

**ATTORNEY GENERAL
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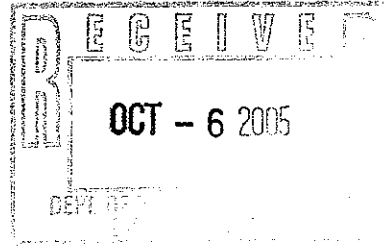
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October 5, 2005

Yvette G. Moore, Administrator
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Dear Ms. Moore:

You have requested an opinion from the Office of the Attorney General regarding constitutional questions associated with the adoption of regulations that will require the installation and use of cameras in taxicabs.

BACKGROUND

The Taxicab Authority (TA) was created by NRS 706.8818 and is charged with the oversight of the taxicab industry in counties which have a population of over 400,000 persons. NRS 706.881. The TA may adopt appropriate regulations for the enforcement and administration of NRS 706.881—.885, and as it deems necessary, for the conduct of the taxicab industry. See NRS 706.8818(5).

Consistent with its statutory obligations, the TA has become increasingly concerned with the safety of taxicab drivers and the best method to address this safety issue. Thus the TA conducted a review of various types of safety equipment. After careful consideration, the TA decided that the installation of a camera in every taxicab would be the preferred method to protect taxicab drivers, and would serve two purposes: 1) to deter crime; and 2) if a crime was committed, a camera would provide an effective means of identifying the perpetrator.

Thereafter, the TA adopted a regulation mandating installation and use of cameras in taxicabs on or before April 1, 2005. Members of the taxicab industry and the American Civil Liberties Union opposed the regulation, citing constitutional privacy concerns.

Later, the regulation was referred by the Legislative Counsel Bureau to the Legislative Commission, which objected to it. The 2005 Legislature then considered the regulation and adopted Senate Concurrent Resolution No. 42, which stated that the regulation failed to conform to the statutory authority pursuant to which it was adopted or to carry out the intent of the Legislature in granting that authority and declared that the regulation would not become effective. See S. Res. 42, 73d Leg., (2005) File No. 96.

Despite the actions of the Legislature, several members of the taxicab industry, who supported the regulation, installed camera systems in their taxicabs. These systems include still digital cameras as well as cameras that are capable of making video and audio recordings.

Based upon the foregoing, the TA has requested an opinion from the Office of the Attorney General as to the parameters of allowable governmental intrusion into a passenger's reasonable expectation of privacy. Using our opinion for guidance, the TA intends to craft another regulation to achieve its joint purposes of crime deterrence and, if a crime occurs, the identification of the perpetrator.

QUESTION ONE

Does a passenger in a taxicab have a reasonable expectation of privacy which would completely bar the use of audio and/or video recording equipment for purposes of protecting driver safety?

ANALYSIS

Before responding to the question of whether a passenger in a taxicab has a reasonable expectation of privacy protected by constitutional principles, there must be a determination of whether some governmental action has occurred. Privacy protection under the United States Constitution is relevant to government rather than private action.¹

"Fundamental to a democratic society is the ability to wander freely and anonymously, if we so choose, without being compelled to divulge information to the government about who we are or what we are doing." *Hiibel v. Sixth Judicial District Court*, 118 Nev. 868, 871—872, 59 P.3d 1201, 1204 (2002). This right to live in privacy is protected by the Fourth Amendment. U.S. CONST. amend. IV. But this right is not

¹ This opinion will not address the legal issues surrounding the installation of a camera system by a taxicab company on its own initiative.

“absolute.” *Hibel* at 118 Nev. 871—872, 59 P.3d 1204. It only protects against “unreasonable invasions of privacy, or searches and seizures *by the government.*” *Id.* (emphasis added).

In this matter, the TA, a Nevada government agency, would mandate by regulation that surveillance equipment be placed in taxicabs. The surveillance equipment, however, would be paid for, installed and maintained by the individual taxicab companies.²

Where a governmental agency has commanded a result, the actions taken by a private party are considered government action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (the government may dominate an activity to such an extent that its participants are deemed to act with the authority of the government); *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (Government action when restaurant excluded black patrons in conformity with local ordinance). Here, the cameras would be placed at the command of the TA, a government agency. Therefore, the presence of the cameras should be considered government action.

Neither the United States Constitution nor the Nevada Constitution expressly provides for a right to privacy. An individual's right to privacy must be premised on an expressed constitutional right, such as the Fourth Amendment prohibition against unreasonable searches and seizures or the Fourteenth Amendment personal privacy rights. *Vega-Rodriguez v. Puerto Rico Telephone Company*, 110 F.3d 174, 182 (1st Cir. 1997).

