access to a jail is limited does not alter our conclusion.
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> 628 N.W.2d at 474.

In State v. Black, 545 S.W.2d 617 (Ark. 1977), the Arkansas Supreme Court determined that the drunk tank of a city jail wherein a jailer observed the defendant engaged in a sex act with another prisoner was a "public place" within the meaning of the public sexual indecency statute. The Court noted that "[i]t is not uncommon for groups of persons to tour a jail . . . and persons constituting such groups would have no difficulty in seeing acts committed in the 'drunk tank.'" 545 S.W.2d at 867. Similarly, in Minor v. State, 501 S.E.2d 576 (Ga. Ct. App. 1998), the court dealt with a situation involving the allegation of a sex act having been committed in the common television-viewing room of a state prison facility. The court noted that the crime of public indecency consists of the performance of proscribed acts in a public place and determined that correctional institutions are public places within the meaning of the public indecency statute.

In People v. Giacinti, 358 N.E.2d 934 (Ill. 1976), the Illinois court construed a situation involving an allegation of public indecency where the defendant argued that since the act involved was committed in a prison cell, no one except prisoners could have observed the act and, therefore, the act was not committed in a public place. However, the court concluded that a prison cell is a public place stating that

> . . . (w)hen imprisoned, the prisoner is deprived of his private life. His entire existence becomes public, open to the view of other prisoners, as well as prison officials . . . Given the fact that the bars on the front of the cell could be seen through and that other prisoners did view the incident, a reasonable person would have expected the conduct to be viewed by others.

358 N.E.2d at 937. In State v. Cromartie, 2006 WL 2771869 (Fla. Ct. App. 2006), the court commented that while

> (t)here are patently aspects of a jail cell that do not comport with a public place in the sense that it is not open to the public at large . . . we can discern no basis to ignore the fact that the cell in this case is public in the aspect that an inmate has no control over persons being present at any time . . . (The prisoner's) . . . infirmary cell was open to view by any authorized employee, nursing staff, cleaning personnel, or visitors.

Therefore, these cases support the conclusion that at least parts of a prison or detention center may be considered a public place and, therefore, "publicly viewable".

The opinion concluded that:

> . . . it appears that the response to your question may be dependent in part as to what part of a prison or detention facility is being considered. For instance, in State v. Narcisse, 833 So.2d 1186 (La. Ct. App. 2003), the court determined that the question of whether a jail infirmary is a public place or a place open to public view is a jury question. The case involved an allegation of a sex act having been committed in front of a picture window in an infirmary. The court stated that
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> > [a] public place or place open to the public view does not have to be open to all members of the public. Any person who can see the act of obscenity being committed is a member of the public.
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> 833 So.2d at 1192. As to the particular incident involved before the court on review, the court determined that "[t]he public nature of this area of the jail clearly makes it a public place and a place open to the public view." Ibid. However, in State v. Holmes, 866 So.2d 466 (La. Ct. App. 2004), it was determined that a prison shower should not be considered a place open to the public view stating that
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> > . . . there are no visitors in prison showers, and it cannot be reasonably held to be a 'place open to the public view'. . . . [A] prison shower heretofore has been regarded as one of the few places a prisoner is permitted to attend to his "private needs' except for minimal security monitoring by authorized prison personnel.
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> 866 So.2d at 408. In State v. Smith, 887 So.2d 701 (La. Ct. App. 2004), the inmate defendant similarly argued that since he was in the shower, he was entitled to some measure of privacy. However, in this particular case, the inmate had been observed engaged in a sex act in the area of the shower window, a place the court concluded that he could not have reasonably expected privacy.

Consistent with the above, in the opinion of this office, provisions outlawing the offense of illegal graffiti vandalism may be applicable to individuals incarcerated by the State Department of Corrections or who are

> are in the custody of the State Department of Juvenile Justice in that those those facilities may be considered public property and, depending upon the the situation, publicly viewable. However, certain limited areas, such as shower facilities, that are not generally considered open to public view where there is a reasonable expectation of privacy may be considered exempt from the applicability of such provisions. A case by case determination would have to be made as to the legislation's applicability.

