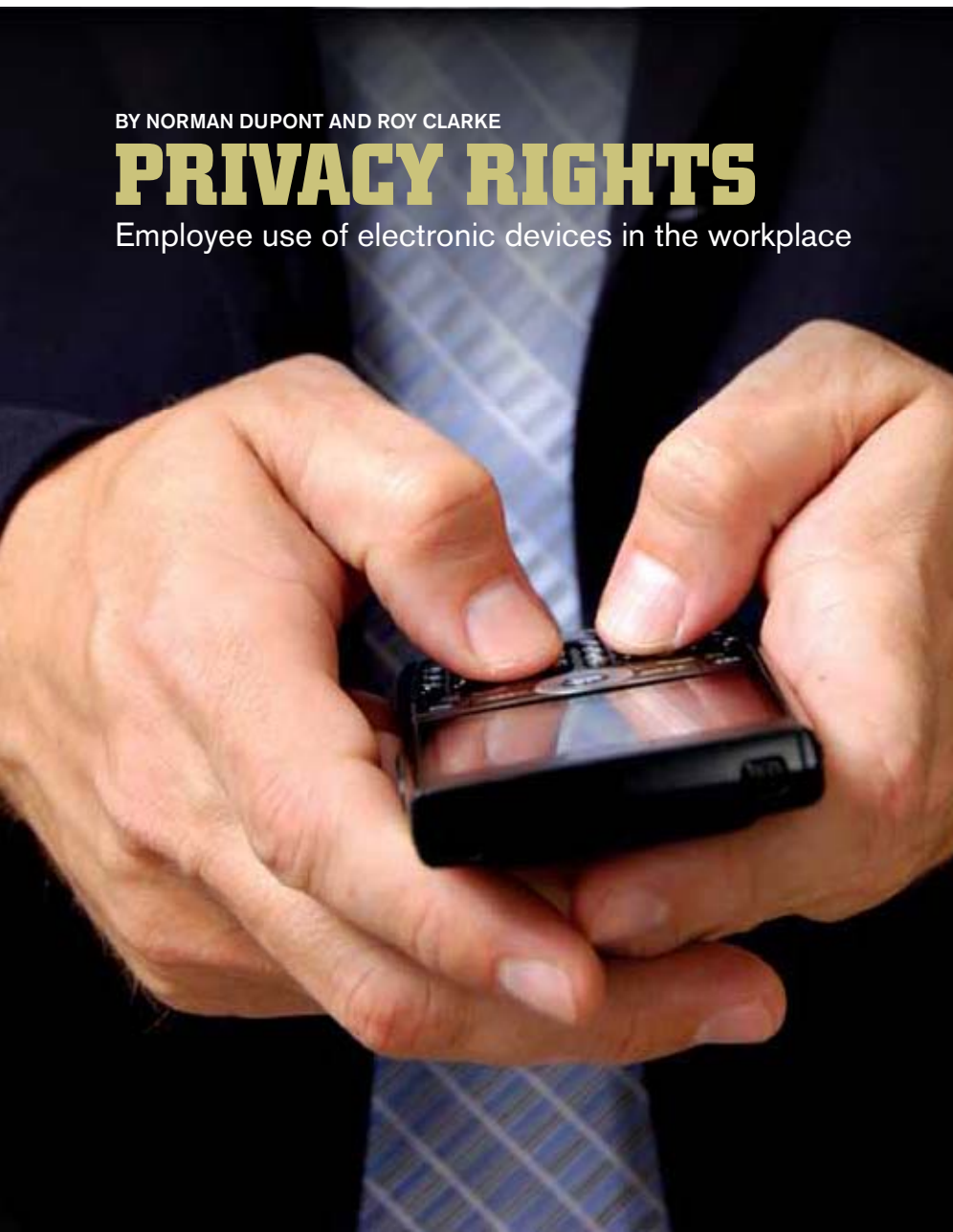


BY NORMAN DUPONT AND ROY CLARKE

PRIVACY RIGHTS

Employee use of electronic devices in the workplace



Many Supreme Court decisions fall short of providing a bright-line rule—an unambiguous guideline—that many lawyers and interested observers hope is the outcome of Court decisions. And *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), an opinion that provided insights but nothing definitive regarding the rights of public employers to monitor the use of electronic devices provided to their employees, was no exception.

