

Private Eyes Are Watching You: They See Your Every Move

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A police sergeant with the city of Ontario, California, filed a lawsuit which claimed, in addition to other legal causes of actions, that the City invaded his privacy by auditing his messages and finding explicit personal messages sent during work hours. This case garnered attention with media scrutiny due to the graphic nature of the text messages and alleged privacy issues. This case is appropriate for graduate and undergraduate business law, business management, and human resource management classes.

THE BACKGROUND

Privacy is a very important part of the fabric in the American culture. To ensure that this right is secure, the Fourth Amendment of the United States Constitution states that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” This is a very powerful provision providing certain types of protections from various governmental intrusions. Further, in keeping with this mandate, “it is well known that the [F]ourth Amendment’s protection extends beyond the sphere of criminal investigations.” However, the basic essence of this provision notes that “the amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government.” Protecting society at large from governmental intrusion was important. Notably, these efforts don’t stop here. What happens when the employee works for the government?

The tenets of the Fourth Amendment to the Constitution are utilized even when the employer is the Government and assumes the mantle in this role. Accordingly, “[I]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.” As a necessary component to provide these safeguards, “special needs, beyond the normal need for law enforcement,” note that provisions such as a warrant and probable cause difficulty when applied to employees of the government.

THE CASE

Jeff Johns was a police sergeant with the City of Ontario, California (City). The City

is one of a number of sub-sections within the State of California. There was nothing in the record to diminish John's reputation as a reputable police officer who performed his duty in a respected manner. He worked as a part of the Ontario Police Department's (OPD) Special Weapons and Tactics (SWAT) Team. Often, positions such as these required much training in order to become a member of this organization and are viewed as an excellent organization.

In October 2001, the City decided to procure alphanumeric pagers and contracted with Barch Wireless Operating Company for these services. The City secured 20 alphanumeric pagers with the ability to send text messages and receive them. As a result, these communication devices were to be utilized by the police officers while performing their duties. In other words, the pagers were to be used by the officers in the normal and routine duties during the work hours. Barch Wireless Operating Company provided the necessary services for the pagers as a result of the contract.

Referencing the provisions of the City's wireless service agreement with Barch Wireless, there was a limit placed on the amount of text message usage that could be utilized by each officer. As a result, each officer had a limit placed on the number of outgoing and incoming characters that could be used each month. If an officer went over this allotted amount, there was a penalty cost that was attributed to that officer. Accordingly, text usage over and above the required limit would result in an added charge. Pages were provided to Johns as well as the other SWAT associates in an effort to assist in deployment readiness and crises circumstances.

In an effort to provide structure, prior to procuring the pagers, the City stated that it was implementing a "Computer Usage, Internet and E-Mail Policy (Computer Policy)" which would be applicable to each worker. In addition to other requirements, most notably, it stated that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." This is quite important in its application and effect. As a result of this policy, individual workers will forgo the tenet of privacy. Accordingly, in March 2000, Johns affixed his signature to this document which noted that the provisions of this Computer Policy document were clearly understood and agreed too.

Interestingly enough, the provisions of this document were not applicable to the pagers and the text messages that were the output of this communication tool. There are definite consistent features in the agreement which apply to emails and text messages. However, there is a significant dissimilarity between each.

In the current situation, the City's data servers were utilized in computer e-mail communication while Barch Wireless controlled and owned the equipment from communicated

wireless radio frequencies used by pagers. Accordingly, information was communicated utilizing Barch Wireless systems and stayed there until an employee's pager procured the signal. Once this message was provided, Barch Wireless kept a duplicate message on its network. Notably, this transmission did not use City computers.

Even with the provisions of this policy not affecting employees specifically, Lieutenant Steve Dutch of the City purposefully informed each worker that the tenets of the current policy would be consistent with application to e-mails. Therefore, text messages usage would be treated like e-mail usage. This notes that City scrutiny and review would be applicable to text message communication. As a means to ensure its application, Dutch's verbal mandates were provided to each worker in a written document on April 29, 2002 by Chief Scott as well as other individuals within the City.

The pages were be distributed to the officers and put into use in late 2001 and 2002. During the initial periods of usage, the usage of characters for Johns was surpassed. Dutch informed Johns of this limit excess and reminded him that communications from these devices were treated the same as e-mails and were subject to review by the City. However, Dutch stated that he didn't plan to review the output from these text communications to determine their content. He stated that Johns pay the City for the excess usage and there would not be an audit. Accordingly, Johns provided compensation to the City for the excess usage and this arrangement was made to each employee.

During the next several billing cycles, Johns went over his character usage and provided the City with payment for this excess usage. This was done without apparent incident. Again, in August 2002, excess usage was applicable to Johns and a fellow officer.