In its decision in Sacramento County Deputy Sheriffs' Association et al. v. County of Sacramento, 51 Cal. App.4th 1468, 59 Cal. Rptr.2d 834 (1997), the California Court of Appeals was concerned with a situation involving the placement of a video camera in the release office of the county jail. In reaching its decision, the court stated that:

> "[v]ideotaping is a form of conduct which, if used by law enforcement to intrude on the reasonable and justifiable privacy interests of an individual, is subject, like any other governmental action, to the limitations of the Fourth Amendment and the requirements formulated in the cases construing that amendment." . . . "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. . . . Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Oliver v. United States, supra, 466 U.S. at pp. 182-183, 104 S.Ct. at p. 1743, 80 L.Ed.2d at p. 227.)

Id., 59 Cal. Rptr. at 840. The Court further noted that:

> Fourth Amendment jurisprudence reveals a long history of judicial recognition that privacy expectations may be diminished in prison or jail settings, due to institutional security concerns. . . . Thus, Lanza v. New York (1962) 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384, stated in dictum dictum that there was no Fourth Amendment violation in the electronic audiotaping of a jailhouse conversation between an inmate and his brother. brother. "[A] jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." (Id. at p. 143, 82 S.Ct. at p. 1221, 8 8 L.Ed.2d at p. 388, fn. omitted.) . . . (However) . . . [t]he "protected area" area" analysis of Lanza was later repudiated in Katz v. United States (1967) (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, which held the Fourth Fourth Amendment "protects people, not places. . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be be constitutionally protected." (Id. 389 U.S. at pp. 351-352, 88 S.Ct. at p.

> 511, 19 L.Ed.2d at p. 582 [person in public phone booth had reasonable expectation of privacy in contents of telephone calls].)
>
> Nevertheless, although the Fourth Amendment protects people, not places, the particular setting remains a consideration in determining whether a Fourth Amendment violation exists. Thus, as indicated, the post-Katz case of Oliver v. United States, supra, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214, said "In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as . . . the uses to which the individual has put a location [citations], and our societal understanding that certain areas deserve the most scrupulous protection from government invasion [citations]." (Oliver v. United States, supra, 466 U.S. at p. 178, 104 S.Ct. at p. 1741, 80 L.Ed.2d at pp. 223-224 [warrantless search of marijuana fields permissible]; see also Sec. & Law Enforcement Emp., Dist. Council 82 v. Carey (2d Cir.1984) 737 F.2d 187, 202 [expectations of privacy can vary, depending on circumstances and location].) Moreover, despite Katz, "[f]ederal courts . . . have consistently followed Lanza and upheld admission of monitored conversations in jails or police stations." (Donaldson v. Superior Court (1983) 35 Cal.3d 24, 29-30, 196 Cal.Rptr. 704, 672 P.2d 110, citing inter alia United States v. Hearst (9th Cir.1977) 563 F.2d 1331, 1345; see also People v. Von Villas (1992) 11 Cal.App.4th 175, 213, 15 Cal.Rptr.2d 112 ["Federal and California cases have repeatedly relied on the Lanza dictum as authority."].)
>
> Bell v. Wolfish, supra, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 held pretrial detainees were subject to unannounced searches of inmate living areas. Even assuming they retained an expectation of privacy, those rights were subject to restriction in order to maintain institutional security and preserve internal order and discipline. (Id. 441 U.S. at p. 546, 99 S.Ct. at pp. 1877-1878, 60 L.Ed.2d at p. 473.) "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." Id. 441 U.S. at p. 547, 99 S.Ct. at p. 1878, 60 L.Ed.2d at p. 473.)

Id., 59 Cal. Rptr. at 841-842.

The court cited the decision in United States v. Taketa, 923 F.2d 665 (9th Cir. 1991), where that court stated:

> [v]ideo surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not

> not violate the fourth amendment; the police may record what they normally normally may view with the naked eye. [Citation.]" (Id. at p. 677.) Taketa went on to say: "Persons may create temporary zones of privacy within which they may not reasonably be videotaped, however, even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by by some other means. [Citation.]" (Ibid.) However, here the jail setting - including the Release Office accessible to a variety of people within the jail jail - is unique. The test is not whether an individual "chooses to conceal assertedly 'private' activity," but rather whether the intrusion infringes on personal and societal values protected by the Fourth Amendment. (Oliver v. v. United States, supra, 466 U.S. at pp. 182-183, 104 S.Ct. at pp. 1743-1743-1744, 80 L.Ed.2d at p. 227.)

