

CORPORATE POLICY V. THE FOURTH AMENDMENT

By Joe Picone

SUPREME COURT TO DECIDE ON RIGHTS TO CELLULAR PHONE PRIVACY ON COMPANY ISSUED PHONES/COMMUNICATION DEVICES

As an employer, do you have a right to examine the cell phone records of your employees? Do you have a right to obtain a listing of their text messages?

The Supreme Court will decide this issue early in 2010. The case of *City of Ontario v. Quon*, involves a sergeant on the city police SWAT team allegedly sending text messages to his wife and to another officer with whom he was having a romantic affair. Members of the city SWAT team were provided pagers and told that they could use these devices; however, they were responsible for any charges over 25,000 characters per month. The police lieutenant adopted an informal policy verbally stating that those who paid the excess charges in full would not have their phone text messages inspected.

In 2002, it was brought to the lieutenant's attention that a police sergeant, Jeff Quon, was allegedly sending text messages to the officer that he was having an affair with and his wife. The lieutenant requested that the cellular phone company provide transcripts of all messages sent and received by Sgt. Quon.

Consequently several of the senders who had texted Sgt. Quon sued the city of Ontario and the cellular phone company stating that their Fourth Amendment Rights had been violated. The Fourth Amendment of the United States Constitution is the part of the Bill of Rights which guards against unreasonable searches and seizures.

A federal appeals court in California decided that Sgt. Quon had a right to privacy regarding the sexually explicit texts he sent on his city/department-issued pager. The court, in a divided opinion, stated that the lieutenant violated the Fourth Amendment because there was no reasonable suspicion of wrongdoing. The dissenting opinion stated that "most employers routinely tell their workers that they have no expectation of privacy when it comes to e-mail and other communications that involve company equipment, and the city of Ontario is no different. The city policy stated that it "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice." The city, in seeking an appeal to the Supreme Court, stressed that the Ninth Circuit Appeals Court had erred. "To warrant Fourth Amendment protection, a government employee's expectation of privacy must be one that society is prepared to consider reasonable under the operational realities of the workplace," the city said, echoing the

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words of the court's previous decision on workplace privacy. In this case, its brief said, "The SWAT team sergeant failed to comport himself as a reasonable officer would have, and he and the other plaintiffs embarrassed themselves through their lack of restraint in using a city-owned pager for personal and highly private communications. The city of Ontario should not have to pay for that."

One of the judges involved with his case, Judge Stephen G. Larson of the Federal District Court in Riverside, California, **commented**: "What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friend and family via hand-held, computer-assisted electronic devices?"

The Supreme Court is expected to issue their decision on this case in the spring of 2010. This decision should have a widespread impact on how companies develop and enforce their communication policies on computer-assisted electronic devices and may cause companies to rethink their practice of providing cell phones and texting capabilities to their employees.

According to a **2009 survey** of 586 companies by the American Management Association and the ePolicy Institute, 83% have policies covering personal use of company-provided e-mail. More than a quarter of the employers reported firing workers for violating e-mail rules, up from 14% in 2001, the survey found. Only one-third of the employers said they have rules covering personal text messaging during work hours.

What can you do as an employer to prevent violating a person's Fourth Amendment rights?

- Review your existing cell phone/pager policies.
- Define parameters for the use of text messaging, email and telecommunication.
- Maintain consistent enforcement of policies. The city of Ontario had a policy, but it appears that there was an informal policy within the police department.
- Make sure your supervisors are trained in company communication policies.

- Consult with legal counsel before requesting cell phone texting records or any other communication records that may have an employee's personal information.
- Understand your legal obligations to monitor computer usage, which may supersede the Fourth Amendment or other privacy laws. For example, a school district needs to watch employee's web use that may involve child pornography.
- Consider developing policies to protect your company's review of websites which may show employees committing actions that could be detrimental to their jobs. There have been many recent instances where employees have been dismissed for placing inappropriate information on Facebook, Twitter and MySpace.

In 2009, for the first time, Americans with cell phones sent more messages with their thumbs than their voices. Teens between 13 and 17 send and receive an average of 1,742 text messages per month but receive, on average, only 231 calls, according to an industry **survey**. Clearly, most employers are tolerant of their employees using company-issued cell phones, Blackberries and pagers for personal matters. The dilemma for the Supreme Court is: what are the appropriate parameters? Willis encourages all employers to monitor this decision and take appropriate actions to protect their company's interest.

CONTACT

Joe Picone

National Director Regional Operations
Strategic Outcomes Practice
804 967 2066
joe.picone@willis.com

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