

A Public Employer's Right to Search in the Workplace

By Gene King, MML LEAF Coordinator

The Law Enforcement Action Forum (LEAF) is revising Chapter 21, "Audio and Visual Recording Policy" (formerly the "In-Car Video Policy"), so that it covers several different areas of technology under different circumstances, including interrogation. During a recent LEAF meeting, members talked about the end of Chapter 21 that discusses the restriction on employees using, copying or distributing data, images or documents they obtain while performing their duties.

The discussion then turned to what authority an employer has to inspect and seize property that belongs to the department held on some electronic equipment owned by the employee. LEAF began looking at policy language in the *Manual of Law Enforcement Risk Control* and found that Chapter 11, "Rules," Section 2.6, "Privacy—Items Subject to Random Searches," that sets the expectation of privacy for employees when in the workplace. The following question arose: "Under what authority may a public employer perform searches and inspections?"

This edition of the LEAF Newsletter will clarify this issue and point out policy language in the *Manual of Law Enforcement Risk Control* regarding a municipality's ability to manage and to search. The intent of the Newsletter is to outline the responsibilities of the public employer that happens to be a law enforcement agency. There is a difference between the employer and police function.

Management Control

The employer is responsible for ensuring the efficient and effective operation of the workplace. Citizens need the assurance that the department will protect their privacy within the parameters of the law. Given the diverse situations and environments in which law enforcement officers work and the modern technology available to them, they can easily circumvent those departmental rules or policies that exist to protect sensitive or confidential information they gather. Without the ability to monitor and control the data and information gathered, an employer has no way of uncovering violations of rules or policies unless the information or pictures appear in the media or on the internet.

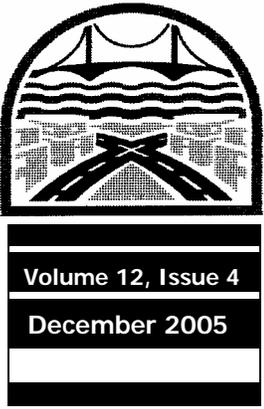
The LEAF Committee has worked hard to stay current with this changing issue so that law enforcement executives will have the tools they need to effectively manage their operations and strike a balance between protecting the privacy of those that serve and those that the department serves.

Unlike private sector employees, public employees have protection under the Constitution's Fourth Amendment protections against unreasonable search and seizure. It is necessary to explore two factors when discussing Fourth Amendment protections: (1) the expectation of privacy for the employee, and (2) the reasonableness of the search.

Expectation of Privacy

The federal courts first addressed the issue of expectation of privacy in *Katz v United States*, 389 US 347 (1967), a case which did not involve a public employer. The Katz case involved the FBI's recording of a bookmaker's telephone while in a phone booth. The Court felt that society would think that Katz had a reasonable expectation that his conversation would be private once he entered the booth and closed the door. The Court felt that the FBI's intrusion was unreasonable and disallowed the use of the recorded evidence. The Court held that the Fourth Amendment protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id.*, at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id.*, at 361. The Court said that if the phone booth had not had a door, any passerby could hear the conversation, so that the expectation of privacy may not be reasonable.

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School Administrator's Reasonable Search

The Court next looked at the issue in *New Jersey v. T. L. O.*, 469 U.S. 325, 334-335 (1985). This case outlined the ability of school administrators to search when they reasonably believed that a student had committed an infraction of the rules or the law. of the rules or the law. The United States Supreme Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches that school officials conduct and not solely to those that law enforcement officers carry out.

The Court said that determining reasonableness involves a twofold inquiry: first, was the action was justified at its inception, and second, was there a reasonable relationship in the search's scope to the circumstances that justified the initial interference. Under ordinary circumstances, the search of a student is justified where reasonable grounds exist to suspect that a search will uncover evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age, sex and nature of the infraction.

The Court also said that school officials do not need to establish probable cause before conducting a search because the legality of a search of a student and the student's locker depends on its reasonableness. The less stringent standard was the Court's attempt to balance the student's interest in privacy with the substantial interest of teachers and administrators in maintaining discipline and safety in the classroom and on school grounds.

