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PRIVACY & INFORMATION SECURITY UPDATE

Supreme Court Fails to Clarify Employers' Rights to Access Employees' Communications

Businesses have been eagerly awaiting the Supreme Court's decision in a case addressing whether an employer may access and review an employee's communications made via employer-provided devices. If business owners and managers were expecting some clear guidance on this important issue, they will have to wait a while longer. On June 17, the Court unanimously decided that a governmental employer *may*, in certain circumstances, access archived text messages sent over cell phones provided by that agency without violating the Fourth Amendment's ban on unreasonable searches. However, the Court in effect ducked the question of whether an employee has any reasonable expectation of privacy in his or her personal communications over employer-supplied devices, leaving that critical question still to be decided. Employers wishing to design and implement policies and procedures for access to their employees' communications will still need to do so on a case-by-case basis with the assistance of sound legal advice.

In *City of Ontario v. Quon*, the Supreme Court addressed an unusual scenario: a California police department conducted a search of the text message history for all SWAT team officers who used department-issued pagers. The search was prompted by the fact that officers had exceeded the department's texting plan limits for several months in a row, and the department wanted to audit the messages to determine whether the overages were due to an insufficient texting limit for business-related texts or whether officers were simply abusing their limited personal texting privileges. The department limited its search to several months of records and reviewed them to determine how much of the traffic was work-related and how much was personal. To its surprise, the department discovered that Sgt. Jeff Quon's texting history was particularly personal in nature (400 out of 456 texts sent or received were personal rather than business-related), and some of his texts even contained sexually explicit content.

Sgt. Quon and others filed suit against the department to challenge the search, claiming that the department had violated their Fourth Amendment rights against unreasonable searches. Sgt. Quon asserted that, although the department's policy informed officers that they had no right to privacy in messages sent or received through department resources, a high-level police official informed officers that their text messages would not be searched if the officers personally paid for any excess monthly charges related to their personal texts. Sgt. Quon claimed that he had relied on this informal announcement and paid for his overages accordingly. The 9th U.S. Circuit Court of Appeals found Sgt. Quon's argument compelling and ruled that—despite the department's policy—the official's informal announcement essentially created a "reasonable expectation of privacy" in officers' text messages, and the department could have accomplished its auditing goal through less intrusive means.

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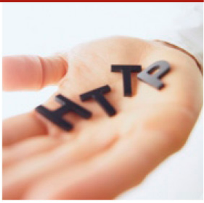

The Supreme Court unanimously reversed the 9th Circuit, finding that—regardless of whether Sgt. Quon had a reasonable expectation of privacy in his text messages—the department's search was reasonable because the department had a legitimate business interest in ensuring that its texting plan was sufficient to meet operational needs and was not improperly devoted to officers' personal pursuits. In addition, the Court held that the search was an efficient way to accomplish the department's business purpose, and it was neither unreasonable in scope nor unduly intrusive. Despite this detailed analysis of the search's "reasonableness," the Court declined to decide the most important issue in this case for private employers (who, of course, aren't bound by the Fourth Amendment's prohibition of unreasonable searches): do employees have a reasonable expectation of privacy in electronic communications conducted through employer-issued equipment? Unfortunately, *Quon* leaves this issue undecided. The Court did strongly suggest—without expressly deciding—that an employee's privacy expectations may depend largely on the substance of the individual employer's electronic communications policy, stating, "[E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."

In short, while the Court's decision leaves open the question of when an employee has a reasonable expectation of privacy, it helps to clarify the importance of employers making certain that their electronic communication policies are adequate and appropriate to ensure that employees' expectations of privacy (or the lack thereof) are clearly defined and that the potential for searches is clearly disclosed, as such individual policies may be the only guidance available on these issues.

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