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Ryan J. Walsh


February 13, 2023

VIA EMAIL

c/o Terry Sorelle, Executive Secretary
terry.sorelle@greenbaywi.gov

Mayor Eric Genrich
100 N Jefferson Street
Green Bay City Hall
Green Bay, WI 54301

Re: Audio Surveillance of Green Bay City Hall

Dear Mayor Genrich:

I represent the Wisconsin State Senate, which has learned that you have installed extremely sensitive audio-recording devices at Green Bay City Hall, capable of intercepting low-volume oral conversations. As far as we are aware, these devices are on the ceilings in the hallways outside (1) the first floor Clerk's office, (2) the City Council chambers, (3) the Mayor's office—and perhaps elsewhere. These hallway bugs are placed in areas where members of the public—attorneys and their clients, constituents discussing political issues, journalists conducting off-the-record conversations, and our colleagues in the Senate, to name just a few groups—retreat to discuss matters discreetly.

We understand that the public was not informed of this surveillance equipment when it was installed and that the Green Bay city government has not been informing those entering City Hall about the audio surveillance. No sign anywhere had warned that audio recording devices are deployed throughout City Hall. Nevertheless, members of the public have been subject to its audio surveillance.

This surveillance activity is not only disturbing. It is unlawful. The State Legislature, from which the City of Green Bay derives its authority, has never delegated this power to it.¹ And it never would. The American Civil Liberties Union has correctly condemned this practice as a “very serious privacy invasion.” See Ben

¹ See *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21, 373 Wis. 2d 543, 892 N.W.2d 233 (“It is true, and ever has been, that cities exercise only such authority as they receive from our constitution and statutes.”)

Krumholz, “*Very serious privacy invasion*”: *ACLU analyst on Green Bay’s audio surveillance*, Fox 11 News (Feb. 9, 2023).²

We demand that you immediately disable the audio recording devices deployed anywhere within City Hall. We also demand that you destroy all illegally obtained audio recordings. **We ask that you please provide adequate assurances, by 5:00 PM on Tuesday, February 14, that all audio surveillance in City Hall has ceased. We also ask that all illicitly obtained recordings be destroyed by 3:00 PM on Friday, February 17. If these deadlines are not met, we will be forced to move a court for an immediate order ending this unlawful conduct.**

I. THE AUDIO SURVEILLANCE IS UNLAWFUL UNDER WISCONSIN’S ELECTRONIC SURVEILLANCE CONTROL LAW

The City’s audio recording is a clear violation of Wisconsin Electronic Surveillance Control Law (WESCL), Wis. Stat. § 968.31, which makes it a Class H felony to intentionally intercept oral conversations.³ An “oral communication,” for purposes of the WESCL, is one in which the speaker has a reasonable expectation of privacy—in other words, “(1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable.” *State v. Duchow*, 2008 WI 57, ¶ 20, 310 Wis. 2d 1, 749 N.W.2d 913. The second element depends on a variety of factors, including “(1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker’s statements; and (6) the place or location where the statements are made.” *Id.*, ¶ 22.

Here, the City’s audio surveillance program has certainly recorded, and will continue to record, conversations in which persons have a reasonable expectation of privacy. For example, it is entirely reasonable that those involved in low-volume exchanges and consultations, who have retreated to the hallway away from others, expect their exchanges to remain private. More, these recording devices are apparently highly sensitive and capable of recording otherwise inaudible conversations. Many of these recordings therefore certainly intercept “oral communications,” as that term is understood in the statute.

More, this surveillance has also certainly captured communications to which no one has consented. There is no indication that the City had ever informed any member of the public of this audio surveillance. Nor is there any evidence that City Hall had posted signs warning that audio-recording devices are used in the building.

² <https://tinyurl.com/2p9bnwh4>.

³ 18 U.S.C. § 2511 makes the interception of oral conversations a federal crime.

In any event, as explained below, the City cannot force members of the public to consent to an otherwise unlawful recording of their oral communications as a condition of accessing City Hall and concomitant government officials and services.

II. THE AUDIO SURVEILLANCE VIOLATES THE WISCONSIN AND UNITED STATES CONSTITUTIONS

Both the federal and state constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. Art. I, § 11. These provisions “extend[] to the recording of oral statements where the person has legitimate expectation of privacy.” *Tittle v. Carver*, No. 06-C-938, 2008 WL 4425882, at *8 (E.D. Wis. Sept. 24, 2008). Indeed, the WESCA “is a particularized statutory codification of the fourth amendment right.” *State v. Smith*, 149 Wis. 2d 89, 95 n.4, 438 N.W.2d 571 (1989). Whether a person has a reasonable expectation of privacy for constitutional purposes involves the same analysis as that for the WESCA. *See Duchow*, 2008 WI 57, ¶¶ 20–21 (citing constitutional law). Therefore, for the same reasons that the surveillance program violates the WESCA, it likewise violates the constitution.

More, the City cannot claim that the public has consented to these searches by entering a government building. First, there is no indication that the public has even been warned about this surveillance. In any event, the City cannot require its citizens to submit to generalized audio surveillance as a condition of accessing government buildings and services. That is because the government cannot condition the exercise of a constitutional right on the relinquishment of another constitutional right. *Milewski v. Town of Dover*, 2017 WI 79, ¶ 68, 377 Wis. 2d 38, 899 N.W.2d 303 (“The constitution may not be put at odds with itself.”). Nor can the government condition the receipt of a benefit on the relinquishment of a constitutional right. *Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶ 34, 358 Wis. 2d 1, 851 N.W.2d 337.

The City responds that its practice of secret, suspicion-less audio surveillance helps it respond to “emergencies.” *Fact Sheet - City Hall Security*, City of Green Bay, Wisconsin, MAYOR'S OFFICE PRESS RELEASES (Feb. 10, 2023).⁴ This is absurd on its face, given that the City also admits that the audio is not monitored in real time. *Id.*

III. THE CITY HAS NO AUTHORITY TO ENGAGE IN THE AUDIO SURVEILLANCE

The City is a “creature[] of the state legislature that ha[s] no inherent right of self-government beyond the powers expressly granted to [it]” either by the constitution or by statute. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21, 373 Wis. 2d 543, 892 N.W.2d 233 (citation omitted). And even if a city is granted power, it must yield to the Legislature. *See id.*; *see also Black v. City of Milwaukee*, 2016 WI 47, ¶ 23, 369 Wis. 2d 272, 882 N.W.2d 333.

As relevant here, even if one assumes that this extraordinary authority had ever been arguably delegated, the Legislature has plainly withdrawn the power of cities

⁴ <https://greenbaywi.gov/CivicAlerts.aspx?AID=506> (“Fact Sheet”).

to engage in this audio surveillance. The WESCL expressly forbids any person in the State of Wisconsin, including government officials, from recording oral statements without consent. Wis. Stat. § 968.31. Because the Legislature has expressly forbidden this surveillance, the City has no power to engage in it.

* * *

We trust that the City has other means of safeguarding its citizens that do not require spying on them. We demand that you immediately cease engaging in the unlawful audio surveillance of Green Bay City Hall, that you destroy all illegally obtained audio recordings from that surveillance, and that you send us confirmation of the same. If you do not take these actions promptly, we will seek an injunction against this surveillance in a court of law.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Walsh", written in a cursive style.

Ryan J. Walsh

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