The facts of *Quon* are relatively simple. Sergeant Quon was a member of

Ontario, California's SWAT team and was issued an alphanumeric pager for his use on city business. The city had previously provided a written policy to its employees stating that there were no privacy guarantees with respect to e-mails sent through a city-owned system.

Apparently, there was some confusion as to whether this policy also applied to alphanumeric pagers used to send text messages. Because of Quon's extremely high usage charges, the city's senior police staff conducted an audit of Quon's text messages.

Senior staff did not like what they found: a large volume of personal e-mails, many of a sexually explicit nature, sent through the city's pager. After Quon was disciplined, he brought a Section 1983 civil rights lawsuit against the city, charging that it had violated his federal constitutional right against unreasonable searches under the Fourth Amendment.

It was expected that the Supreme Court would address the exact expectation of privacy of public employees in the context of modern technology. If Quon had no reasonable expectation of privacy for his text messages, then there could be no Fourth Amendment violation. The High Court confounded expectations, however, and instead chose a much narrower outcome.

The Court *assumed* that Quon might have a privacy expectation, but the Court held that in the particular facts of this case the search of the text messages by the city was a reasonable one. Thus, Ontario had no liability for violating Quon's constitutional rights.

Justice Anthony M. Kennedy, for the majority, explained that the question of a public employee's privacy rights was a complex one in the dynamic and changing world of electronic technology. But aside from describing the complexity of the question, Justice Kennedy and the majority unfortunately provided no definitive rules.

Despite the Court's reluctance to comprehensively tackle the privacy question, the decision still provides public employers with this helpful guidance:

Manage privacy expectations. A technology use policy still matters—and it probably matters a lot. As the Court observed: “Employer policies covering communications will of course shape the reasonable expectations of their employees, especially to the extent such policies are clearly communicated.” Effective communication and training were two activities that helped the city in this case. The Court did not explicitly rely on the city's policy. However, Quon's

knowledge of the policy, gained through written communications and staff briefing, were factors influencing the extent of his expectations and determining that the search was not excessively intrusive

State the obvious. Even where incidental personal use is allowed, make clear that there is no reasonable expectation of privacy for personal use. Tell employees they have the option of using a personal device and service if they want to assure privacy.

In a point-counterpoint discussion on privacy, the Court noted that “the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones

or similar devices for personal matters can purchase and pay for their own.”

Cover everything. Make the policy as broad as possible to cover all types of electronic communications that occur on work equipment, including those that may be developed and implemented in the future (cell phone, e-mail, text messaging, instant messaging, and so forth). The policy should be set up to evolve with the rapid pace of technology. One weakness of Ontario’s policy was that, on its face, it did not address text messages.

Make sure the policy matches practice. Take care that mid-level managers do not undermine the policy with stray comments and assurances that are contrary to the policy. Make sure that the policy matches up with actual practice.

If the policy intends a no-personal-use policy, do not undermine that directive with mixed messages. It is also advisable to have employees sign an

acknowledgement that they have read and understand the policy, as the city did in this case.

At the same time, make sure the policy is practical. If incidental personal use is inevitable, understand the implications of such a policy and address it. Contrary to the city’s policy, Quon was told by a supervisor that he could pay for overuse charges and -avoid audit of his messages.

Conduct narrow searches. The policy should reserve to management broad inspection and investigation options. At the same time, the actual investigation and any search should be motivated by legitimate work-related purposes and narrowly focused on that purpose. **PM**

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Made possible through a generous grant from ICMA-RC.



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11-074

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