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Ninth Circuit Decides Employees Have Privacy Rights in Content of Electronic Text Messages

The Ninth Circuit Court of Appeals recently ruled that a public agency violated employee constitutional privacy rights by reviewing text messages transmitted on pagers provided by the public agency. *Quon v. Arch Wireless* has important implications for all public agencies that issue text pagers to their employees.

In *Quon v. Arch Wireless*, the City of Ontario, California contracted with Arch Wireless to provide pagers and text-messaging services to employees in its Police Department. The City had a written policy governing use of City-owned computers, equipment, programs, networks, internet and email. The policy limited use to business purposes and stated employees had no expectation of privacy because the City would monitor network activity, internet use and email. The City's written policy did not directly address pagers and text messages, but the plaintiff in this case was told pagers and text messages were covered by the policy. Despite the policy, the City developed an informal practice, verbally reinforced by the management representative in charge of the program, of not auditing text messages so long as employees paid excess use charges for use exceeding the monthly limit of 25,000 characters.

A City employee, Sgt. Quon, exceeded the monthly limit three or four times and avoided audit by paying the additional charges. When Sgt. Quon exceeded the limit again, the City launched an investigation to determine whether the 25,000 limit should be raised under its contract. To further its investigation, the City obtained and reviewed transcripts of Sgt. Quon's text messages, including some that were personal and sexually explicit.

The Court found that Sgt. Quon had a reasonable expectation of privacy in the content of the text messages. In reaching this conclusion, the Court relied chiefly upon the City's informal policy, reinforced by management, that the pager use would not be audited so long as employees paid for the overage. Sgt. Quon had complied with this policy by paying the overage fee on at least three occasions before his pager use was audited. This 'operational reality' was enough to overcome the City's formal position that its computer, internet and email policy extended to pagers. Of note, the Court specifically declined to extend its ruling to email, leaving that question for another day.

Following *Quon*, it is important that public agencies review both their

existing policies and practices. Policies should be updated to match all technology currently in use, and the practices should conform with the policies. Management representatives should be cautioned against making statements contrary to the policies. As new technology is put into operation, policies should be amended to reflect the new devices or methods of communication.

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