

LEGAL SERVICES

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MEMORANDUM

September 30, 2013

SUBJECT: Alaska Laws Protecting Privacy
(Work Order No. 28-LS0990)

TO: Representative Shelley Hughes
Attn: Ginger Blaisdell

FROM: 
Kathleen Strasbaugh
Legislative Counsel

You have asked for a review of Alaska's laws protecting individual privacy in preparation for a meeting of the Task Force on Unmanned Aircraft Systems. Among the Task Force's duties is providing written recommendations concerning, among other things, a state policy that protects privacy. 2013 Legislative Resolve No. 17 at 3. To that end, as I understand from Ms. Blaisdell, you would like to know what protections might already exist, with a view toward avoiding duplication of existing law. The Task Force has apparently expressed concern about how information gathered by unmanned aircraft could be used by private or public parties, and what use might be made of such information captured inadvertently.

This memo will outline constitutionally based protections of privacy and identify state statutes that might apply to conduct considered invasion of privacy. As you requested, this memo focuses on the protections afforded under Alaska law. A brief discussion of emerging federal law is included, but I haven't explored other states' case law, nor lower federal court cases that consider these issues. However, I have attached an excerpt of an *Alaska Law Review* which summarizes Alaska's privacy law as it has developed independently of federal constitutional law. I have also attached a recent *Harvard Law Review* article that specifically addresses this topic in great detail. The memo also briefly addresses scenarios set out in your request. Please note that it is very difficult to predict the outcome of litigation in this very new intersection of technology and privacy law.

1. Constitutional Protection of Privacy

The Constitution of the State of Alaska explicitly protects the right of privacy against government (but not private) intrusion. Art. I, sec. 22, provides:

The right of the people to privacy is recognized and shall not be infringed.
The legislature shall implement this section.

This protection, although not unlimited, has been held to be broader than the protection afforded by the United States Constitution. *Woods & Rohde, Inc. v. State, Department of Labor*, 565 P.2d 138, 149 (Alaska 1977).¹ Both the Alaska Constitution and the Fourth Amendment to the United States Constitution require a warrant by a governmental agency for the search of a place where a person has a reasonable expectation of privacy. *Beltz v. State*, 221 P.3d 328, 333, 337 (Alaska 2009) (search of garbage placed out on the street for collection did not require warrant; expectation of privacy found not reasonable.)

Neither the Alaska Supreme Court nor the United States Supreme Court has ruled on whether surveillance by a government operated unmanned aerial vehicle is a search under the Fourth Amendment. Based on available precedent, it is possible that the courts will decide that the use of an unmanned aerial vehicle constitutes a search requiring either a warrant, or the application of a recognized exception to the warrant requirement.

The United States Supreme Court has considered law enforcement or other government agency use of aerial surveillance and the use of technological devices for surveillance purposes. The Court found that surveillance by manned aircraft is not an intrusion into a private area that renders an overflight a search under the Fourth Amendment to the United States Constitution; however the placement of a global positioning device on a person's vehicle is an intrusion that constitutes a search. Here is a brief summary of some of these cases: *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945 (2012): Attachment of global positioning device to automobile parked in public place is a search under the Fourth Amendment.

Dow Chemical Co. v. United States, 476 U.S. 227 (1986) EPA aerial surveillance and photography of chemical plant is not a search where the aircraft was manned and operating at a lawful altitude.

California v. Ciraolo, 476 U.S. 207 (1986) Manned aerial surveillance of a backyard marijuana grow at lawful altitude did not violate the Fourth Amendment.

The Court might find the use of a technology that exceeds human observational capacity the sort of intrusion that constitutes a search requiring a warrant or an accepted exception:

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Kyllo v. United States, 533 U.S. 27, 40 (2001) (internal citations omitted) (thermal

¹ In Alaska, the right to privacy extends to protection of such activities as possession and use of marijuana in the home by an adult, which, while not a fundamental right, is protected because such possession and use does not implicate the public welfare in the manner that more harmful substances, or public ingestion, or use by minors might. *Ravin v. State*, 537 P.2d 494, 508-09 (Alaska 1975).

imaging of home from outside a search under the Fourth Amendment).

2. Alaska Statutory protections

There are a handful of criminal statutes that may apply to improper use of images obtained from unmanned aerial vehicle surveillance. These statutes would seem to apply for the most part to private actors. These are offenses that punish conduct that invades the privacy of a victim, and would require proof that images gathered by the unmanned aerial vehicle were disseminated. These offenses would probably not punish capturing the images inadvertently, although collecting and storing them might be a concern.

Alaska Statute	Charge	Penalty
11.41.270	Stalking in the second degree: nonconsensual conduct prohibited by statute prohibits monitoring by technical means.	Class A misdemeanor ²
11.61.116	Sending an explicit image of a minor.	(1) class B misdemeanor if the person distributes the image to another person; ³ (2) a class A misdemeanor if the person distributes the image to an Internet website that is accessible to the public.
11.61.120(a)(6)	Harassment in the second degree: publishing or distributing images that show certain body parts or a sexual act.	Class B misdemeanor

² A class A misdemeanor is punishable by a fine of up to \$10,000, and a sentence of imprisonment up to one year.