In *T.L.O.*, a teacher's observations led to the initial search for cigarettes. The discovery of the rolling papers then gave rise to a reasonable suspicion that *T.L.O.* was carrying marijuana, and this suspicion justified further exploration that turned up other drug related activities. For more information on *T.L.O.* and the issues of law enforcement in the schools, go to Chapter 27 of the Manual of Law Enforcement Risk Control.

Public Employer's Search

The next case, built upon *T.L.O.*, is *O'Connor v Ortega*, 480 U.S. 709 (1987). This case dealt with a public hospital administrator who searched and seized personal items from the desk and files in the hospital office of a physician who was suspended for impropriety. The hospital had no policy or reasonable regulation that would limit the doctor or any employee's perception that they could store personal property and papers in their workspace. The Court upheld the search even though the hospital had no policy. The Court felt that because the search arose from a reasonable suspicion that the search of hospital property would produce evidence that the employee was guilty of misconduct and rule violations.

The Court explored several issues that clarify the exception to the Fourth Amendment Search and Seizure protections. In *O'Connor*, the Court defined the workplace as work-related

areas and items generally within the employer's control. Since the immediate case involved a hospital, the Court used the hallways, cafeteria, offices, desks, and file cabinets among other areas, as examples of what is part of the workplace. They also said that these areas remain part of the workplace even if an employee places personal items in them.

The Court differentiated between the workplace and those personal items, such as an employee's personal luggage, handbag or briefcase that happen to be in the workplace. Absent any legitimate regulation or actual practice or procedure, an employee may have an expectation of privacy that the contents of the luggage, handbag or briefcase are secure. In fact, the items would be secure from a search by law enforcement unless officers had a warrant.

Justice O'Connor in the opinion wrote:

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy rights of public employees in the workplace that, while not insubstantial, are far less than those found at home or in some other situations. As with the building inspections in *Camara*, the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U.S., at 537. Government employees have offices for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.

Justice Scalia, concurring, wrote a good summation of the case.

The case turns, therefore, on whether the Fourth Amendment was violated - i.e., whether the governmental intrusion was reasonable. It is here that the government's status as an employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are per se unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . ." *New Jersey v. T. L. O.*, 469 U.S. 325, 351 (BLACKMUN, J., concurring in judgment). Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules - searches of the sort that are regarded as reasonable and normal in the private-employer context - do not violate the Fourth Amendment.

O'Connor v Ortega is the foundation for a public employer's ability to search without violating an employee's Fourth Amendment rights to be free from unreasonable searches and seizures. *O'Connor v Ortega* established that although a public employee may have a reasonable expectation of privacy, the employer may legally conduct a search, but only if it serves to protect the employer's interests in ensuring that employees are performing the work of the agency properly and efficiently. This standard is much less stringent than that to which law enforcement officers must adhere if they were to search the same property for criminal evidence.

A review of the cases in Michigan failed to reveal any cases that are on point to this topic. What was found is a *Michigan Attorney General Opinion # 5753* (August 6, 1980) in which Frank Kelly answered the question of whether a board of education may adopt reasonable regulations concerning employer inspection of files, lockers, desks and lesson plans of teachers of the school district. This opinion predated *T.L.O.* and *O'Connor* but does cite many of the cases used in the foundation of the opinion in *O'Connor*. In the opinion, Attorney General Frank Kelly said that it was his opinion that the board of education of a school district could adopt reasonable regulations concerning employer inspections.

Legal Advisor Comments

After having reviewed the case law on this subject, LEAF turned to its Legal Advisor, Audrey Forbush of *O'Connor, DeGrazia, Tamm and O'Connor P.C.*, and asked what a public employer should do to establish and inform public employees about the limits on their expectations of privacy in the workplace. She said that a common theme in *O'Connor* and in the Attorney General Opinion was the need to establish a policy and practice in the organization that specifically establishes management's authority to search and outlines what they may search. She also noted that law enforcement should communicate policy and practice regularly to employees through training, signage or policy review.

