



## **LEGAL DEFENSE TRUST**

*Training Bulletin*

*Presented by*

**MICHAEL P. STONE, GENERAL COUNSEL**

*6215 River Crest Drive, Suite A., Riverside, CA 92507*

*Phone (951) 653-0130 Fax (951) 656-0854*

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### **ELECTRONIC COMMUNICATIONS**

**The Ninth Circuit Court of Appeals recently issued a ruling that may make many public employers take a closer look at their electronic communications policies.**

by

**Michael P. Stone, Esq.**

and

**Freda Lin, Esq.**

The ruling that public employers may not review their employee's private electronic communications, stems from a case involving private, and oftentimes illicit, text messages sent by a police sergeant on his department issued pager, to individuals within his department, as well as individuals outside the department. The issue first arose when Sergeant Quon, of the Ontario Police Department ("OPD" or "Department"), along with other employees, were issued alphanumeric pagers with text messaging services contracted by the City of Ontario to Arch Wireless Operating Company, Inc. ("Arch Wireless"). While the pager was Department issued, employees understood the internal policy to allow for private use if the employees

voluntarily paid for the overage charges. In fact, employees were told that their messages would not be reviewed and audited if they reimbursed the City for the overage fee. Supervisors did not feel it was their role or area of expertise to become bill collectors.

Sergeant Quon went over the monthly charge on at least four occasions, and each time paid the City for the overages. In August 2002, when Sergeant Quon and another officer again exceeded the character limit, the Chief of Police instructed the supervising Lieutenant to "request transcripts of those pagers for auditing purpose" and "to determine if the messages were exclusively work related...or...for personal matters." City

officials were unable to retrieve the text messages themselves and had to request transcripts through Arch Wireless. The transcripts were released to the City and Sergeant Quon brought complaint against the City and Arch Wireless for violations of the Fourth Amendment right to privacy and of the Stored Communications Act ("SCA"). Quon alleged that the Department's retrieval of his personal text messages on a department issued pager was in violation of the Fourth Amendment and that Arch Wireless violated the SCA when it distributed the contents of the messages to the department.

After the Federal District Court ruled that Arch Wireless did not violate the SCA because it was not defined as a "remote computing service" ("RSC") under the provision of the SCA to which appellants brought claim of violation, Quon appealed to the Ninth Circuit Court of Appeals. The lower district court also held that there was no violation of privacy rights because Quon did not have a reasonable expectation of privacy in his text messages.

In reviewing the case, the Ninth Circuit Court looked at first, whether Arch Wireless had violated the SCA provision. This matter was resolved largely by determining whether Arch Wireless could be considered an RSC. Under the SCA, an RSC would not be liable for releasing private information that is in electronic storage. The difference then becomes whether Arch Wireless would

be deemed as more of a provider of communications services (an ECS) or a provider of computer storage and processing services, an RSC. In comparing the other companies defined as RSCs, the Court found that even though Arch Wireless "stored" the information, it's primary function was not in providing these storage services. Thus, as an ECS, Arch Wireless was liable for violating provisions of the Act, which prohibit an ECS from disclosing private information to anyone other than the addressee or intended recipient of the message. In this case, the intended recipient of the text messages sent by Quon was neither the City or the Department.

As to the 4<sup>th</sup> Amendment claim for privacy, the Court held that not only did Quon have a reasonable expectation of privacy, but that the search was unreasonable. The court looked at this by evaluating whether the search was "justified at its inception" and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place."

The Court held that **Quon had a reasonable expectation of privacy** because he did not expect that the Department would look into the contents of his text messages. The informal policy of allowing the officers to pay for their overage charges without review or audit of their messages rendered in the officers a reasonable expectation that such text messages

would not be read or reviewed by anyone other than the recipient. The informal policy was based on the supervising Lieutenant's verbal assurance that because he did not want to be a "bill collector," he would allow the officers to pay for any overage expenses and would not audit their messages so long as they paid.

Based on this policy, Quon paid for any overage fees and no audit was ever initiated prior to August 2002. The Department contends that the Lieutenant could not have instilled this policy because he was not a policymaker, but the Court held that this did not diminish his chain of command and he was effectively the one in charge of administering the use of the pagers.

The Court also held that the **search into Quon's text messages was not reasonable**. The Court's determination was based on whether the "measures adopted are reasonable related to the objectives of the search and not excessively intrusive in light...the nature of the misconduct." Under this standard, a search will be unreasonable if less intrusive means were available to accomplish the same goals. The Court here held that even if the objective of the Chief in retrieving the messages from Arch Wireless was for efficacy of work related expenses, the search still could be unconstitutional, which it was. The Department had numerous methods of verifying the efficacy of the character limits on text messaging. This included

advising Quon that he would be forbidden from using his pager for personal communication for one month and that his pager would be reviewed in that time period to accomplish such a purpose. Another alternative would have been for the Department to ask Quon to count the characters himself, or redact any personal messages, and grant permission to the Department for review. The means by which the Department retrieved Quon's messages from Arch Wireless was excessively intrusive and unreasonable in light of the circumstances.

Despite the recent ruling, employees are not given a free pass to use their Department resources to engage in private electronic communications, so long as they reimburse the Department. The issue in each situation is whether the employee has a reasonable expectation of privacy and whether the Department uses the least intrusive means for search and seizure.

Stay Safe!  
Michael P. Stone

*Michael P. Stone* is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 29 years, following 13 years as a police officer, supervisor and police attorney.

*Freda Lin* is an associate with our firm and is a graduate from the University of the Pacific, McGeorge School of Law.