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May 19, 2010

Jay Holmquist, General Manager
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1244 K Street
PO Box 82048
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Re: Security Cameras

QUESTION

You have asked whether there are any limitations or restrictions on the use of security cameras by public power districts or electric cooperatives in or around buildings and facilities owned by these entities and whether there is any requirement for a written policy governing the use of such cameras and access to any stored data.

BRIEF ANSWER

The law imposes virtually no limitations on districts or electric cooperatives, as owners of property or facilities, for deployment or archiving of access control and video surveillance within a lobby and public areas of a property, or on the exterior of buildings and facilities. Generally speaking this rule applies equally to members of the public and employees in these specified areas.

If a District desires to place security cameras in the workplace, this same general rule applies; however it is advisable to give notice to employees that the area in which they work will be under surveillance by a video camera.

This opinion does not address the situation where a District desires to surreptitiously conduct surveillance of employees in the workplace. If a District desires to conduct such surreptitious surveillance, it should consult with its own attorney for advice.

Although we can find no statutory requirement in Nebraska for a written policy or procedure or for signage disclosing the use of security cameras, I believe that it is advisable to adopt such a policy and post a sign in the area that is under surveillance.

ANALYSIS

Using a security camera to record activities in public areas or on the exterior of buildings or facilities owned by district or electric cooperatives does not raise serious legal implications, so long as a member of the public or an employee has no expectance of privacy in the area where the surveillance is being conducted. An employee of a district or employee generally has no expectation of privacy in the work place, except in rest rooms or locker rooms. If a member of the public or an employee believes that his or her rights have been violated by the surveillance of a security camera, the most likely complaint will be that their privacy has been invaded.

Invasion of Privacy

Much has been written about the doctrine of invasion of privacy. The formulation of the doctrine has a long history and there are some aspects that are not implicated by the question presented. However, to understand the rationale behind the doctrine, I believe that it is necessary to briefly review its history. Rather than independently ferreting out the tenants of the doctrine and in the interest of saving time, I have decided to quote a brief history written by Donald P. O’Gorman in an article which appeared in the Nebraska Law Review entitled “Looking Out for Your Employees: Employers’ Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy” 85 *Neb. L. Rev.* 212 (2006). In the article O’Gorman gives a brief history of the tort of invasion of privacy, liberally quoting from articles and treatises written by William Prosser, a recognized authority on torts.

In 1890, Samuel D. Warren and Louis D. Brandeis wrote an article entitled the Right to Privacy. The authors asserted that certain court decisions based on defamation, the invasion of some property right, or a breach of confidence or an implied contract were actually based on the broader concept of a right to privacy. The authors argued that invasion of privacy should be recognized as a distinct cause of action, and that a remedy should be provided for a breach. ‘Warren and Brandeis were not presenting a picture of the law as it was, but of the law as they believed (or hoped) it should be.’

Although courts were slow to adopt Warren’s and Brandeis’s invasion of privacy tort, by the 1930’s ‘the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled.’ In 1960, William L. Prosser, then dean of the University of California School of Law at Berkeley, announced that ‘[a]t the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts.’

Prosser, in a law review article ‘that significantly influenced the development of the common law,’ surveyed the legal landscape, and concluded that what had emerged from the decisions recognizing and applying a right to privacy was not one tort, but ‘a complex of four.’ Prosser asserted that ‘[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing

in common except that each represents an interference with the right of the plaintiff 'to be let alone.' Prosser identified these four torts (or sub-torts) as follows: (1) 'intrusion upon the plaintiff's seclusion of solitude, or into his private affairs'; (2) '[p]ublic disclosure of embarrassing private facts about the plaintiff'; (3) '[p]ublicity which places the plaintiff in a false light in the public eye'; and (4) '[a]ppropriation of the defendant's advantage, of the plaintiff's name or likeness.'

With respect to the tort of invasion upon the plaintiff's solitude, or into his or her private affairs [the tort which with we are concerned], Prosser stated that 'there must be something in the nature of prying or intrusion.' Prosser described the tort as including physical intrusions, such as intruding into the plaintiff's home or hotel room, or searching the plaintiff's shopping bag in a store. Prosser noted, however, that the principle protecting this branch of the right to privacy was 'soon carried beyond such physical intrusion,' and was extended to such things as peering through the windows of a home.

Prosser also observed that 'the thing into which there is prying or intrusion must be private.' Thus for example,

[o]n the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.

But, 'when he is confined to a hospital bed, and in all probability when he is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain.'

Prosser further observed that 'the intrusion must be something which would be offensive or objectionable to a reasonable man.' Prosser concluded his discussion of the tort of invasion of privacy by stating that '[i]t appears obvious that the interest protected by this branch of the tort is primarily a mental one.'

(Emphasis added) *id* at 224-225.