Audrey stated that public employers should base policy and practice on reasonableness and that, in the actual search, management must be sensitive about protecting an employee's privacy when it comes to personal property that may be subject to the search. As an example, Audrey suggested that even though it may be reasonable to search among an employee's personal papers or property, it is unreasonable for the employer to disclose the nature of the found items or the information gathered from private papers unless the information is germane to the investigation. It would also be inappropriate, during a search of an employee's luggage or purse, to display or comment upon their choice of undergarments or other personal items.

Additionally, it is important for municipal employers to discuss the policy and practice with any labor representatives. This will give the representatives notice and help them to understand why the public employer is initiating such a policy or practice. It is also wise to include labor representatives when developing the protocol for implementing the policy.

Their participation may ensure that the public employer does not violate employees' due process rights under the contract should an investigation require a search of personal property that is on property controlled by the employer.

Audrey suggests municipal entities consider the following:

- Adopt a policy that there is no expectation of employee privacy in their use of any property owned and/or provided by the governmental entity.
- Include in the policy that there is no expectation of privacy for any property that is located on the workplace or used while in the course of the employee's duties regardless of ownership. This property includes electronic communications devices, computers and/or audio or visual recording devices.
- Provide their employees with a copy of the policy and train them to its intent.
- Be aware of other policies of the municipal entity that may work in tandem with the assertion of the employer's rights. Examples include rules or policies that require employees to follow orders, be truthful, cooperate with investigations, or submit to testing.
- Establish a practice of inspecting municipal property on a random but regular basis by top-level department managers or their designees.
- When it is reasonable, based on the circumstances, municipal employers should inspect any property used in the course of all employees' duties.
- Be careful to preserve any labor agreement rights and due process that may exist.
- Ensure that employer's searches preserve any employee rights as well as privacy and due process rights that the law provides.
- Ensure that all searches of personal property are reasonable and based only on the business necessity at hand.

A review of the MML-LEAF Manual of Law Enforcement Risk Control revealed the following samples of rules and policy language that serve as examples to establish management's rights to manage and control the workplace environment. These examples inform employees that they should have no expectation of privacy when in the workplace and that management may take specific actions, including inspections or searches, to ensure compliance.

You can find The LEAF Manual on the Web at MML.org. Glide the mouse over the blue tool bar to “Insurance.” The options will appear on a grey tool bar. Click on Management Resources and then click on LEAF.

CHAPTER 11 RULES FOR POLICE OPERATION

2:5 Guidelines Regarding Relationship with the Public:

The Department acknowledges that its effectiveness depends upon acceptance of its authority and approval of its actions by the community. The Department, therefore, expects exemplary conduct of its employees; it attempts to provide or direct the public to other sources for needed information and seeks public cooperation through the news media; and it encourages positive public reaction to its service through careful attention to complaints received and service provided.

2:6 Privacy—Items Subject to Random Searches: There is no expectation of privacy for property owned by the (City/Village/Township/County) or for employee’s personal property or vehicles possessed or carried on to (City/Village/Township/County) premises, including communications devices and electronic storage media.

4:1 Purpose: To enhance the status of police professionalism, provide effective law enforcement services and preserve the public trust.

4:2 Requirement for Compliance: All personnel of the Department shall be responsible for all written directives. Failure to comply with any applicable directive may be cause for disciplinary action.

4:4 Conduct Unbecoming Department Personnel: Personnel shall conduct themselves, at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming Department personnel shall include that which brings, or may bring, the Department into disrepute or reflects discredit upon the employee or the department, which impairs the efficient operation of the Department.

4:7 Neglect or Inattention to Duty:

- A. Personnel shall not perform their duties negligently, carelessly or in an inattentive manner.
- B. They shall not engage in any activities or personal business on duty, which would cause them to neglect or be inattentive to duty.

