

**REPORT OF INVESTIGATION INTO RECORDING OF CONVERSATIONS  
WITH REPORTERS**

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In late October 2009, the California Department of Justice (DOJ) learned that Scott Gerber, Director of Communications for DOJ, had recorded telephone conversations with reporters without notifying those reporters or obtaining permission to do so. I have been asked to determine what instructions Gerber was given by the office with respect to recording conversations, how often recordings were made, who else knew of the recordings, and whether anyone else in the press office recorded telephone conversations. I have also considered the potential criminal consequences of Gerber's actions.

In order to prepare the report I interviewed Attorney General Edmund G. Brown Jr.; James Humes, Chief Deputy Attorney General; Christine Gasparac, DOJ Press Secretary; Dana Simas, Deputy Press Secretary; Abraham Arredondo, Deputy Press Secretary; Evan Westrup, Deputy Press Secretary; and Kate Gibbs, press office Administrative Assistant. I also met with Senior Assistant Attorney General Jonathan Renner.

In light of this information I have reached the following conclusions:

Gerber had been specifically instructed by James Humes not to record any telephone conversations without notifying all participants that he was doing so.

All of the conversations Gerber recorded were on-the-record discussions with reporters or on-the-record interviews with the Attorney General or other DOJ staff. In all instances Gerber was on the phone.

No other member of the press office recorded telephone conversations with reporters or anyone else, although they did record press conferences and other public appearances of the Attorney General.

There is no evidence that the Attorney General or anyone else in DOJ was aware that Gerber was recording telephone conversations without notifying the parties.

Gerber's actions do not warrant a criminal investigation for possible violation of Penal Code § 632.

## BACKGROUND

According to both Gerber and Humes, Gerber had a discussion with Humes in November 2008 about recording telephone conversations with reporters. Humes advised Gerber not to record conversations unless he notified all of the participants to the call that he was doing so. Shortly thereafter, when Gerber ordered tape recorders for use by the press office, Humes asked why he needed them. Gerber stated that he wanted to record press conferences and other events when the Attorney General spoke in order to have an accurate record of his statements. Humes believes he reminded Gerber not to record telephone conversations without notification to the participants. None of the tape recorders Gerber ordered were equipped for attachment to a phone line to record telephone conversations.

Also in early November 2008, Gerber proposed to other members of the press office that all press contacts be recorded. Christine Gasparac questioned the propriety of recording press calls. She expressed her concerns to Humes who advised not to make recordings without permission of the reporter. Gasparac told Gerber what Humes had said, adding that in any event she did not think it was a good idea to make such recordings. She told Gerber that she would not record her press conversations and he said OK. Gasparac did not know whether Gerber still intended to record his conversations. Gasparac did not record any telephone conversations.

Dana Simas also raised the notification requirement when Gerber proposed making recordings of press contacts. Simas did not record any telephone conversations and did not know that Gerber was doing so until she was asked to transcribe a conversation with a *San Francisco Chronicle* reporter on October 28, 2009.

Abraham Arredondo was present when Gerber suggested recording press contacts. He recalled other staff questioning the propriety of such recordings without notification. He did not think recording was appropriate and never recorded any of his telephone calls, although he did record a public hearing at which the Attorney General appeared. Arredondo knew that Gerber recorded conversations but was not aware that he did so without permission.

Evan Westrup did not recall a request by Gerber to record press calls and was not aware that Gerber had done so until the *Chronicle* story broke. He never recorded any telephone conversations, although he did record a press conference with the Attorney General.

## THE *SAN FRANCISCO CHRONICLE* CONVERSATION

On October 28, 2009, Carla Marinucci, a reporter for the *Chronicle*, was preparing a story on criticism of an initiative title and summary prepared by the Attorney General's Office and sought a response from the office to that criticism. Humes proposed to speak directly with Marinucci and asked Gerber by e-mail to provide him with her telephone number. Gerber responded in an e-mail that he would like to be on the call so he could record the conversation. Humes opened the e-mail before the conversation with Marinucci but does not recall noting the recording reference at that time.

The telephone call to Marinucci was placed by Gerber from DOJ's Oakland office. After he had her on the line he added Humes, who was in the San Francisco office, and Jonathan Renner who was in Sacramento. (Renner had been copied on the earlier e-mail setting up the call but did not open it until the next day.) Neither Humes nor Renner knew that Gerber was recording the conversation, nor were they privy to any conversations between Marinucci and Gerber prior to their joining the call. The recording and transcript of the call begins with a question from Marinucci to which Humes responds. There is no indication during the conversation that it was being recorded.