Id., 59 Cal. Rptr. at 844-845. The California court held that, under the circumstances before it, the videotaping was "not excessively intrusive."

Other courts have determined that jail officials may monitor prisoners without violating a reasonable expectation of privacy. See, *e.g.*, State v. Trevino, 113 N.M. 804, 833 P.2d 1170, 1176 (Ct. App. 1991) [holding videotaping of jail inmate's telephone calls held proper based on need for maintaining security], *aff'd*, 113 N.M. 780, 833 P.2d 1146 (1992); State v. Lucero, 96 N.M. 126, , 628 P.2d 696, 698 (Ct. App. 1981) [holding jail inmates have no reasonable expectation of privacy and detention center officials may exercise constant surveillance, including eavesdropping on inmates' conversations]; State v. Williams, 690 S.W.2d 517, 524 (Tenn. 1985) [holding an expectation of privacy in a jail cell is not reasonably justified].

In an opinion dated June 18, 2009, the Texas Attorney General dealt with the question of whether certain information was subject to required public disclosure under that State's Public Information Act. At issue was the requested release of a jail duty roster. It was asserted that the ". . . release of this information would reveal how many and which officers are on duty at specific times, thus making the jail vulnerable to escape attempts, facilitating the smuggling of contraband, and generally jeopardizing security. In addition, . . . (it was asserted) . . . that release of the submitted video surveillance footage, which shows booking areas, holding areas, and other portions of the jail, would provide the public with a "virtual video of the layout of secured areas of the city's jail facility," reveal blind spots with regards to camera placement, and jeopardize security and safety at the facility. The opinion concluded that:

> . . . the department has demonstrated that the release of this information would interfere with law enforcement and crime prevention. Thus, we conclude that the department may withhold . . . (from release) . . . the duty roster and video surveillance footage. . . .

It was noted that the Texas Public Information Act:

> . . . excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime". . . A governmental body claiming. . . (an exemption). . . must reasonably explain how and why the release of the requested information would interfere with law enforcement. . . .

The opinion concluded that the department could withhold the submitted jail duty rosters and video surveillance footage under those particular circumstances.

Finally, in an opinion dated May 29, 2009, the Mississippi Attorney General dealt with the question of whether it was permissible to install audio and/or video surveillance equipment in jail cells. The opinion referenced the ruling of the United States Supreme Court in Hudson v. Palmer, cited above. Reference was also made to a prior opinion of the Mississippi Attorney General, which held that there was no expectation of privacy for an inmate that would override the interest of institutional security. It was stated that "[i]n fact, it has been the position of this office that loss of freedom of choice and privacy are inherent incidents of confinement."

Conclusion

Referencing the above, in the opinion of this office, and consistent with the mandate of liberal construction under the FOIA, it could be concluded that inmates' personal telephone calls should be construed as being subject to disclosure, especially where some form of express or implied consent can be construed to have been in place. Such a construction would be appropriate assuming, of course, that no other specific exemption exists, such as that for a conversation of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy, or such as that for an exemption for records of law enforcement and public safety agencies which are not otherwise available by state and federal law, and which were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the law enforcement agency. Of course, as indicated previously, until a court specifically rules on the construction of South Carolina law with regard to your question, we can only advise as to how we believe the law should be interpreted.

Additionally, it is the opinion of this office a court would probably conclude that under this this State's FOIA, videotaped security footage from a jail's booking area and other areas would not not generally be considered private but, instead, would be considered "public places," and would be be subject to disclosure. Again, this conclusion would be appropriate assuming that no other specific specific exemption exists, such as that for a matter of a personal nature where the public disclosure disclosure of such would constitute an unreasonable invasion of personal privacy, or such as that for for an exemption for records of law enforcement and public safety agencies which are not otherwise

otherwise statutorily available. However, as stated previously, until a court rules specifically on such such a matter, we can only suggest how we believe a court would rule.

If you have any further questions, please advise.

Very truly yours,

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