



CLIENT NEWS BRIEF

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REVIEW OF EMPLOYEE'S TEXT MESSAGES SENT FROM EMPLOYER-OWNED PAGER DID NOT VIOLATE EMPLOYEE'S PRIVACY INTERESTS

In its recent decision, *City of Ontario v. Quon* (2010) ___ U.S. ___ (WL 2400087), the United States Supreme Court found that an employer did not violate an employee's privacy rights when it reviewed transcripts of text messages sent and received by the employee on the employee's work-issued pager.

The City of Ontario ("City") issued pagers with text-messaging capabilities to its employees. The contract between the City and its service provider included a monthly limit on the number of characters each pager could send and receive, with overages resulting in an additional fee. City employees were told that the City would not audit the content of their text messages as long as they paid the overage charges.

Although the City had no official policy related to use of the pagers or text messaging, the City did have a "computer usage, internet, and e-mail policy" which restricted the use of the City equipment to work-related activities and provided that employees did not have a reasonable expectation of privacy in using such equipment. The City sent out a memorandum to employees clarifying that this policy extended to text messages.

City employee Jeff Quon and others exceeded their monthly character limit for several consecutive months and paid their overage charges. The City asked its service provider to release two months' worth of pager transcripts containing messages sent from devices issued to employees, including Mr. Quon. The City made this request to assess whether the existing character limit was too low and to determine whether the overage fees were for work-related messages or whether the overages were the result of personal communications.

Text messages sent by employees before and after work hours were redacted and not reviewed. After reviewing the transcripts, the City found that few of Mr. Quon's on-duty messages were work-related, and in fact the majority were personal and some were sexually explicit. Mr. Quon was later disciplined for violating City rules.

Mr. Quon sued, claiming that the City had violated his Fourth Amendment privacy rights against unreasonable search and seizure when it reviewed the content of his text messages. He also sued the wireless provider under the Stored Communications Act for releasing the pager transcripts. The federal district court dismissed the case against the wireless provider.

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The district court also determined that the City reviewed the text messages to assess the efficacy of the character limit and, therefore, the search was not unreasonable.

Mr. Quon appealed the decision. The Ninth Circuit found that Mr. Quon had an expectation of privacy when sending and receiving text messages and the City's searches of his text messages violated the Fourth Amendment. It further held that Mr. Quon's expectation of privacy was reasonable in light of the City's assurance that it would not audit text messages if the responsible employee paid the overage fee. While the Ninth Circuit accepted the City's argument that the audit of Mr. Quon's text messages was initiated for a work-related purpose, the Court found that the search was unreasonable in scope because there were other, less intrusive ways of determining the sufficiency of the allotted characters. (See our earlier [2008 CNB No. 26](#), for more detail on these lower court decisions.) The City appealed the Ninth Circuit decision to the United States Supreme Court.

Reversing the Ninth Circuit's decision, the Supreme Court found that the City's decision to review the pager transcripts was reasonable because it was motivated by a legitimate work-related purpose, i.e., to determine if it needed to change the terms of its service contract. The Supreme Court also reasoned that reviewing pager transcripts covering a 2-month period was not excessive in scope. "Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. And the review was also not 'excessively intrusive'."

This case illustrates the evolving state of the law dealing with the impact of technological advances on workplace practices. Public agencies should regularly review their policies, administrative regulations and practices governing employee use of agency-issued equipment to ensure that these policies and practices account for technological advances and are consistent.

If you have more questions about employee privacy rights when using employer-issued equipment, please do not hesitate to contact one of our [seven offices](#) located statewide or consult our [website](#).

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