MEMORANDUM

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| TO: | Ohio Provider Resource Association Members |
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| FROM: | Suzanne J. Scrutton  Jackie Ford  Robin L. Canowitz  Mairi K. Mull |
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| DATE: | May 22, 2019 |
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| RE: | Use of Video Cameras in Residential Facilities |
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1. **Introduction**

Members of the Ohio Provider Resource Association (OPRA) have requested legal guidance regarding the use of video cameras in group homes and Intermediate Care Facilities (ICFs), both by facility staff or management and by residents’ family members and other visitors. This memorandum provides an overview of the various regulatory and employment considerations associated with the use of video cameras in this context, as well as an analysis of the specific obligations of providers in conducting and/or permitting such use.

1. **Regulatory Considerations**

*a. Use of Video Cameras by Facility Staff or Management*

Used appropriately, video cameras may offer uniquely effective means of maintaining building security, preventing or identifying misconduct that could potentially jeopardize residents’ safety and well-being, and retrospectively gathering information about an incident’s root causes. However, these benefits must not take precedence over a provider’s responsibility under state and federal law to protect the privacy of its residents, and any use of video cameras by facility staff or management should be in accordance with specific policies designed and implemented for this purpose.

The Centers for Medicare & Medicaid Services (CMS) has previously issued guidance[[1]](#footnote-2) setting forth requirements for the use of video cameras by ICFs, which guidance may also serve as a useful reference for other provider types in determining what would constitute reasonable safeguards. Specifically, the CMS guidance states that providers may use video cameras only in the common areas or shared spaces of a facility, where residents have lower expectations of privacy and would typically be likely to encounter other individuals. By contrast, a facility may never use video cameras in areas where residents have the highest expectations of privacy, such as bathrooms or private visitation areas.

Additionally, the CMS guidance states that any use of video cameras by an ICF must first be reviewed and approved by the specially constituted committee (SCC) as constituted under 42 C.F.R. § 483.440.[[2]](#footnote-3) Depending on the size, complexity, and available resources, an ICF may establish more than one SCC.[[3]](#footnote-4) In Ohio, the Human Rights Committee (HRC) required under Ohio Admin. Code § 5123:2-2-06(F) for county boards and ICFs could be the applicable committee responsible for reviewing and approving the use of video cameras, unless the facility has a different committee responsible for this specific task.[[4]](#footnote-5) The ICF HRC or other applicable SCC should therefore be involved with all decisions and policies regarding use of video cameras in these facilities. Moreover, although the CMS guidance does not specifically apply to non-ICF provider types, we recommend that all residential facilities seek input from county board HRCs, as well as from staff, residents and their families and/or legal guardians, and any other qualified individuals, regarding the specifics of proposed video camera use. In any case, all affected residents and their families must be informed before a facility implements any proposal to install and use video cameras, and must each[[5]](#footnote-6) provide written consent prior to the cameras’ installation.

A facility must also implement policies and procedures to ensure the confidentiality of any footage captured by its video cameras. In particular, these policies and procedures should: (1) limit the persons permitted to view or access the footage; (2) ensure that all staff afforded access to the footage are trained on the facility’s policies and procedures, as well as on the protection of residents’ rights; and (3) ensure that adherence to the facility’s policies is monitored and that breaches or identified risks are promptly addressed.

A facility should also implement policies and procedures which address how long video footage will be kept. Facilities should be mindful that the videos may be subject to subpoena, investigatory requests by law enforcement or DRO, or by licensing or accreditation agencies. We recommend that providers speak with their counsel before releasing such footage, as there may be a variety of legal and privacy issues to consider prior to release.

Finally, the facility may not pass along the cost of its video cameras in the form of charges to residents or their families, but rather must incur any associated costs itself. Video cameras are not to be used as a substitute for having appropriately trained staff available on-site.

*b. Use of Video Cameras by Residents’ Family Members and Other Visitors*

A residential facility retains responsibility for protecting its residents’ privacy when video cameras are brought into the facility by residents’ family members or other visitors, but must also strive to minimize any interference with a resident’s right to receive visitors and communicate with loved ones.

We recommend establishing policies that specifically address visitors’ use of video cameras, and displaying or distributing such policies in a manner reasonably calculated to reach all visitors to the facility. In particular, these policies should delineate any specific areas of the facility where the use of video cameras is prohibited (e.g., bathrooms), discuss the types of video recording allowed at the facility, and set forth clear and reasonable procedures for monitoring and enforcement. If living units within the facility are shared by multiple residents, the policies should also (1) require that all occupants of a unit give consent before video recording is permitted inside the unit, and (2) identify alternative areas within the facility for the use of residents whose roommates have declined consent. Providers may also wish to set parameters or limits regarding the use of live video streaming by families.