Accordingly, the deployment or archiving of access control and video surveillance within a public area of a property owned by a district or electric cooperative, or on the exterior of such a property or facility, is not an actionable tort of invasion of privacy, unless the person complaining can show that he or she had a right to expect privacy in such an area and that the intrusion is something which would be offensive or objectionable to a reasonable man. This same conclusion would apply to employees in public places and in the work place (excluding rest rooms or locker rooms).

Statutory right to privacy in Nebraska

The Legislature in Nebraska has codified the common law right to privacy by enacting a statutory scheme protecting this right. *See, Neb. Rev. Stat. § 20-201 to 20-211. Neb. Rev. Stat. § 20-201* provides “ It is the intention of the Legislature to provide a right of privacy as described and limited by sections 20-201 to 20-211 and 25-840.01 [not applicable to the question presented here], and to give to any natural person a legal remedy in the event of the violation of the right.”

In *Neb. Rev. Stat. § 20-203*, the right is expressed as follows:

Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.

CONCLUSION

It is my opinion that with respect to property or facilities owned by a public power district or an electric cooperative, a person who enters a lobby or common area of a such a property or facility or approaches the exterior of a building or facility has no reasonable expectation of privacy and could not in good faith maintain that a video surveillance of such person would be highly offensive to a reasonable person. The same conclusion applies to an employee in the workplace (excluding rest and locker rooms).

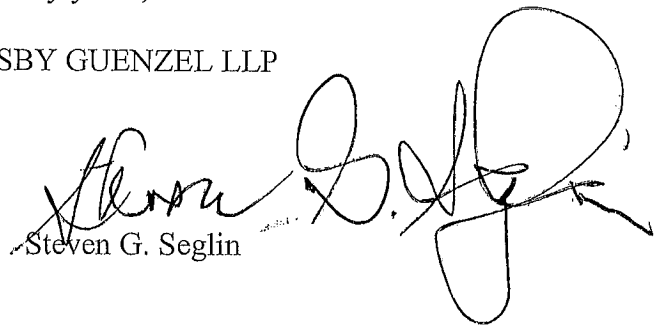
This opinion does not cover surreptitious surveillance of an employee in the workplace.

We can find no statutory requirement in Nebraska that an entity which installs and operates one or more security cameras have a written policy. However, I think it makes good sense to have one to establish guidelines for the operation, storage and disclosure of any data recorded by such equipment. A suggested draft policy is attached.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

SGS:rrk

DRAFT BOARD POLICY ON THE USE OF SECURITY CAMERAS

Policy Statement

1. Security cameras may be installed in situations and places where the security of either property or people would be enhanced.
2. When appropriate, cameras may be placed throughout the District or Cooperative, inside or outside of buildings or facilities, except in areas where members of the public or employees have an expectancy of privacy. An appropriate sign located in the viewing area of any security camera will be conspicuously posted.
 - (a) Cameras will be used in a professional, ethical, and legal manner consistent with the law in the State of Nebraska.
 - (b) Camera use will be limited to situations that do not violate the reasonable expectation of privacy as defined by law.
3. The manager of operations for the District or Cooperative will serve as the coordinator of the security cameras and manage the placement, recording, storage, and use of any video surveillance.

Reasons for the Policy

1. The purpose of this policy is to regulate the placement and use of security cameras to protect the legal and privacy interests of the District or Cooperative, the public and employees.
2. The function of security cameras is to assist in protecting the safety and property of the District or Cooperative.
3. The primary use of security cameras will be to record images for future identification of individuals in the event of legal or policy violations.

Policy Requirements

1. Only authorized personnel, as determined by this policy and authorized by the General Manager will be involved in, or have access to security camera data.
 - (a) Local facility managers and designated personnel may have access to security camera data in their areas of responsibility.
2. When an incident is suspected to have occurred, designated personnel may review the images from the security camera data.
3. A log will be maintained for a period of 12 months for all access to and use of data stored by the District.

4. The installation of new security cameras must be approved in advance by the General Manager.

Related Policy Information

1. Security cameras will not record or monitor sound.
2. Recorded security camera data must be retained for a period of at least 30 days.
3. Security camera data is not considered to be Directory Information and may be subject to confidentiality restriction under the Nebraska Public Records Act, *Neb. Rev. Stat. §§ 84-712 et seq.*
 - (a) Requests from District employees to release information obtained through security camera surveillance must be approved by the General Manager.
 - (b) All requests from sources external to the District or Cooperative to release information obtained through security camera surveillance must follow the procedures outlined in the Nebraska Public Records Act to request that information be released, unless such information is requested through a lawful subpoena or search warrant issued by a court of competent jurisdiction.

Exclusions

1. Cameras installed or utilized for criminal investigations are subject to appropriate Nebraska and Federal laws and are excluded from this policy.