Courts have recognized some personal privacy rights grounded in the Fourteenth Amendment. U.S. CONST. amend. XIV. These cases center on the right of the individual to have autonomy over personal decisions regarding human reproduction. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Video and/or audio surveillance of passengers in taxicabs does not implicate the personal privacy rights found under the Fourteenth Amendment. *Vega-Rodriguez*, 110 F.3d at 183 (workplace video surveillance not within personal privacy rights recognized by the Fourteenth Amendment).

² At the 2005 Annual Review of Taxicab Rates, the TA re-characterized a temporary fuel surcharge as a rate increase based upon, *inter alia*, the cost of safety equipment.

The Fourth Amendment protects individual privacy against certain types of governmental action. *Katz v. U.S.*, 389 U.S. 347, 350 (1967). Further, the Fourth Amendment protects people, not places. *Id.* at 351. Video surveillance initiated by the government is subject to a Fourth Amendment analysis. *United States v. Corona-Chavez*, 328 F.3d 974, 980 (8th Cir. 2003).

A person must show that he has a reasonable or legitimate expectation of privacy in order to invoke the protections of the Fourth Amendment. *U.S. v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000). This expectation of privacy contains both a subjective and objective component. *Young v. State*, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993). The individual must show through his conduct that he had a subjective expectation that his activities would be private and that his subjective expectation is one that society recognizes as reasonable. *Nerber*, 222 F.3d at 599.

In *Katz*, the Supreme Court of the United States found a public telephone booth to be a "temporarily" private place for purposes of the Fourth Amendment. *Katz*, 389 U.S. at 361. The Court reasoned:

[W]hat he sought to exclude when he entered the booth was not the intruding eye--it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.

Id. at 352 (emphasis added).

In *Chapa v. Texas*, 729 S.W.2d 723 (Tex.Ct.App. 1987), the Texas court reviewed the question of whether a passenger in a taxicab had a reasonable expectation of privacy. The Texas court found that Chapa had a reasonable expectation of privacy in the passenger compartment of the taxicab stating:

[Chapa] exercised a significant degree of control over the taxicab. As a presumptively paying fare he could determine its destination for the duration of his presence therein. Moreover, though lacking ownership or possessory interest in the cab, [Chapa] and his companions could nevertheless exclude others from it during their ride.

Id. at 728. Likewise, in *U.S. v. Santiago*, 950 F. Supp. 590 (S.D.N.Y. 1996), the Southern District of New York also recognized a Fourth Amendment privacy interest on the part of a passenger in a taxicab.

[A] passenger in a taxicab may exclude others from the cab, as he has hired the cab for his exclusive use for the duration of his trip. In effect, the passenger area belongs to the passenger who pays for it during the course of the trip. The passenger determines the destination of the taxicab. . . . For these reasons, defendant's expectation of privacy is objectively reasonable and one that society has accepted. Defendant easily meets the second prong of the test. His subjective expectation of privacy was manifested by entering the cab, closing the door and directing the driver to a particular destination. . . . There is no question that the rear seat of the taxicab belongs exclusively to the passenger for the duration of the ride for which he hired the cab. Thus, defendant has established a Fourth Amendment interest in the search and seizure at issue in this stop.

Id. at 598 (citations omitted). See also *United States v. Woodrum*, 202 F.3d 1, 6 (1st Cir. 2000) (a taxi fare--who by definition has contracted to pay for both the right to exclude others from the cab and the right to control its destination in certain respects--has a reasonable expectation that he will not gratuitously be seized while en route); *Bates v. Maryland*, 494 A.2d 976, 980 (1985) (one who hires a taxicab and contracts to pay a fare . . . acquires, for the period of his use and occupancy, a reasonable expectation of privacy); *Massachusetts v. Hooker*, 755 N.E.2d 791, 792 (Mass. 2001) (lower court judge erred in determining that [Hooker] had no expectation of privacy in the back seat of a taxicab); *United States v. Sutherland*, 891 F. Supp. 658, 662 f.n. 3 (D. Me. 1995) ("The Court assumes Defendants had a reasonable expectation of privacy in the passenger compartment of the taxicab."); compare, *United States v. Lopez*, 915 F. Supp. 891, 899 (E.D.Mich. 1996) (passengers in a taxicab do not have a legitimate expectation of privacy in the trunk of the taxicab).

