6157 Library

The State of South Carolina

OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 10, 1997

Lieutenant James E. Palmer
School Resource Officer
Union Public Safety Department
P. O. Box 987
Union, South Carolina 29379

Re: Informal Opinion

Dear Lieutenant Palmer:

You have asked for an opinion concerning "the legal use of video tapes, with audio, in the surveillance of high school students during the school day on the campus of a public school."

You outline the following factual setting for your questions:

> [t]he video/audio tapes were made in the following manner and as a result of numerous complaints to the Union High School Resource Officer, from students and faculty members, that marijuana was regularly being smoked outside of a rear entrance to the main building of the school. A small video camera was mounted on the glass of the window just above the rear entrance in plain view. In fact, this camera was discovered by the students and the camera was stolen but later recovered by the school principal. A small microphone was installed outside of the rear door in the ceiling area of the rear entrance. The video/audio recorder was located inside of the school library approximately (30) thirty feet from the rear door and out of view of the students. All of the wiring for the camera and the microphone was concealed in the ceiling area of the hallway just inside of the rear door. A second

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Request Letter

video camera was placed inside of a parked school bus located in the student parking lot of the school. As with the other video camera, this second camera was also in plain view. The school bus was specifically moved into the parking lot each day such that the camera could be installed and operated daily. The rear entrance area could easily be observed from the bus (see photo "B"). Both cameras were operated each day to capture a full view of this area of the campus. It should be noted that no warning signs have been posted on the campus to alert the students or anyone that video cameras are being used on the campus.

After placing the cameras as descried above numerous students were observed smoking cigarettes outside of the school building near this rear entrance. The video tapes are very clear and from viewing both tapes students can be identified without error. On one tape, (3) three students are observed smoking cigarettes when one of the three students produces a cigarette from his pocket which he calls a "joint". All of the three students smoke a portion of this cigarette even while they are holding and still smoking another cigarette. This substance is believed to be marijuana. However, none of the cigarettes was recovered for analysis. This cigarette was not discarded by the students as other cigarettes which often are found littering the concrete near this entrance.

The use of the video camera was found to be necessary due to the fact that the students were located in an area of the school where they couldn't be quickly reached by staff members. This unique area was created by the construction of the school (see photo "A"). An administrator is unable to approach any student from any direction without being seen by the student for at least (100) one hundred feet on the outside of the building. The hallways inside of the building is approximately (50) feet in length and the students constantly observe this hallway through the glass windows of the doorway. Further, the rear entrance doors are always locked and the students are always prohibited from entering the building through these doors until they are opened from the inside.

Your questions concerning these facts can be summarized as being the following:

1. Do students or other persons have the right of privacy on a public school ground except in areas such as restroom or dressing rooms?

2. Is there an exception of privacy for students or anyone who is engaged in any activity at a public entrance to the school when this entrance is in plain view from public parking lots or other public areas of the campus?

3. Is there any exception of privacy concerning any conversation held between students or others at the entrance to any public school?

4. Is there any legal problem with the parents of the children captured on the video tapes viewing the video tapes? These parents will see their children and other children violating school rules and the law.

LAW / ANALYSIS

In an Informal Opinion, dated January 29, 1997, I addressed the question of "video equipment in the classroom." There, the question presented was whether video cameras can be placed in the classroom for surveillance purposes."

The Informal Opinion noted particularly that "there is not a great deal of precedent dealing with the use of video cameras in schools." However, two cases in particular were referenced, Roberts v. Houston Independent Sch. Dist., 788 S.W.2d 107 (Tex.Ct.App. Houston) (1st Dist.) and Thompson v. Johnson Co. Community College, 930 F.Supp. 501 (D.Kan. 1996).

The Roberts case involved the taping of a school teacher's performance as a teacher in the classroom. She contended that her privacy rights were violated by the taping. The Court rejected the argument, however, finding that the teacher "has not demonstrated that she had a 'reasonable expectation of privacy' in her public classroom." She was taped in full view of students, faculty members and administrators in the performance of her public duties rather than "her private affairs." Id. While there was obviously audio taping

involved in that case, the Court stressed that the taping in no way intruded into any expectation of privacy.

The Thompson case involved the video-only surveillance of the workplace at a school. A video surveillance camera was placed in the storage room/locker area as a response to reported incidents of theft and weapons being brought on campus.

Members of the college's security force attacked the installation of cameras on the basis that it violated both their constitutional right to privacy as well as the federal Electronic Communications Privacy Act. (18 U.S.C. 2501 et seq.). The Court rebuffed plaintiffs' arguments, however. With respect to the federal Wiretap statute, the Court found that the statute is not violated by video recording because it prohibits a person from intercepting "any wire, oral or electronic communication." Holding that "virtually every circuit that has addressed the issue of silent video surveillance has held that Title I does not prohibit its use," the Court concluded that a video-only surveillance mechanism did not implicate the federal Wiretap statute. As to the Fourth Amendment claim, the Court concluded that a lack of reasonable expectation of privacy in the security personnel locker area "defeats their claim that defendants violated their Fourth Amendment right to privacy." 930 F.Supp. at 507.