4:12 Unsatisfactory Performance:

- A. Personnel shall maintain sufficient competency to perform properly their duties in a manner that will maintain the highest standards of efficiency in carrying out their duties and the objectives of the Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of law, departmental guidelines; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employees rank, grade, or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention.
- B. The following will be considered prima facie evidence of unsatisfactory performance: repeated poor evaluations or a written record of repeated infractions of departmental guidelines.

4:18 Use of Department Communications or Other Electronic Devices: Personnel shall operate department communications, networks subscribed to by the department and electronic devices in conformance with all laws and departmental procedures. Unauthorized, inappropriate or unnecessary use shall be prohibited.

4:36 Dissemination of Information:

- A. Personnel shall treat the official business of the Department as confidential.
- B. Information regarding official business shall be disseminated only to those for whom it is intended, in accordance with established departmental guidelines and applicable laws.
- C. Personnel may not, without the authorization of the [Chief of Police, Sheriff, Director of Public Safety], or his designee, remove, transmit and/or copy records, reports or documents from a police installation or a designated area.
- D. Personnel shall not divulge the identity of persons giving confidential information except as authorized by proper authority.

4:38 Departmental Reports:

- A. Personnel shall submit all necessary reports on time and in accordance with established departmental guidelines.
- B. Reports submitted by personnel shall be truthful and complete, and no employee shall knowingly enter or cause to be entered any inaccurate, false, or improper information.

- C. Personnel shall not modify official documents, reports, forms or audio or video tapes or electronic files by attaching non-authorized statements whether written or verbal.

4:39 Processing Property and Evidence:

- A. Property or evidence that has been discovered, gathered or received in connection with departmental responsibilities will be processed in accordance with established departmental guidelines.
- B. Personnel shall not convert to their own use, service, manufacture, conceal, falsify, destroy, remove, tamper with, or withhold any property or evidence in connection with an investigation or other police action.
- C. Disposition of property and/or evidence shall be made in accordance with established departmental guidelines.

4:41 Use of Equipment/Uniforms/Technological Devices:

- A. Personnel shall utilize Department equipment/uniforms only for its intended purpose, in accordance with established departmental guidelines, and shall not abuse, damage or lose Department equipment/uniforms. Stolen, lost, damaged or missing equipment or uniforms shall be reported to the (Chief, Sheriff, or Director).
- B. All Department equipment/uniforms shall be maintained in proper order/condition.
- C. Personnel shall not convert to their own use, service, manufacture, conceal, falsify, destroy, remove, tamper with, or withhold any Department property, uniforms or equipment.
- D. No equipment, including image capturing, voice or data transmitting or receiving devices or any other technological device shall be possessed or used while on duty unless issued or authorized by a commanding officer.

- 4:56 Requests for Records: All requests for records, reports, or other official documentation shall be referred to the (Chief, Director, Sheriff), or his designee, for approval.

IN-CAR VIDEO POLICY

IX. REQUIREMENTS FOR COMPLIANCE

- A. Any abuse, misuse, alteration, sabotage, or intentional destruction of the in-car audio/visual system's equipment will result in a disciplinary action, up to and including dismissal.
- B. Recordings made by an in-car audio/visual system of this department are considered as an official report of the department. Any theft, intentional misplacement, alteration, sabotage, or editing or distribution of any recording device or recording assigned to an officer without the consent of the (Chief, Sheriff, Director) or designee, will be considered a falsification of an official police record, evidence tampering or other rule violation that will result in disciplinary action up to and including dismissal.
- C. Any recording made, no matter what the method or electronic device used, by an employee of this department while in the performance of their duties or when acting in the capacity of their employment, is considered as an official record of the department. Any theft, intentional misplacement, alteration, sabotage, distribution or editing of any media recording device or a recording assigned to an officer without the consent of the (Chief, Sheriff, Director) or designee, will be considered a falsification of an official police record, evidence tampering or other rule violation that will result in disciplinary action up to and including dismissal.
- D. Violations of this policy, or portions thereof, may result in disciplinary action.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. If you have difficulties accessing the LEAF manual, do not hesitate to contact Gene King, MML LEAF Coordinator, at gking@meadowbrook.com.

While compliance with the loss prevention techniques suggested herein might reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

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