1. **Employment Considerations**

In addition to respecting the privacy rights of residents, facilities must also be mindful of the privacy interests of employees providing services to those residents. Employee privacy rights are governed primarily by common law principles, and may also be subject to additional restrictions on recording found in the Electronic Communications Privacy Act (EPCA), 18 U.S.C. § 2510. These legal principles generally require notice and consent to audio recording and prohibit all types of recording devices in spaces where the employee has a reasonable expectation of privacy. The following recommendations apply regardless of whether the employer or a family member installs the camera in the workspace.

1. *Use of cameras in bathrooms and other private spaces*. In broad summary, both the EPCA and Ohio’s common law impose limitations on an employer’s ability to record employees in areas where they have a reasonable expectation of privacy. Such areas include bathrooms or other similar private spaces, such as dressing rooms and other enclosed spaces where employees would reasonably assume that they are alone and not being watched. Employees may give consent to such monitoring, but even with consent, it would not be advisable to have a camera in a bathroom or similarly private space. Such “consent” would likely be found to be too coercive to be meaningful, resulting in a potential violation of statutory or common law requirements. Consequently, cameras should not be permitted in bathrooms or other private spaces used by employees.
2. *Disclosure of cameras to staff*. Even in “open” areas of a living unit, an employee may assume that he or she is alone in a space when no one else is present – and may, consequently, do things that the individual considers private (such as, for example, change clothes, self-administer an insulin injection, or pump breast milk). To avoid issues regarding employees being recorded without their knowledge or consent in such circumstances, the policies should include written advance notification to employees of the locations of any and all cameras in living units and a description of whether those cameras record both sound and imagery. The employees should sign those notifications in order to ensure that they are aware of and consent to the cameras.
3. *Extra precautions for audio recording*. Both federal law and Ohio law require a minimum of “one party consent” to any audio recordings.[[6]](#footnote-7) This means that in any recorded conversation, at least one party to that conversation must consent to the recording. Recording devices left in rooms in which non-consenting individuals might be recorded – for example, visitors who are unaware of the presence of the devices – could violate these legal requirements. Accordingly, notices should be posted in any room in which audio recording devices, whether in cameras or otherwise, are present.

**IV. Recommendations**

Providers who wish to install video cameras in facilities should ensure that they are only placed in common areas, that their placement is approved by the HRC or other specially constituted committee in accordance with federal requirements, and that they have appropriate policies and procedures in place to address confidentiality, release and use of the video footage. Additionally, the location and use of cameras and recording devices should be disclosed to employees, and employees should sign an acknowledgement in order to ensure that they are aware of, and consent to the recording devices. Further, notices should be posted in rooms where recording is taking place so that visitors and residents are aware of their use.

Providers should also develop policies and procedures regarding the use of video cameras and other recording devices by residents and visitors. These policies should delineate areas in the facility where recording may occur, and state that all occupants of a unit shared by multiple residents have consented to the recording.

Should you have any questions or need additional information or clarification regarding these requirements, please feel free to contact us.

1. Centers for Medicare & Medicaid Services, *The Use of Video Cameras in Common Areas in Intermediate Care Facilities for the Mentally Retarded (ICFs/MR), Survey & Certification Memo 11-34-ICF/MR*, Jul. 29, 2011. [↑](#footnote-ref-2)
2. As defined in federal law, this committee must consist of the following: facility staff, parents, legal guardians, clients (as appropriate) qualified persons who have either experience or training in contemporary practices to change inappropriate client behavior and persons with no ownership interest in the facility to (i) review, approve, and monitor individual programs designed to manage inappropriate behavior and other programs that in the opinion of the committee involve risks to client protection and rights; (ii) insure that these programs are conducted only with written informed consent of the client, parent (if the client is a minor), or legal guardian; and (iii) review, monitor and make suggestions to the facility about its practices and programs as they relate to drug usage, physical restraints, time-out rooms, application of painful or noxious stimuli, control of inappropriate behavior, protection of client rights and funds, and any other area that the committee believes needs to be addressed. 42 C.F.R. § 483.440(f)(3). [↑](#footnote-ref-3)
3. See State Operations Manual, Appendix J – Guidance to Surveyors: Intermediate Care Facilities for Individuals with Intellectual Disabilities (Rev. 178, Apr. 13, 2018). [↑](#footnote-ref-4)
4. This committee would still need to contain the required membership and participate regularly and perform the functions of the committee according to the requirements. Id. [↑](#footnote-ref-5)
5. If a facility consists of physically separate living units, video cameras may be installed in the units of consenting residents even if residents in other units have not given consent. However, the facility should still inform all residents (and their guardians, if applicable) that cameras are in use in the specific unit where residents have given consent. [↑](#footnote-ref-6)
6. See 18 U.S.C. 2511(2)(d); O.R.C. § 2933.52. [↑](#footnote-ref-7)