Nevada courts have not addressed the issue of privacy rights for a taxicab passenger, but the analysis used by Nevada courts in other situations is instructive. *Kemp v. Block*, 607 F. Supp. 1262 (D.Nev. 1985) is a civil case premised on invasion of privacy. The court, however, used the two-part Fourth Amendment subjective-objective test to determine whether the plaintiff had a legitimate expectation of privacy. *Id.* at 1264. *Kemp* concerned the recording of an argument between two employees by a

third employee in their workplace, an instrument shop. The court looked at several factors including the size of the shop, the ability of other employees to hear the argument and the plaintiff's inability to exclude other persons from entering the shop and determined that the plaintiff had no reasonable expectation of privacy. *Id.*

In *Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002), the police attached a monitoring device to the bumper of Osburn's car without a search warrant. The court again used the two-part Fourth Amendment subjective-objective test to determine if Osburn had a legitimate expectation of privacy in the bumper of his car. *Id.* at 327, 44 P.3d at 526. The court reasoned that because the exterior of a car, including its bumper, is open to public view and subject to visual inspection by passersby, there could be no objective expectation of privacy in the exterior of a car. *Id.*

Young v. State, 109 Nev. at 214, 849 P.2d at 342, concerned the placement of video cameras in a public restroom. The court found that because the plaintiff engaged in sexual activity in a doorless stall of a public restroom, his expectation of privacy was not reasonable. The court further discussed that an expectation of privacy would be greatest if a person were using a public restroom for its intended purpose while enclosed in a stall. *Id.* Fourth Amendment protection is not afforded to activities which a person knowingly exposes to the public. *Id.*

Nevada has statutes regarding the operation of taxicabs similar to the ones discussed in *Chapa, Santiago, and Woodrum*. In Nevada, a taxicab driver may not take a passenger to a destination other than the one requested by the passenger or fail to comply with the reasonable and lawful requests of a passenger as to the speed of travel and the route to be taken. NRS 706.8846. Moreover, a taxicab driver may not permit any person or persons other than the person who has engaged the taxicab to ride therein unless the person who has engaged the taxicab requests that the other person or persons ride in the taxicab. NRS 706.8849(1)(f).

Based upon the Fourth Amendment analysis presented above, a passenger in a Nevada taxicab has a reasonable expectation of privacy from unreasonable governmental intrusions. Objectively, the passenger has the ability to direct the taxicab and has the right to exclude others from the vehicle. Subjectively, by entering the taxicab for its intended purpose and shutting the door, a passenger manifests an intention to preserve reasonable privacy rights.

However, this privacy right is limited to the passenger's actual occupation and reasonable use of the interior of the vehicle. Activities that are open to the visual or auditory observation of the public and those activities and speech subject to observation by passersby, such as a passenger's entry into and exit from the vehicle, are not protected by the Fourth Amendment.

The presence of the taxicab driver does not eliminate the passenger's reasonable expectation of privacy from governmental intrusion. Even though the passenger can not expect total privacy due to the presence of the driver, this diminished state of privacy does not eliminate the passenger's right to be free from unreasonable government mandated surveillance. See *Nerber*, 222 F.3d at 604. ("Even if one cannot expect total privacy while alone in another person's hotel room (*i.e.*, a maid might enter, someone might peek through a window, or the host might reenter unannounced), this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras.")

As discussed in *Katz*, 389 U.S. at 351—352, even though the person in a glass telephone booth could be seen by passersby, he did not lose his legitimate expectation that the government would not record his telephone conversation with another.

The taxicab driver is not the "public." The driver must take the passenger to the destination requested. NRS 706.8846. The driver must obey the reasonable commands of the passenger with respect to the route to be taken and the rate of speed. *Id.* While a passenger may not legitimately expect total privacy in his travels with respect to the driver, he can legitimately expect that the government will not unreasonably invade his privacy throughout his entire travel.

CONCLUSION

A taxicab passenger has a legitimate expectation of privacy from governmental intrusion once he occupies the interior of the taxicab. However, this privacy right clearly does not extend to activities and speech that are open to visual or auditory observation by the public or passersby, when the passenger enters into and exits from the taxicab.

QUESTION TWO

If a passenger has a reasonable expectation of privacy in the interior of the taxicab, what is a constitutionally acceptable, regulatorily-required audio or video recording device invasion of that privacy interest?

ANALYSIS

In order to determine whether the TA's proposed revised regulation requiring camera installation complies with the Fourth Amendment, it is necessary to look at the extent of the surveillance and balance any intrusion against the passenger's legitimate expectation of privacy. See *Hibel*, 118 Nev. at 873, 59 P.3d at 1205 (2002). The TA's proposed regulation would allow for the installation of still digital cameras or video recorders with or without audio capabilities.

