



Privacy Alert™

Legal and political developments affecting privacy

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Supreme Court to review privacy rights in texting case

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On Monday, December 14, the United States Supreme Court agreed to hear the issue of employees' privacy rights as these relate to text messaging on employer-issued devices. In *City of Ontario v. Quon*, No. 08-1332, the Court will consider whether an Ontario, California, police department violated the constitutional rights of an employee when it looked into text messages the employee sent on a pager provided by the police department.

The city of Ontario claims that the employee, a Sergeant, sent hundreds of texts—many of them sexually explicit—to his wife, his girlfriend, and another officer. The police department investigated officers who regularly exceeded monthly character limits for their pagers, and as part of the investigation received transcripts of messages from the city's wireless provider, Arch Wireless (now USA Mobility). Of the Sergeant's 450 messages sent in one month in 2002, only 57 were related to official business.

While the Ontario Police Department had formal policies addressing its right to monitor e-mail and internet use by employees, and cautioned employees that they should have "no expectation of privacy," it did not have a formal policy on text messaging. The Sergeant, as well as several of the people with whom he messaged, brought suit, arguing that their Fourth Amendment rights had been violated by the Ontario Police Department.

The Ninth Circuit Court of Appeals ruled that the city's review of the message transcripts constituted an unreasonable search. Its decision was based in part on an informal policy of the police department, which allowed officers to avoid inspection of their pagers if they paid for the excess charges themselves. Despite this informal policy, the lieutenant at the Ontario Police Department ordered the transcripts of the Sergeant's messages for review.

The Ninth Circuit also held that USA Mobility turned over the transcripts in violation of the federal Stored Communications Act. Notably, while the Supreme Court agreed to hear the city's appeal, the justices decided to not hear USA Mobility's appeal.

The city of Ontario's brief to the Supreme Court argued that a "lower-level supervisor's informal arrangement" regarding payment for excessive messaging, should not hinder the police department's official no-privacy policy. The city went on to argue that it is not objectively reasonable to expect privacy in messages sent to another workplace pager, and especially unreasonable to expect privacy in messages sent to and from an officer's department-issued pager.

While this case only concerns text messaging in a government workplace, and thus the Court's decision will be limited to scope of constitutional privacy rights, the potential implications of the ruling are significant. Indeed, lower courts may rely on the decision in this case to review similar privacy challenges brought by employees of private employers. And, with the explosion of social media in the workplace, any direct or indirect guidance in this area by the Court will likely influence corporate and government policies and practices—as well as employee activities—in many ways.

Oral arguments will likely be held in the spring of 2010, with a decision expected by June.

Regardless of what the Supreme Court rules, it is clear that organizations need to have well-developed policies governing employee use of company-issued computing and communication devices. These policies should clearly spell out the usage and privacy expectations for all manners of communications. Organizations should also evaluate their enforcement programs and the potential consequences of decisions as they may affect rights to review and monitor communications and data.

Contact us

Please contact your regular Nixon Peabody attorney or any of the attorneys listed below if you have questions or need assistance reviewing your technology policies in these areas.

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