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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 5, 1998

Betty Miller, Esquire
Assistant Solicitor
Sixteenth Circuit Solicitor's Office, Union County
P.O. Box 200
Union County, South Carolina 29379

Re: Informal Opinion

Dear Ms. Miller:

You have requested a opinion from this office concerning the application of S.C. Code Section 16-17-470, better known as the "Peeping Tom" statute. The essential question presented is whether the statute is violated when a person enters a public restroom, designated for the opposite sex, in order to purposefully spy on the members of the opposite sex within. It is the opinion of this office that the "Peeping Tom" statute is violated by such conduct.

INTRODUCTION

Section 16-17-470 states:

> It is unlawful for a person to be an eavesdropper or a Peeping Tom on or about the premises of another or to go upon the premises of another for the purpose of becoming an eavesdropper or a Peeping Tom. The term "Peeping Tom", as used in this section, is defined as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others.

Request Letter

This section prescribes three basic elements that must be satisfied for the criminal sanctions to apply. These three elements consist of the following: 1) the conduct must occur on the "premises of another"; 2) the victim must have a reasonable expectation of privacy; and 3) there must be some invasion of, attempted invasion of, or conduct which tends to invade that reasonable expectation of privacy.

ANALYSIS

1) "Premises of Another" - The courts of this State have provided little analysis concerning Section 16-17-470. In fact, there is only one case which provides any language concerning the application of the statute. In Herald Publishing company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986), the court stated, in dicta, that Section 16-17-470 was "obviously inapplicable since the [defendants] were on public property and not 'on or about the premises of another.'" The court seemed to imply that one can not violate the "Peeping Tom" statute on any public property, yet the rule's precedential value is uncertain.

The dicta in Herald Publishing seems to follow the analysis of the South Carolina Supreme Court's decision in State v. Hanapole, 255 S.C. 258, 178 S.E.2d 247 (1970). The issue in Hanapole was whether the state criminal trespassing statute, S.C. Code Section 16-11-620, could be violated on public property. The court held that it could not, finding that the central purpose of the statute was for "protecting the rights of the owners or those in control of private property." Since the land was public property, there were no ownership rights infringed upon and thus no violation of the statute.[1]

In order to derive the true meaning of "premises of another" as intended in the Peeping Tom statute, it is important to recognize the legislative intent behind its enactment. As opposed to the trespass statute, there is no property interest protected under the Peeping Tom statute. The focus of the Peeping Tom statute is to protect the victim's privacy and to deter morally despicable behavior. Violation of the Peeping Tom statute has long been considered a crime of moral turpitude. See State v. Harris, 293 S.C. 75, 358 S.E.2d 713 (1987). Therefore, its application should not be restricted to conduct on private property. "Premises of another" is meant only to protect the culprit from being

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[1] It is important to note that public schools are not included within the public property exclusion of the trespass statute. See In the Interest of Joseph B., 278 S.C. 502, 299 S.E.2d 331 (1983). Public school land is owned and possessed by the respective school district and does not satisfy the traditional characteristics of a public place. Thus, public school property qualifies as "premises of another."

charged when his conduct occurs exclusively on or about his own property. All other premises are necessarily "of another." Since the intent of Section 16-17-470 is for the recognition and deterrence of sex offenders[2] and not protection of property rights, there is no justification for a public property exclusion as in Section 16-11-620.

At least two other jurisdictions in the United States with criminal statutes similar to Section 16-17-470 have found that spying or surveillance activities in public bathrooms violate their respective statutes. See State v. Million, 578 N.E.2d 869 (Ct. App. Ohio 1989)(finding that use of a mirror under a partition separating urinals in a public bathroom was enough to violate the state voyeurism statute); People v. Abate, 306 N.W.2d 476 (Mich. Ct. App. 1981)(use of cameras and two-way mirror in a public bathroom violated state criminal law). Both Ohio and Michigan provide exclusions for activities which take place in areas open to the public, yet refuse to put public bathrooms within this exclusion. The focus of these courts has been on the nature of the privacy interest invaded and not the legal ownership of the premises. Such focus, rather than the ownership focus of Hanapole, is more in tune with the spirit and intent of South Carolina's Peeping Tom statute.

