



State of New Jersey

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ATTORNEY GENERAL ADMINISTRATIVE EXECUTIVE DIRECTIVE NO. 2021-9

TO: All Division Directors, Department of Law & Public Safety

FROM: Gurbir S. Grewal, Attorney General

DATE: July 15, 2021

SUBJECT: **Directive Establishing Protocol for Undercover Audio Recordings by Investigators Working on Civil Matters**

Over the last several years, we have bolstered the Department of Law & Public Safety's capacity to pursue investigations and litigation for the purpose of enforcing civil laws that protect New Jersey residents. Within the Division of Law, we added a Deputy Director to oversee an expanded Affirmative Civil Enforcement Practice Group, and we created new sections for Affirmative Civil Rights and Labor Enforcement, Data Privacy and Cybersecurity, Environmental Enforcement and Environmental Justice, and Special Litigation. Within the Division on Civil Rights and the Division of Consumer Affairs, we have worked to expand our investigative capacity not only so that we can pursue more investigations but so that we can take on more complex and impactful investigations.

In light of these developments, we are continuously evaluating the tools at our disposal to pursue affirmative civil investigations and litigation, and reviewing the policies in place to ensure their appropriate use. This memorandum addresses one such tool: covert audio recordings by the Department's investigators in the course of a civil investigation.

Divisions conducting civil investigations may find that covert audio recordings of in-person conversations in which their investigators are participants may be useful for a variety of reasons. For instance, such recordings can ensure a level of accuracy above that of an investigator's notes and directly capture evidence beyond the words used, such as tone and demeanor, in the conversation. Such recordings also may be used to impeach the testimony of individuals who deny having made a particular statement during a conversation with an investigator.



Although the authority of the Department's investigators to conduct covert audio recordings of in-person conversations in which they participate in the course of investigations is not new, the Department's civil investigators have not used the technique more than occasionally within recent years. With the expansion of our capacity to conduct affirmative civil investigations and litigation, the use of this investigative tool (and others) may become more common. As a result, it is appropriate at this time to establish certain guidelines to ensure that any covert audio recordings created by the Department's investigators in the course of civil investigations are made within the confines of the law and subject to appropriate Departmental approvals and oversight.

Pursuant to the authority granted to me under the New Jersey Constitution; the Law and Public Safety Act of 1948, N.J.S.A. 52:17B-1, et seq., which provides for general responsibility of the Department's operations and the supervision of the organization of the Department; and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97, et seq., which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I hereby direct all Department personnel operating under the authorities of the laws of the State of New Jersey to implement and comply with the following directives.

I. Protocol for Undercover Audio Recordings by Investigators Working on Civil Matters

- A. ***Legal requirements.*** Department personnel conducting or supervising investigations that will include covert audio recordings should be aware of the New Jersey Wiretapping and Electronic Surveillance Control Act ("New Jersey Wiretap Act"), N.J.S.A. §§ 2A:156A-1 to -34, and other legal authorities that may restrict the creation, use, and disclosure of such recordings, or that may affect their admissibility in legal proceedings. The New Jersey Wiretap Act imposes significant restrictions on covert audio recordings in civil investigations. Broadly speaking, however, a statement made in the course of an *in-person* conversation with, or *in-person* communication directed to, an investigator who covertly records that conversation is not a "wire, electronic or oral communication" subject to the New Jersey Wiretap Act because the statement is not made via wire or electronic communication and is not made in a context in which the speaker has a reasonable expectation of privacy. *See, e.g., Hornberger v. Am. Broad. Cos.*, 351 N.J. Super. 577 (App. Div. 2002). For additional guidance on the New Jersey Wiretap Act and other relevant legal authorities, investigative Divisions should consult with their counsel in the Division of Law. Divisions that do not have counsel in the Division of Law should consult with their in-house counsel. If a Division seeks to make or use covert audio recordings in investigations involving jurisdictions outside New Jersey, consideration must be given to that jurisdiction's legal requirements, which may differ from those that apply in New Jersey.

- B. ***Investigative plans.*** Covert audio recordings should be made in accordance with a written investigative plan developed in advance. Such plans should include – among other details for the anticipated recordings – descriptions of the nature of the investigation and anticipated recordings; the identity of the Department investigator who will participate in the in-person conversation to be recorded; the identities of any other individuals who will be recorded (if known); the anticipated date, time, and duration of the anticipated recordings (if unknown, a target date range may be substituted); the means used to maintain operational security; and the protocols that will be followed to ensure the integrity of the record and compliance with applicable laws.
- C. ***Approvals for investigative plans and recordings.*** The written investigative plan developed pursuant to Section I.B must be approved by an appropriate Assistant Attorney General in the Division of Law and the member of the Attorney General’s Executive Leadership Team responsible for providing oversight for the relevant Practice Group within the Division of Law. Divisions that do not have counsel in the Division of Law must obtain approval for the written investigative plan from an in-house Assistant Attorney General and the member of the Attorney General’s Executive Leadership team responsible for providing oversight for that Division. Approval of an Assistant Attorney General must be obtained before seeking approval from the Office of the Attorney General.

For investigations of conduct that could be charged criminally (based on the facts known at the time the investigative plan is submitted for approval) and investigations otherwise involving the use of criminal investigators, the investigative plan and recording must additionally be approved by the Attorney General or designee within the Division of Criminal Justice.

- D. ***Training.*** Investigators who conduct covert audio recordings must be appropriately trained in the use of the relevant devices and technologies, as well as practices to ensure the integrity of the recording and compliance with applicable laws. The Division of Criminal Justice may be able to assist other Divisions whose investigators require such training.
- E. ***Use of covert recordings.*** Nothing in this Directive shall be construed to require the making or use of covert audio recordings as part of any investigation.
- F. ***Scope.*** This Directive does not apply to internal investigations or to investigations subject to Internal Affairs Policies & Procedures (IAPP).

II. Other Provisions

- A. ***Non-enforceability by third parties.*** This Directive is issued pursuant to the Attorney General’s authority to supervise LPS operations and ensure the uniform and efficient

enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.

- B. **Severability.** The provisions of this Directive shall be severable. If any phrase, clause, sentence, or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the document shall not be affected.
- C. **Questions.** Any questions concerning the interpretation or implementation of this Directive shall be addressed to the First Assistant Attorney General, or the First Assistant's designee.
- D. **Effective date.** This Directive shall take effect immediately and remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Gurbir S. Grewal
Attorney General

ATTEST:



Andrew Bruck
First Assistant Attorney General
Dated: July 15, 2021