A meeting was held in October. During this meeting, Dutch informed Chief Scott that collecting money for excess text usage was tiring. Chief Scott decided to investigate the matter. He wanted to find out if the character limit was in excess due to work related messages or personal messages. Scott required Dutch to obtain text communications for August and September which applied to a number of officers who had gone over the allotted usage. Johns was among this group being investigated.

In keeping with this investigation, Barch Wireless was contacted by an individual working for OPD acting under the requirements of Dutch. Ensuring that the City was the proper account entity, the text communication information was given by Barch Wireless to the City. Dutch looked over the transmission information and noted that a number of the excess text communications attributed to Johns' account were not of a professional work related nature and in fact were of a sexual nature in certain instances. With this information, Dutch provided his report to Scott. Scot looked over the findings as well as the individual who was Johns' supervisor. With the conclusion of this review by Scott, OPD's organization which handles this type of matter, the internal affairs divi-

sion was required to weigh in on this situation. They were specifically concerned with the personal usage of the text communications and the possible applicable OPD rules. Notably, they wanted to know if there were any violations of OPD requirements during the normal course of business by the officers.

Sergeant Patrick Mann was the individual leading the internal affairs investigation. Prior to him looking in the situation, Mann reviewed the transmission information to ensure that text communications made while Johns was not on duty were not included in the review. This was accomplished by comparing the text communications sent when Johns was at work and those sent when Johns was not at work. Mann then examined the actual content of the text communications sent during the work period only. According to Mann's review, there were 456 text communication messages sent in during work hours in August 2002 and only 57 of these communications were job applicable. Johns, during an average business day, sent or received 28 text communications and only 3 pertained to work. Accordingly, the conclusion of the review stated that OPD rules were broken. Corrective procedures were purportedly taken against Johns.

THE DECISION TO SUE

Although much effort was made, various facts pertinent to the reason for the lawsuit were not available. However, the reason for the lawsuit may be inferred by the available facts. There were no facts provided or stated that Johns did not pay the text message overages in a timely manner. In the facts, although there was a policy banning personal usage of these pagers, Johns stated that he was told that he would not be audited if he paid the fees for excess usage of the pagers. In addition, information was revealed that the content of the text messages were of a very personal nature and this content was something that Johns would probably not want public. With Johns being purportedly disciplined, and possibly feeling wronged, an action for violation of privacy as well as other laws was filed in federal district court.

LEGAL ACTION SUMMARY

The case began in the Central District of California. Johns sued for various privacy and other statute violations. The concept of privacy is Fourth Amendment hallmark. There was substantial interest in the case because the concept of workplace privacy. The initial District Court trial did not result in Johns favor. The United States Court of Appeals for the Ninth Circuit reversed the District court's ruling. The court had several concerns with the lower court's rulings. As a result, the matter was appealed to the United States Supreme Court to obtain their ruling.

DISCUSSION QUESTIONS

Legal Concerns

1. Discuss the possible legal arguments utilizing the appropriate corresponding facts supporting Jeff Johns' position.
2. Discuss the possible legal arguments/defenses utilizing the appropriate corresponding facts supporting City of Ontario's position.

Other Concerns

3. What are the implications for Human Resources as it relates to employees' text messaging.
4. If you were the Sergeant Scott and tired of being a bill collector, how would you have handled this situation?

EXHIBIT 1

Amendment IV

The Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment shield goes past the area of unlawful inquiries.

Source: *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967).

"The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," irrespective of if it is inquiring about a crime or carrying out a different role.

Source: *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614.

The Fourth Amendment is valid even when the government is functioning in the role of an employer.

Source: *Treasury Employees v. Von Raab*, 489 U.S. 656, 665.

EXHIBIT 2

City of Ontario Policy

Computer Usage, Internet and E-mail Policy

Employees of the City of Ontario police department were required to affix their signature and adhere to the City's guidelines relating to computer usage. This policy requires that "[t]he use of any City-owned computer equipment, computer peripherals, City networks, the Internet, e-mail services or other City computer related services."

The policy itself is outlined as follows:

1. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
2. Access to the Internet and the e-mail system is not confidential; and Information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.
3. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

Source: *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1123-24 (CD Cal. 2006).

REFERENCES

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Fourth Amendment to the United States Constitution

Article I, Section 1 of the California Constitution

Stored Communications Act, 18 U.S.C. §§ 2701-2711 (1986)

O'Connor v. Ortega, 480 U.S. 709 (1987).

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 613-614.

Treasury Employees v. Von Raab, 489 U.S. 656, 665.

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