2) Reasonable Expectation of Privacy - Any expectation of privacy must be reasonable, according to objective community standards, in order to be afforded protection under the law. See Southern Bell Telephone & Telegraph Company v. Hamm, 306 S.C. 70, 409 S.E.2d 775 (1991); Katz v. United States, 389 U.S. 347 (1967). A person will have a much more difficult time justifying an expectation of privacy in a public area than he would in his own home. Yet, being in a public area does not foreclose the possibility that the person may have a legitimate expectation of privacy. In Katz, a defendant claimed he had a right to privacy in a public phone booth. The Court agreed, stating:

> The critical fact in this case is that anyone who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that his conversation is not being intercepted. The point is not that the booth is 'accessible to the public' at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. (citations omitted) 389 U.S. at 361.

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[2] Violators of Section 16-17-470 are required to register as sex offenders. See S.C. Code Section 23-3-430.

Therefore, a person may have a reasonable expectation of privacy even though he is in a public place.

In the situation presented in your request, it is difficult to discern the exact contours of a person's reasonable expectation of privacy within a public bathroom. The issue has been addressed by numerous courts, with varying results. The vast majority of courts have held that a person has a recognizable expectation of privacy within a bathroom stall with the door closed. See State v. Biggar, 716 P.2d 493 (Haw. 1986); People v. Abate, supra; State v. Bryant, 177 N.W.2d 800 (Minn. 1970); Brown v. State, 238 A.2d 147 (Md. 1968); Britt v. Superior Court of Santa Clara County, 374 P.2d 817 (Cal. 1962). Some courts have recognized a privacy interest in doorless stalls. See State v Casconi, 766 P.2d 397 (Or. 1988); People v. Triggs, 506 P.2d 232 (Cal. 1973). Almost all courts refuse to recognize a privacy interest, at least with respect to members of the same sex, in common areas of public restrooms. See 74 A.L.R.4th 508. In any event, there are numerous factors which courts take into account when determining whether a person has a reasonable expectation of privacy within a public restroom. Id.

This particular issue has never been addressed by any court in South Carolina. It is fair to assume that our courts will recognize a legitimate privacy interest in a public bathroom, at least within the confines of a closed stall. This is especially likely in the situation presented in your request. If there is one constant expectation among the public concerning bathrooms, it is that members of the opposite sex will not enter to spy or stare at them while they are engaged in the most intimate of activities. Such conduct seems to be exactly what the Peeping Tom statute was meant to prevent.

3) Peeping - The overt act necessary to satisfy the "peeping" element under 16-17-470 is rather common sensical. The language of the statute is unambiguous and clear. Any activity which intrudes upon the privacy of the person targeted, or which tends to intrude will satisfy the statute. The statute is broad in scope, and "peeping" would include spying, photographing, videotaping, and the use of mirrors. It must be a purposeful "peep", with the intent to spy upon or invade the privacy of others. This requirement would excuse the innocent mistake of wandering into the wrong (gender-wise) bathroom and certain police investigative activity.[3] The determination of whether a "peep" was

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[3] The majority of caselaw discussing a person's reasonable expectation of privacy within a restroom deal with Fourth Amendment claims against the police for unlawful searches and seizures. There are different exceptions available to police officers which would not apply to a defendant under Section 16-17-470 and are not addressed by this opinion.

"purposeful" will be determined by a jury, as it is an issue of fact. Law enforcement should use discretion in determining whether sufficient evidence exists to satisfy this requirement.

CONCLUSION

The focus of the Peeping Tom statute, Section 16-17-470, is to protect the privacy interests, as opposed to the property interests, of the public and to prevent morally despicable behavior. There is no justification for a public property exclusion to the statute similar to that established in Hanapole. "Premises of another" merely provides that the culprit cannot be charged criminally for conduct on his own personal property. There can be little doubt that a person has some reasonable expectation of privacy from intrusion in a closed bathroom stall. Intrusion by a member of the opposite sex would be the most egregious. So long as the intrusion is intentional, this office sees no reason why the Peeping Tom statute does not apply.

I trust this information will be helpful. Please contact my office if you have any further questions.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With warmest regards, I am

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General