Referencing these two cases primarily, we thus concluded in the earlier Informal Opinion that

> ... there is no expectation of privacy in a public school classroom. Therefore, certainly, a "video only" surveillance system in a public school classroom would likely be upheld in the courts against any attack that it violates the Fourth Amendment or Title I of the Electronic Communications Privacy Act. The question of audio surveillance is a closer question, but I believe that a good argument can be made that because there is no expectation of privacy in a public classroom, the federal Electronic Communications Privacy Act is not violated by audio surveillance. As a matter of caution, however, school officials may want to consider "video only" surveillance to avoid the possibility of conflict with the federal Act. And of course, the installation of video cameras as surveillance tools is a matter of policy for the school district to determine.

Since I wrote this Opinion in January of this year, there does not appear to have been any case law which would shed any further light on the question of audio taping. I can find no case which has addressed the issue of audio taping of students conversing in an area outside of the rear entrance of a school in the manner you have described. What I am happy to do in response to your request herein is to outline the most relevant case law regarding the Electronic Communications Act and suggest that you consult extensively with the School District's attorney regarding the formulation of any policy in this area concerning audio taping.

The federal Wiretap law prohibits a person from intentionally intercepting, endeavoring to intercept or procuring any other person to intercept or endeavor to intercept "any wire, oral or electronic communication." 18 U.S.C. § 2511(1)(a). The Act defines "wire communication" as "any aural transfer made ... through the use of facilities for the transmission of communication by the aid of wire, cable, or other like connection between the point of origin and the point of reception ... ." 18 U.S.C. § 2510(1). The term "oral communication" is defined by the Act as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation ... ."

I have located several cases which may be somewhat analogous to your situation and may be helpful to the District's attorney in evaluating the situation. All of these cases involve the applicability of the Electronic Communications Privacy Act to a particular situation.

In United States v. Clark, 22 F.3d 799 (8th Cir.1996), the Court held that the Act was not violated in the taping by a police officer of a conversation which occurred in the back seat of the officer's patrol car between two suspects. The Court held that "[a] marked police car is owned and operated by the state for the express purpose of ferreting out crime." Continuing, the Court concluded that a patrol car

> ... is essentially the trooper's office, and is frequently used as a temporary jail for housing and transporting arrestees and suspects. The general public has no reason to frequent the back seat of a patrol car, or to believe that it is a sanctuary for private discussions. A police car is not the kind of public place, like a phone booth ... where a person should be able to reasonably expect that his conversation will not be monitored.

Id. at 801.

In 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 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 reasonbly to believe that his call was an exception to the "all incoming calls recorded" rule or that the monitoring of it would be less than total. In short, Griggs-Ryan ... had considerably more than a mere expectation that his call might, or probably would, be monitored. In the face of express notice, it cannot be gainsaid that plaintiff impliedly 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].

As noted, I have not located any case involving whether the audio taping of a student outside the classroom setting would violate the Electronic Surveillance Privacy Act or the Fourth Amendment. As stated in the Informal Opinion of January 29, 1997, the seminal United States Supreme Court decision of New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) held that the privacy interests of school children require a balancing with the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 105 S.Ct. at 741. The Court held that the "legality of a search of a student should depend simply on the reasonableness, under all the circumstance, of the search." Id.

There would be two arguments which might be employed to sustain the audio taping of students as you have outlined. It is well recognized that "there is an accepted loss of privacy when one occupies a public place." U.S. v. Mankani, 738 F.2d 538, 544 (2d Cir.1984). Courts have consistently concluded that in common areas such as public restrooms, there is no reasonable expectation of privacy. See, State v. Boynton, 688 A.2d 145, 147 (N.J. 1997); People v. Lillis, 448 N.W.2d 818 (Mich.1989); State v. Holt, 630 P.2d 854 (Or. 1981).

In Adams v. State, 436 So.2d 1132 (Fla.1983), the Court held that the video and audio taping of defendant by various law enforcement officers as part of a "sting"operation did not violate his privacy rights. The police organized a storefront operation designed to attract customers dealing in stolen merchandise. To monitor the activities of these customers, the storefront was equipped with video cameras, one-way mirrors, tape recorders and still photography equipment. The Court concluded that "[w]e find little to support his contention that he had a reasonable expectation of privacy when transacting business in a place of business open to the public." Id. at 1133.

It could be argued that the area in question at school is more or less a "public place" where students have little or no expectation of privacy.

A second argument which could be made is that students "consented" to the taping where it is clear that they have been warned that their conversations are subject to taping such as was the case in the Griggs-Ryan case (tenants advised that their conversations are subject to recording) or the Van Poyck case (where is was clear that all pre-trial detainees were subject to having their telephone conversations monitored and recorded). This would, of course, be ultimately a decision of the school board as to whether to go this far with respect to providing this type of notice and warning.

Again, as I indicated in my earlier Informal Opinion of January 29, I would urge caution because there is so little case law involving the video and audio recording of students. While the Supreme Court has held in the T.L.O. case that students clearly have a diminished expectation of privacy in the school setting, the audio recording of their conversations, even if such conversations are conducted in a "public" or semi-public place such as a school courtyard or outside of the school building has never been sustained (or even addressed) by the courts, insofar as I am aware. While I believe good arguments can be made to support such a policy where it is clear that a serious drug problem is present, that is as far as I am able to go at this point. Such a policy should thus be carefully considered by the school board together with its attorney prior to any implementation.

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 kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph