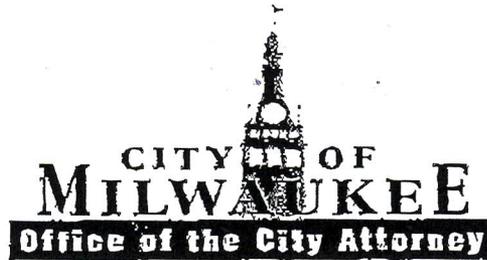


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January 2, 2008

Dale T. Schunk
Acting Chief of Police
Milwaukee Police Department
749 West State Street
Milwaukee, WI 53233

Re: Encrypted OpenSky Radio Communications

Dear Acting Chief Schunk:

On September 18, 2007 you requested our legal opinion on issues relating to the Milwaukee Police Department's (MPD) plan to transition from its current analog police radio communication system to a new encrypted, digital radio communication system. The system is OpenSky, and is a product of M/A-COM.

The OpenSky system provides high security, encrypted, digital radio communication capabilities. MPD decided to switch to OpenSky because the current analog radio communication system does not provide sufficient channels for all members of MPD to communicate efficiently and effectively. The OpenSky system allows MPD to communicate safety and security sensitive information with outside entities such as the FBI, Homeland Security, and other county and local law enforcement agencies. Your staff has informed us that the encrypted radio communication system will more efficiently meet MPD's growing needs to communicate efficiently within the department, as well as with other law enforcement agencies.

Under the current system any member of the media and of the public may monitor police radio communications in real-time by purchasing a conventional radio scanner programmed to MPD radio frequencies. When MPD transitions to OpenSky the media and the public will no longer be able to access police radio communications by use of radio scanners. OpenSky radio transmissions can be monitored by the public only by purchasing M/A-COM OpenSky radios programmed by MPD. You have informed us that both broadcast TV and print

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media have requested authorization to buy OpenSky radios. M/A-COM will not sell OpenSky radios to anyone outside MPD unless MPD specifically authorizes them to do so. If MPD authorizes sale of the radios to the media and the public, MPD technical staff will be required to program, update, and provide necessary maintenance on all of those radios. You state that MPD is unable to charge for these services.

While there was no intent to block radio scanner access when MPD decided to update its radio communication system, your staff has expressed security concerns relating to granting access to the OpenSky radio communications to the public. Your staff has informed us, for example, that when a call is made from a high-security line to a low-security line there is no way for MPD to block public access to the high-security calls. This could result in a serious security breach.

You have asked whether MPD is obligated to authorize the media and the public to purchase the OpenSky radios and to then undertake the obligation of programming, updating, and maintaining the radios at no charge. For the following reasons we believe that you are under no such obligation.

Public Records Analysis

The public records law defines a "record" as:

... any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. 'Record' includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks.

Wis. Stat. § 19.32(2) (Emphasis added.) The definition of a "record" under the public records law does not include real-time radio communications until they are recorded in some format. Radio communications in real-time are similar to telephone conversations, which are not "records" as defined by Wis. Stat. § 19.32(2). We have conducted extensive legal research and find no court decision or attorney general opinion in Wisconsin, or in any other state, that defines a "record" to include real-time police radio communications. Accordingly, it is our opinion that the public records law creates no obligation to authorize sale of the

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OpenSky radios and to provide programming, updating, and regular maintenance for the radios to the media or to the public at no charge, because the real-time communications are not "records" as defined by the public records law.

Your staff has informed us that MPD will continue to record all police dispatches and radio communications. The recorded radio communications will be subject to the public records law analysis; including statutory, common law, or public policy exceptions that may apply to an individual recording, or portion of a recording.

Federal Law Analysis

You have also asked whether MPD would violate the Electronic Communication Privacy Act (ECPA), or any other state or federal law, if you allow members of the media and the public to purchase the OpenSky radios and to thereby access police radio communications. The ECPA amended the Federal Wiretap Act in 1986. It sets out the provisions for access, use, disclosure, interception and privacy protections of electronic communications.

Congress "enacted the Federal Wiretap Act for the dual purpose of protecting the privacy of wire and oral communications, and delineating the conditions under which such communications may be intercepted." *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000). The purpose of the ECPA amendments to the federal wiretap law was to extend to electronic communications the same protections against unauthorized interceptions that the wiretap law provides to oral and wire communications via common carrier transmissions. *Brown v. Waddell*, 50 F.3d 285, 289 (4th Cir. 1995).

Under the ECPA a "person" is defined as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation." 18 U.S.C. § 2510(6). The ECPA defines "electronic communications" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic, or photo optical system that affects interstate or foreign commerce . . ." 18 U.S.C. § 2510(12). "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not scrambled or encrypted; or is not transmitted in a method with the intent of preserving the privacy of such communication. 18 U.S.C. § 2510(16).

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It is not a violation of the ECPA to intercept electronic communication when the system is configured in a manner that is readily accessible to the general public. 18 U.S.C. § 2511(1)(g)(i). This definition "has been interpreted to require that the speaker have a subjective expectation of privacy that is objectively reasonable." *U.S. v. Hill*, 669 F.2d 23, 25 (1st Cir. 1982). Any individual who violates the ECPA may be subject to monetary fines as well as imprisonment up to five years. 18 U.S.C. § 2511(4). The provisions of the wiretap act apply to private conduct as well as to governmental agents. *U.S. v. Steiger*, 318 F.3d 1039, 1046 (11th Cir. 2003), cert. denied, 538 U.S. 1051.

If MPD authorizes the sale of the OpenSky radios to the media and to the public, MPD encrypted radio communications would be readily accessible to the general public and, therefore, no individual who accesses the communications would be in violation of the ECPA. If MPD does not authorize sale of the radios it is our opinion that a court could rule that any individual who unlawfully accesses the encrypted communications could be in violation of the ECPA.

The Communication Act of 1934, as amended by 47 U.S.C.A. § 605, prohibits any unauthorized person from intercepting any radio communication and divulging or publishing the "existence, contents, substance, purpose, effect or meaning of such intercepted communication to any such person." 47 U.S.C.A. § 605(a).

The Act applies to interstate or foreign communications, 47 U.S.C.A. § 605(a), and to intrastate communications. *Benanti v. U.S.*, 355 U.S. 96 (1957). The Act applies to all radio communication not intended for use by the general public. *Reston v. FCC*, 492 F.Supp. 697 (D.D.C., 1980). Two-way radio transmissions, such MPD radio communications, are protected under the Act. *U.S. v. Laughlin*, 226 F. Supp. 112 (D.D.C., 1964). It is our opinion that a court could rule that it would be unlawful for any unauthorized individual to intercept MPD's encrypted radio communications and to then divulge the content of those communications. If, however, MPD authorizes sale of the OpenSky radios all such purchasers could be considered "authorized recipients" and would therefore not be subject to the prohibitions of the Act.

We do not believe that MPD would violate the ECPA or the Communications Act of 1934, as amended, by allowing access. However, the ECPA is an extremely complex and "often convoluted, area of the law." *Steiger*, 318 F.3d at 1047. Therefore, if you decide to authorize the sale of the OpenSky radios to the media and the public we believe that we should further research and communicate this

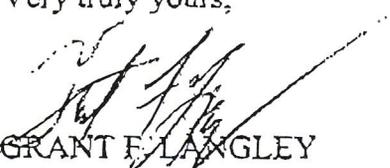
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issue with members of Homeland Security, the FBI, and the U.S. Attorney's office to address their concerns, if any, prior to such authorization.

We find no state or federal law or court decision that directly addresses your question of whether MPD is obligated to or prohibited from authorizing the sale of the OpenSky radios to the media and to the public, and to program, update and maintain the radios at no charge. Neither the public records law nor the First Amendment to the United States Constitution creates such an obligation.

We hope the above has answered your questions. If you have any additional questions, you may feel free to contact us.

Very truly yours,



GRANT F. LANGLEY
City Attorney



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Assistant City Attorney

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