After reviewing an on-line version of Marinucci's story, Gerber believed that some of Humes's statements had been taken out of context and asked the *Chronicle* to make changes. On October 29 Gerber sent the *Chronicle* the transcript of the call prepared by Simas in order to support his complaints about the story. Marinucci objected to the conversation having been recorded without her knowledge and made a Public Records Act (PRA) demand for any other press recordings. Gerber forwarded the request to Humes who learned for the first time that the conversation had been recorded without notification to the reporter, an act he viewed as a violation of the clear instructions he had provided earlier.

When Humes spoke with Gerber about the *Chronicle* recording Gerber admitted that he knew he was not supposed to record conversations without notification. He also admitted having recorded other conversations with reporters. Gerber made all of those recordings by placing the calls on speaker phone and recording.

On October 30 Gerber was ordered to take a vacation day and was subsequently placed on paid administrative leave. He resigned on November 2, stating in his letter to Humes he had not "followed the guidance" provided by Humes on the taping of telephone conversations and conceding that "it was wrong not to ask" the reporters for permission to record the discussions. Gerber also stated that "neither the Attorney General nor any other attorneys from our office were aware that I was recording interviews without permission."

## SUBSEQUENT EVENTS AND INVESTIGATION

After placing Gerber on administrative leave Humes ordered that Gerber's e-mails, computer hard drive, recorders, and tapes be confiscated and examined. That investigation uncovered six recorded conversations with five different reporters, beginning in April 2009 and concluding with the Marinucci interview on October 28.<sup>1</sup> Some of the conversations had been transcribed by Kate Gibbs and copies were found in Gerber's e-mails. All of the reporters have been contacted to advise them of the recordings.

Four of the recordings are interviews of the Attorney General, one is the interview with Humes and Renner, and another is a conversation with Special Assistant Attorney General Jacob Appelsmith. All of the recordings are of on-the-record discussions. There is no indication in any

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<sup>1</sup> One of the recordings was a face-to-face interview in which the reporter also recorded the conversation.

of the conversations that the reporter, the Attorney General, or any other DOJ participants were advised that Gerber was recording the call.

No other recorded telephone conversations have been uncovered. Other recordings include dictation by Gerber, public hearings or appearances by the Attorney General, or on-the-air radio or television interviews of the Attorney General.

#### PENAL CODE § 632

Section 632 prohibits the intentional recording without consent of a confidential communication. “The term ‘confidential communication’ includes any communication *carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto*, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” (§ 632(c), emphasis added.) The statute was enacted in 1967 and was intended to “protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation.” (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768-769.)

The Supreme Court has held that the italicized clause of § 632(c) “includes within the statutory protection any conversation under circumstances showing that a party desires it not to be overheard or recorded.” (*Flanagan, supra*, at p. 774.) “Whether a person’s expectation of privacy is reasonable may depend on the identity of the person who has been able to observe or hear the subject interaction.” (*Lieberman v. KCOP Television* (2003) 110 Cal.App.4th 156, 169.)

In light of the statutory definitions it is clear that recording press conferences and other public appearances by the Attorney General is not prohibited. With respect to the recorded telephone conversations with reporters, the issue is whether an on-the-record interview with a DOJ spokesperson, the Attorney General, or other DOJ personnel can be said to constitute circumstances “showing that a party desires it not to be overheard or recorded,” as might be the case when one of the parties indicates that the conversation is “off-the-record” or “only on background.” Nothing in the legislative history of § 632 suggests that conversations of the type recorded by Gerber were intended to be covered by the statute. Indeed, the very purpose of an “on-the-record” interview is to provide the reporter with statements that can later be used in the public media. An “on-the-record” interview with a news reporter is the antithesis of a “confidential communication.”

All of Gerber’s recorded interviews appear to be on-the-record. Nevertheless, § 632 is clearly an expression of California’s policy disfavoring unannounced recording of telephone conversations and Gerber’s actions were in clear violation of explicit instructions given to him by Humes as the Chief Deputy Attorney General not to record any telephone conversations without notice to the participants. Under the circumstances, however, they do not warrant further investigation as a violation of the law.