Video Surveillance

"[Video] surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987). See also, *P.E.T.A. v. Berosini*, 111 Nev. 615, 630, 895 P.2d 1269, 1279 (1995) ("We support the need for vigilance in preventing unwanted intrusions upon our privacy and the need to protect ourselves against the Orwellian nightmare that our 'every movement [be] scrutinized.'")

However, not all video surveillance will violate a Fourth Amendment expectation of privacy. *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991). Videotaping of individuals in public places does no more than record what can be viewed with the naked eye. *Id.*

A taxicab passenger's entry into or exit from the vehicle takes place in the public view, whether it is at the airport, a casino, a shopping center or in front of his home. As concluded above, a taxicab passenger's Fourth Amendment privacy rights do not protect him from being observed entering or exiting a taxicab because that behavior is exposed to the public. See *Young*, 109 Nev. at 213-214, 849 P.2d at 342 (Fourth Amendment protection is not afforded to activities which a person knowingly exposes to the public).

However, nonconsensual, continual governmental videotaping of a passenger from the moment of entry into the taxicab until the passenger's exit from the taxicab requires a different Fourth Amendment analysis. For example, the courts have recognized a difference in the degree of intrusion between a fly-over of someone's backyard and the continual recording of activities in that back yard. In *Cuevas-Sanchez*, 821 F.2d at 251, the police placed a video camera on top of a power pole and kept a portion of the defendant's backyard under continuous surveillance. The court emphasized that the intrusion from the camera was not minimal, as an intrusion by an aerial fly-over or a peek over the fence would be, and found that the defendant's expectation of being free from that kind of constant surveillance was one that society would recognize as reasonable. *Id.*

In addition, the degree of intrusion by the government must be weighed against the individual's privacy rights. "Traditionally, in resolving issues implicating the Fourth Amendment right to privacy, the following touchstone question has been asked: Is the invasion of privacy reasonable?" *Hiibel*, 118 Nev. at 873, 59 P.3d at 1204—1205 (footnote citing to *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). The reasonableness of an invasion of privacy under the Fourth Amendment is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel v. Sixth Judicial District Court*, 124 S. Ct. 2451, 2459 (2004) (citation omitted).

The TA's proposed, revised regulations would also mandate the use of a panic button with which a taxicab driver could activate the camera if he felt in danger. Based on the analysis above, as long as the camera recorded for a minimal amount of time upon being activated, the reasonable intrusion into the passenger's reasonable Fourth Amendment privacy rights would likely be found acceptable. The recording is directly related to the TA's articulated governmental interest in protecting taxicab drivers or deterring crime, and like a fly-over or peek over the fence, is free from the kind of constant surveillance that society would recognize as unreasonable.

Finally, it bears repeating that the legitimate government interest articulated by the TA is the safety of taxicab drivers. Several courts have acknowledged the validity of that concern. See *New York v. Abad*, 771 N.E.2d 235 (N.Y. 2002) (there is an undisputed acute public interest in preventing crime against taxicab drivers); *New Jersey v. White*, 818 A.2d 361, 366 (N.J. 2002) (there is a compelling public interest in protection of taxicab drivers in light of recent trend of violence against taxicab drivers.); *Woodrum*, 202 F.3d at 11 (there is an obvious public interest in protecting taxicab drivers in Boston where many had been robbed and two have been murdered).

Audio Surveillance

Opponents of the rejected regulation have also raised concerns regarding the use of audio recording equipment in taxicabs. Similar to the analysis regarding video surveillance, the parameters of audio recording need to be analyzed by balancing the degree of intrusion by the government against the individual's reasonable privacy expectations.

Based on the analysis above, audio recording in the context of entering and exiting the taxicab and in response to the activation of the panic button would be minimally intrusive of the passenger's privacy rights and directly related to the government's interest in the protection of the taxicab driver or deterring crime.

Upon entering the taxicab, the passenger typically engages in conversation with the driver about his destination. Upon exiting the taxicab, the passenger typically engages in conversation with the driver related to the payment of the fare. Under a Fourth Amendment analysis, it has been established that a person engaged in conversation with another person assumes the risk that the other person may divulge the contents of the conversation or even record the conversation. *Corona-Chavez*, 328 F.3d at 981.

