The Ultimate Backup
A Client News Bulletin

RAINS LUCIA STERN, PC July 2008

Ninth Circuit Case Limits Employers' Access to Police Officers' Text Messages on Department Owned Equipment

(*Quon v. Arch Wireless Operating Company, Incorporated*)

By: Justin E. Buffington

In the recent decision of *Quon v. Arch Wireless Operating Company, Incorporated* (9th Cir. 2008) No. 07-55282, decided June 18, 2008, the Ninth Circuit Court of Appeals analyzed the legality, under the Fourth Amendment, of examining text messages sent by police officers on department owned equipment. The Court's holding and reasoning would appear to apply equally to emails which were sent on Department-owned equipment.

In *Quon*, the City of Ontario ["City"] purchased a number of alphanumeric pagers from Arch Wireless in 2001. The City had no official policy with respect to use of text-messaging via pagers. However, the city had a general "Computer Usage, Internet and E-mail Policy" ["Policy"].

The Policy put all users of city-owned computers, city provided internet and e-mails on notice that any activity on any of those systems could be recorded or reviewed and was not confidential. The Policy also prohibited the use of inappropriate, derogatory, obscene, suggestive, defamatory or harassing language in the e-mail system.

Jeff Quon was a sergeant with the City of Ontario Police Department. In 2000, before the City acquired the pagers, Sergeant Quon signed an "Employee Acknowledgement," which stated that he enjoyed no expectation of privacy or confidentiality in the content of the pagers or their use. Sergeant Quon was further informed that the messages sent via the pager were considered to be e-mails and that the messages would fall under the City's policy as public information and could be audited.

The Department assigned a Lieutenant to oversee purchasing of the pagers and to obtain payment from individual officers for overage charges associated with personal text messages. The Lieutenant advised Sgt. Quon and others that if they would reimburse the Department for overage charges associated with personal text messages, he would not examine the bills to determine the amount of personal activity reflected on the text messages. However, after the Lieutenant complained to the police chief about being tired of being a "bill collector", the Police Chief directed the Lieutenant to obtain a transcript of pages.

2300 Contra Costa Boulevard • Suite 230 • Pleasant Hill • California • 94523
T 925.609.1699 • F 925.609.1690 • www.RLSlawyers.com

The Police Chief claimed he did this to determine (1) if the City needed to purchase more characters for job-related messages and/or (2) if employees who were issued pagers were "wasting time" with them. The audit revealed that Sgt. Quon had exceeded his monthly character allotment and that many of the messages he sent were personal and of an explicit sexual nature.

Sgt. Quon and other department employees issued pagers sued, claiming that their Fourth Amendment Right to be free from unreasonable searches and seizures had been violated by the audit of the City-owned pagers.

REASONABLE EXPECTATION OF PRIVACY

As with any Fourth Amendment inquiry, the Ninth Circuit began by examining whether Sgt. Quon had a reasonable expectation of privacy in the text messages he sent to third parties. The Court held that there is no meaningful difference between e-mails and text messages when making this analysis.

The Court found that Sgt. Quon had good reason to believe that the text messages he sent from his City-issued pager would be kept private. Despite the Department's written policies and the "employee acknowledgment" signed by Sgt. Quon stating that there was no expectation of privacy or confidentiality in the text messages sent, an expectation of privacy was created by the Lieutenant advising Sgt. Quon and others that their messages would not be examined if they simply paid overages for personal text use.

After finding that Sgt. Quon had a reasonable expectation of privacy in the text messages he sent, the Court had to determine if the search conducted by the Department was reasonable under the circumstances.

THE REASONABLENESS OF THE SEARCH

The Court found that the purpose of the audit of the text messages was to ensure that officers were not being required to pay for work-related expenses which, it held, was a legitimate work related purpose.

However, The Court determined that the scope of the search was not reasonable. The Court instructed that a workplace search is reasonable in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct. Thus, if less intrusive means of achieving the governmental objective are available, and the government neglects to use them, then the search is per se unreasonable.

With respect to Sgt. Quon, the Court found that the City had other, constitutionally permissible means at its disposal to determine whether the 25,000 characters were being used for work related or personal purposes. The Court discussed that the City could have (1) prohibited Sgt. Quon from using his pager for personal; or (2) asked Sgt. Quon to count the characters in his personal messages himself; or (3) asked Sgt. Quon to redact the transcript of his texts rather than wade through them wholesale.

Thus, since there were ways to go about finding out how many characters in the texts sent were attributable to personal messages, *without* impinging upon Sgt. Quon's Fourth

2300 Contra Costa Boulevard • Suite 230 • Pleasant Hill • California • 94523
T 925.609.1699 • F 925.609.1690 • www.RLSlawyers.com

Amendment rights, the scope of the search was unreasonable and, therefore the search was illegal.

PRACTICAL IMPLICATION OF THE DECISION

This decision will likely have very little impact on the privacy and confidentiality enjoyed by a police officer with regard to any city owned computer, e-mail system, cell phone or text pager since, in most cases, an officer will be put on express notice that he or she enjoys no expectation of privacy with respect to the particular electronic medium. Therefore no Fourth Amendment violation can occur because the officer cannot reasonably believe their communications will be private.

However, an employer can still create in an officer a reasonable expectation of privacy in his/her emails or text messages if (1) the employer has no electronic communications privacy policy, or; (2) the employer deviates from policy in such a way through directions issued by management personnel or widespread practices instills an officer with reasonable expectation of privacy.

DISCLAIMER

This issue of The Ultimate Backup News Bulletin does not constitute legal advice and is for information only. Our disclaimer, along with past issues of this Newsletter and other important information, can be found on our website at www.RLSlawyers.com.

2300 Contra Costa Boulevard • Suite 230 • Pleasant Hill • California • 94523
T 925.609.1699 • F 925.609.1690 • www.RLSlawyers.com