7512 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

July 16, 2003

The Honorable Jackie E. Hayes
Member, House of Representatives
333-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Hayes:

You have requested legal guidance from this Office regarding the legality and constitutionality of the use of electronic surveillance equipment to monitor patient care in nursing homes. As Chairman of the Social Services, Mental Health, and Children's Affairs subcommittee of the House Medical, Military, Public and Municipal Affairs Committee, you note that the subcommittee is to convene a task force to study the effectiveness of such surveillance equipment. Your request is that we address the relevant constitutional and legal issues which might arise should a nursing home patient, or patient's legal representative, elect to install and use surveillance equipment in the patient's room. As we discuss below, the issue of video surveillance in a nursing home as yet remains an undeveloped area of the law. Thus, our discussion in large part is based upon analogous authorities and case law.

Law/Analysis

As a preliminary matter, we are aware of no South Carolina law which speaks to the issue of the consensual use of electronic surveillance in the room of a nursing home resident. The South Carolina General Assembly has codified a "Bill of Rights for Residents of Long-Term Care Facilities" which guarantees certain rights to nursing home residents, but the right to install surveillance equipment in one's own room is not addressed in that list of rights. S.C. Code Ann. §44-81-10 et seq. Of course, this "Bill of Rights" is not an exhaustive list of those rights which a nursing home resident is afforded by law. Nevertheless, until the General Assembly chooses to enact a statute which specifically authorizes or prohibits the consensual use of electronic surveillance in a nursing home room, we would advise that the matter appears to be one of contract between the parties involved.

The Arkansas Attorney General has reached a similar conclusion. In an opinion dated April 12, 2001, that office directly addressed the issue of the legality of the consensual use of

surveillance equipment in the room of a nursing home resident. There, the Arkansas Attorney General advised that, "[a]bsent any controlling law on the question, it is my opinion that the matter is one governed by the agreements and contracts between the parties."

After extensive research, we have been able to locate one state which has enacted comprehensive legislation concerning the use of electronic monitoring equipment in the room of a nursing home. Texas enacted legislation in 2001 which affirmatively gives the resident of a nursing home, or the resident's legal representative, the right to install and maintain an electronic monitoring system in his or her room without interference or retaliation by the nursing home. V.T.C.A., Health and Safety Code §242.847. The Texas statute requires that the resident must submit a request on a form prescribed by the Texas Department of Human Services, as well as obtain written consent from any other resident of the room. V.T.C.A. §242.846. Further, the statute requires that the institution is responsible only for providing reasonable space and electricity for the operation of the monitoring equipment, and the resident who requests the equipment is responsible for the costs, installation, and maintenance. V.T.C.A. §242.847. The statute is also very specific as to the detail of the request form, the consent of the residents, and potential criminal and civil liability issues that may arise from the effective use of such cameras. Finally, the Texas statute cross-references its criminal statutes regarding the abuse or neglect of a vulnerable adult, as well as the statute which imposes a duty to report such criminal activity. V.T.C.A. §242.848.

The subcommittee on Social Services, Mental Health, and Children's Affairs may wish to consider the Texas statute on "granny cams" in the course of its examination of this issue. It appears from the statute's detail that the Texas legislature has taken many of the legal and constitutional issues raised thereby into account. This statute offers a guide on the issue of electronic monitoring in the room of a nursing home resident to prevent the abuse and neglect of this vulnerable class of citizens. I have enclosed herein a copy of Texas law, V.T.C.A. §242.841 et seq.

We further note that should the General Assembly enact a statute governing the use of electronic monitoring equipment in the rooms of nursing home residents, only the courts possess the authority to determine the constitutionality of such a statute. We have consistently advised in prior opinions that statutes enacted by the General Assembly are presumed valid until declared otherwise by the courts. See Op. S.C. Attn. Gen., August 16, 1985; Op. S.C. Attn. Gen., April 5, 1983. Further, a court's scope of review is limited in cases which involve a challenge to a state statute because all statutes are presumed to be constitutional, and if possible, will be construed to render them valid. Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003); Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003).

With this background in mind, we now turn to potential constitutional issues which may be raised should such use of electronic monitoring equipment in the rooms of nursing home residents be challenged in the courts. Primarily, the privacy rights of the parties involved are likely to be

raised in both civil and criminal contexts, and the treatment of such issues would differ as to which party may assert those rights.[1]

The privacy rights of the resident of the room would be those most readily implicated by the presence of any video surveillance equipment. It has been held that a person possesses a stronger claim to a reasonable expectation of privacy from video surveillance than from a manual search. U.S. v. Gonzales, 328 F.3d 543 (9th Cir. 2003). However, when the resident of the room specifically requests use of the video monitoring equipment and all residents of that room are required to give written consent, the privacy rights of those residents would likely be waived with respect to the use of monitoring equipment in that room. This is the procedure required by the Texas statute.