Federal and Nevada state law both reflect this assumption of the risk principle. NRS 200.650 prohibits the surreptitious recording of conversations of others. However, it does not prohibit recording a conversation in which the one who is recording is also engaged. Further, one of the persons engaging in the conversation can give consent to the recording. Further, the recording of the conversation would not be surreptitious as the TA's proposed revised regulations would mandate the placement of notices both inside and outside of the taxicab alerting passengers of the recording devices.

Similarly, 18 U.S.C.A. § 2511 prohibits the interception of wire, oral or electronic communication. However, it is not unlawful to intercept a communication where the one who is recording is a party to the communication or where any one of the other parties to the communication has given prior consent. 18 U.S.C.A. § 2511(1)(c) and (d).

Neither of these laws would prohibit the audio recording of the entry or exit of the passenger or the panic button recording. The conversation being recorded upon entry and exit is between the driver and the passenger. The driver has consented to the recording by his operation of the taxicab which he knows will record the entry or exit events.

The conversation being recorded in response to the panic button shows an even clearer indication of driver consent. The driver activates the recording because of his perception of danger. It is axiomatic that by turning on the recording device he is consenting to the conversation being recorded. Assuming that the driver is in verbal communication with the passenger at the time the system is activated, one-party consent is clearly present, and recording is both statutorily and constitutionally permissible.

G-Force Event Systems

Members of the taxicab community have also expressed the desire to be able to activate the recording systems in the event of a G-force event. A G-force event is that which alters the vehicle's inertia to such a degree that a trigger is activated. G-force events include severe erratic driving, hitting a speed bump at a high rate of speed or a collision. The G-Force event triggers the camera in the taxicab to record. It also triggers an external camera.

Based on the analysis above, the triggering of the external camera would not implicate any privacy concerns because a taxicab passenger has no reasonable or legitimate expectation of privacy in the exterior of the vehicle. *Osburn*, 118 Nev. at 327.

Activation of the internal camera would require consideration of the passenger's Fourth Amendment privacy rights and the laws respecting recording of oral communications discussed above. For purposes of this opinion, we will analyze this issue premised on a short twenty second recording of the interior of the taxicab. (Current camera models record 10 seconds before the G-force event and 10 seconds after the G-force event.)

Under a Fourth Amendment analysis, the G-force event trigger must further the government's aim of driver protection or crime deterrence. The G-force recording is caused by a sudden change in movement of the taxicab. This change could occur as a result of erratic driving, or perhaps a collision. The G-force event could also come about because of a sudden attack on the taxicab driver. Balancing the suggested minimal 20 second intrusion on the passenger with the ability to record sudden potential criminal acts against the driver, the video recording that accompanies a G-force event would likely be found reasonable and would not implicate the passenger's Fourth Amendment rights.³ See *Cuevas-Sanchez*, *supra*.

³ This is not to say that a larger period of time necessary to meet reasonable governmental goals to deter or record a crime could not be upheld by a court under appropriate facts.

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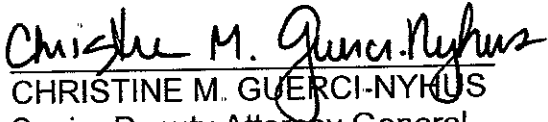
The audio recording accompanying the G-force event, while being a minimal intrusion on the passenger's privacy rights, could also record conversations between passengers or a passenger on a cell phone and arguably implicate 18 U.S.C.A. § 2511. However, recordings of conversations which violate 18 U.S.C.A. § 2511 are those recordings that are done intentionally or purposefully. *In re Pharmatrak, Inc. Privacy Litigation*, 292 F. Supp.2d 263 (D.Mass. 2003). Intentional, as used in 18 U.S.C.A. § 2511, means more than "caused the result." *Id.* at 266. The recording of the conversation must have been the conscious objective. *Id.* Here, the recording is not triggered by a conversation, and in most cases would record conversations between the driver and the passenger. There is no conscious objective to intercept the conversation and therefore no violation of 18 U.S.C.A. § 2511.

CONCLUSION

The adoption of revised regulations discussed within this opinion would be subject to the review and approval of the Legislative Counsel and the Legislative Commission pursuant to authority granted those bodies under chapter 233B of NRS. With that caveat, and based on the authorities above-cited, we conclude as follows: The adoption of revised regulations which limit any video and audio recording of the camera to (1) the entry and exit of the passenger, (2) activation, when the equipment is activated by a panic button, and (3) minimal recording in the event of a G-force event, would be a limited governmental intrusion which would likely be found by a court to not violate the passenger's Fourth Amendment privacy rights.

Sincere regards,

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