³ A class B misdemeanor is punishable by a fine of up to \$2,000, and a sentence of imprisonment up to 90 days.

11.61.123	Indecent viewing or photography (with certain law enforcement and security surveillance exceptions).	(1) class C felony if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, a minor; ⁴ (2) class A misdemeanor if the person viewed or shown in the picture was, at the time of viewing or production of the picture, an adult.
11.76.113	Misconduct involving confidential information in the first degree: use of confidential information to commit a crime or obtain a benefit to which the person is not entitled to injure another, or deprive another of a benefit.	Class A misdemeanor
11.76.115	Misconduct involving confidential information in the second degree: knowingly and without legal authority obtaining confidential information about another.	Class B misdemeanor

In addition to the above criminal offenses, there are other provisions of law that might bear on the information obtained from data gathered by an unmanned aerial vehicles.

If the data is gathered by a government agency, it is a public record. However, AS 40.25.120 provides certain protections for private information. AS 40.25.120(a)(4) excepts records required by law to be kept confidential. *See Falcon v. APOC*, 570 P.2d 469 (Alaska 1977) (physician not required to disclose identity of certain patients to Alaska Public Offices Commission where the disclosure of the patients' identities might disclose the fact that they were being treated for conditions that patients would normally keep private); *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997) (payroll information may be kept private where disclosure might endanger employees or contractors, where those employees and contractors were threatened with harm). AS 40.25.120(a)(6)(C) protects information gathered by law enforcement the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness."

⁴ A Class C felony is punishable by a fine of up to \$50,000, and a sentence of imprisonment up to five years. Presumptive sentences based on whether the offense is a first or subsequent offense are set out at AS 12.55.155(e).

There may be civil liability for obtaining (and subsequently misappropriating) information on trade secrets or patented processes. *See, generally*. AS 45.50.

In addition, a person who is subject to surveillance that is unreasonable or unlawful could sue for the tort of invasion of privacy. *Compare Wal-Mart v. Stewart*, 990 P.2d 626, 634 (Alaska 1999) (daily search of employee's bags held an unreasonable invasion of privacy where not part of a random, nondiscriminatory policy, and where the employee feared that refusing the search might result in others suspecting him of theft, or result in a police call or firing).

3. Particular scenarios

Inadvertent capture of evidence of illegal activity. Use of inadvertently captured information in a criminal prosecution may depend on who captures the information, and whether the person whose actions have been captured has a reasonable expectation of privacy. One of the scenarios mentioned in your request is the capture of evidence of poaching. Assuming that the poacher is a person taking game on property that is not the poacher's own, the poacher cannot reasonably expect privacy when present on another's land without authority.

If a law enforcement agency sends out an unmanned aerial vehicle for patrolling or surveillance, perhaps to look for illegal cultivation of marijuana or manufacture of methamphetamine on public land, and in the course of doing so, captures evidence of an industrial sized marijuana grow operation on private land, it might provide grounds to obtain a warrant to explore further.⁵ Under Alaska law, if the observation of the event is lawful or in "plain view," the discovery inadvertent, and the incriminating nature of the evidence immediately apparent, a warrant might not be required. *Ahvakana v. State*, 283 P.3d 1284, 1288 (Alaska Ct. App. 2012) (entry into property where evidence found was authorized under the emergency aid exception to the warrant requirement). However, since the vehicle is not manned, the federal authorities discussed above suggest that the information might not be considered to be lawfully obtained unless some other exception to the requirement of a warrant is present. It is not clear to me whether and under what circumstances a court might grant a search warrant to follow up on information inadvertently obtained, but not in "plain view."

It is possible that the inadvertent capture of information that might otherwise be inadmissible under the exclusionary rule that bars admission of evidence obtained in violation of the United States Constitution will be treated as a good faith exception under *United States v. Leon*, 468 U.S. 897(1984). In *Leon*, the United States Supreme Court held that the Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant

⁵ *But see State v. Crocker*, 97 P.3d 93 (Alaska Ct. App. 2004) holding that because the application for the warrant did not affirmatively disclose information that the marijuana cultivation was beyond what was permitted under *Ravin*, there was no probable cause for a warrant.

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issued by a detached and neutral magistrate but ultimately found to be invalid. A court could determine that information inadvertently captured in otherwise lawful surveillance is likewise a good faith exception. However, Alaska's appellate courts have not decided whether to adopt this exception. *Deemer v. State*, 244 P.3d 69, 72 (Alaska Ct. App. 2010). Thus it is impossible to predict the outcome of litigation on this subject under Alaska law, and it is not at all clear, given the federal case law developments discussed elsewhere in this memorandum, that the United States Supreme Court would apply the exception in a situation where there was no warrant.

Person intentionally gathers private information for personal use or distribution. A number of the criminal charges listed above might be available. In addition, if the images obtained are used in child pornography, a number of federal and state criminal statutes might apply.

Please advise if you require further assistance in this matter.

KJS:ray
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Enclosures