On the other hand, if legislation makes the use of video equipment compulsory, or such equipment is used without the consent of the resident or residents, the privacy rights of the resident would most certainly be raised as a challenge to any legislation requiring such use of mandatory video surveillance. Based upon our research, it is unclear where the courts might draw the line as to whether a reasonable expectation of privacy exists in these circumstances. The United States Supreme Court has recognized that the right of privacy in one's home lies "[a]t the very core of the Fourth Amendment." Kyollo v. United States, 533 U.S. 27, 121 S.Ct. 2038 (2001). One court has stated that "a hospital room is more akin to one's home than to one's car or office." State v. Stott, 171 N.J. 343, 794 A.2d 120, 126 (2002). The Court in Stott noted that a hospital room to a resident

> ... is a place to shower, dress, rest and sleep. The duration of one's stay at a facility also may be relevant to the analysis. For example, a patient admitted for long-term care may enjoy a greater expectation of privacy than one rushed to an emergency room and released that same day. Moreover, the nature or scope of the privacy interest may differ depending on the facts and circumstances of a given case.

Id. Other courts have agreed that an individual does possess a reasonable expectation of privacy in the hospital room in which they are residing. See, Jones v. State, 648 So.2d 676-77 (Fla. 1994); Morris v. Commonwealth, 208 Va. 331, 157 S.E.2d 191, 195 (1967). Other courts disagree. Compare, U.S. v. George, 987 F.2d 1428 (9th Cir. 1993) [no expectation of privacy for defendant in search of his hospital room].

One commentator has likened nursing home life as falling "somewhere between a residential building where there is a greater expectation of privacy, and a hospital where there is a diminished

---

[1] Any constitutional challenges likely will originate in the context of an attack upon any statute which might be enacted authorizing the use of video surveillance. By and large, nursing homes are private institutions and, ordinarily, there must be "state action" for a constitutional right to be infringed. Such state action would likely be deemed to originate through enabling legislation concerning the use of video surveillance.

expectation of privacy." Elizabeth Adelman, "Video Surveillance in Nursing Homes," 12 Alb. L. J. Sci. & Tech, 821 at 828 (2002). This commentator observes that

> [p]rivacy in a nursing home is multi-layered. Nursing home employees and residents, as compared to visitors, may be afforded a larger zone of acceptable invasion of privacy. Residents have a reasonable expectation of privacy in certain areas of the institution. Although there is some ambiguity in the distinction between public and private areas of such an institution, we can safely assign community rooms and hallways as public areas and bathrooms as private areas. All other areas arguably fall on a continuum somewhere in between.

Id.

It is evident that the law as yet remains undeveloped and thus unclear in this area. We are aware of no case which has specifically commented upon the legality of non-consensual use of video surveillance equipment in the rooms of nursing home residents. Based upon the analogous law to date, it is likely that a court would find that the bedroom of a nursing home resident is entitled to at least some privacy protection from invasion. See, Huskey v. NBC, 632 F.Supp. 1282 (N.D. Ill. 1986). In Huskey, the Court, citing Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), noted that the reasonableness of a prisoner's expectation of privacy is to be determined by balancing his privacy interests with the prison's security interests. Applying some modified form of the Hudson balancing test, a court might well hold that the use of video surveillance without the resident's express consent or the consent of the resident's legal representative, is an unreasonable invasion of personal privacy. Thus, any statute which mandates the use of such surveillance equipment in the rooms of nursing homes, or which allows its usage without the consent of the resident or residents is likely to face a serious constitutional challenge. Accordingly, obtaining the express consent of the resident or his or her legal representative, would need to be the centerpiece of any legislation in this area.

The right to privacy for the employees of the nursing home may also be implicated by the use of such video surveillance. South Carolina courts have not had the opportunity to analyze the privacy rights of employees under these circumstances. However, it should be acknowledged that employees are generally not protected from surveillance[2] because the premises, equipment, and

---

[2] "Employees in private settings, however, do possess certain legal rights against surveillance. They can bring a tort action for intrusion into seclusion, in states where this tort is recognized, where an intrusion occurs, either physically or through video surveillance, in an area that a reasonable person would find offensive or highly objectionable. Areas that are considered offensive or highly objectionable would include, but not be limited to, employee locker rooms and bathrooms. Surveillance of a room of a nursing home resident would not fall under the offensive or highly objectionable category." Adelman, supra, at 838, citing Rothstein, supra, at 382-383.

(continued...)

supplies are the property of the employer. 12 Alb. L.J. Sci. & Tech. at 830-831. As a general matter, courts often conclude that an employee generally gives implied consent to such working conditions by his continued employment. It is not unusual for the employer to monitor the workplace for legitimate reasons. See, Lawrence E. Rothstein, "Privacy or Dignity?: Electronic Monitoring in the Workplace," 19 N.Y.L. Sch. J. Int'l. & Comp. L. 379, 402 (2000). Of course, each situation depends upon the particular facts involved; however, a court might well conclude that the possession of an expectation of privacy by an employee of a nursing home is unreasonable.

In the context of a criminal action against a nursing home employee, the courts have consistently held that the Fourth Amendment prohibition of unreasonable searches and seizures cannot be extended to the actions of private individuals or entities. See State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). In the absence of state action, an employee charged with a crime based on evidence obtained from surveillance equipment cannot raise a Fourth Amendment defense. Op. Ark. Attn. Gen., April 12, 2001. It appears unlikely from the case law that a privately owned nursing home would be considered to be a state actor, despite either extensive regulation from the state or the entity's acceptance of Medicaid funds. See, Town of Mt. Pleasant v. Jones, 335 S.C. 295, 516 S.E.2d 468 (1999); Blum v. Yaretsky, 457 U.S. 911, 1002-12 (1982); Alexander v. Pathfinder Inc., 189 F.3d 735 (8th Cir. 1999). Moreover, surveillance equipment which is installed and maintained by the resident at either a government owned or privately owned nursing home, would not appear to be subject to Fourth Amendment analysis because it is purely a private action. The only set of circumstances where a Fourth Amendment defense might be successful would be if the surveillance equipment is installed and maintained by a government-owned nursing home, or if law enforcement officers installed the surveillance equipment in the room in order to apprehend an individual employee engaging in criminal behavior. Nevertheless, the defendant employee would still have to satisfy the "reasonable expectation of privacy" test even under these circumstances.

We note for your information as well that the South Carolina Constitution also contains a privacy provision. Art. I, § 10 of the South Carolina Constitution provides that "... unreasonable invasions of privacy shall not be violated ...." In Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), our Supreme Court concluded that Art. I, § 10 allows an inmate to "be free from unwarranted medical intrusions ...." As the Court there held, "[f]ederal due process and our own South Carolina Constitution require that an inmate can only receive forced medication where the inmate is dangerous to himself or to others, and then when it is in the inmate's best medical interest." 437 S.E.2d at 60.

Moreover, in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), the Court in dicta stated that

---

[2](...continued)
South Carolina courts recognize an action for invasion of privacy where there is a "wrongful intrusion into one's private activities" as to cause mental shame, suffering, or humiliation to a person of ordinary sensibilities. Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984).

> ... by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution."

541 S.E.2d at 840. It is unclear how the Court will apply this provision in the context of any compulsory video surveillance in nursing homes. However, considering that the Court is likely to deem Art. I, § 10 to be broader than federal constitutional protections concerning privacy, your subcommittee may certainly wish to consider this provision as well in preparing any legislation .

Notwithstanding the potential privacy issues, it would appear that the consensual use of video surveillance equipment in the room of a nursing home resident is consistent with existing South Carolina law. The General Assembly has taken steps to reduce the practice of elder abuse and neglect in this state. It is a crime in South Carolina for any person to commit abuse, neglect, or exploitation of a vulnerable adult. Moreover, it is also a crime for those under a duty to report such crimes to fail to do so. S.C. Code Ann. §16-3-1050 and §43-35-10, et seq. The "Bill of Rights for Residents of Long Term Care Facilities" ensures that such residents "must be free from mental and physical abuse" and "must be treated with respect and dignity and assured privacy during treatment and when receiving personal care." S.C. Code Ann. §§ 44-81-40(F) and (H).

Conclusion

The issue of the use of video surveillance equipment in nursing homes is a novel legal issue in South Carolina. At present, the matter is one of contract between the parties involved.

If the General Assembly chooses to enact legislation in this area, we suggest that the Texas statute, discussed herein, be used as a guide. Such statute requires consent as a centerpiece of the authorized use of such equipment. We caution that if the Legislature opts for making video surveillance equipment in nursing homes compulsory, it is likely that such legislation will be challenged on both federal and state privacy grounds. See, Lawrence v. Texas, 123 S.Ct. 2472 (2003) [Court's support for constitutional right of privacy in the home reaffirmed].

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosure