

## United States Supreme Court Upholds Right Of Public Employer To Read Employee Text Messages

On June 17, 2010, the United States Supreme Court dipped another toe into the digital age with its long-awaited decision in *City of Ontario v. Quon*. The Court unanimously held that the City of Ontario properly reviewed employee text messages sent and received on a City-issued pager without violating Fourth Amendment's ban on "unreasonable searches and seizures." The decision is a significant development in delineating the scope of a public employee's privacy rights under the Fourth Amendment. Although the Fourth Amendment does not apply to private employers, the case will also likely influence courts' perceptions of the scope of privacy rights of private employees as well.

### A. Background Facts

Jeff Quon was a police sergeant of the Police Department in Ontario, California. The City issued Quon a pager capable of sending and receiving text messages so that he could respond to emergency situations. Quon signed an acknowledgment that he had received the City's written computer policy, under which the City reserved its right to monitor all "network activity including e-mail and network use." The policy did not explicitly cover text messages, although the City told employees orally and in writing that the policy applied to text messages as well.

After Quon exceeded his monthly text message allotment, a supervisor reminded Quon that text messages could be reviewed to ensure they were work-related. Quon's supervisor allowed Quon to pay the additional charges for exceeding his allotment, rather than have his text messages reviewed. Quon continued to exceed his quota over the next few months, and he continued to pay the additional charges. A supervisor requested the text message transcripts from the City's outside communications carrier after employees like Quon continued to exceed their monthly allotment. The City's purpose in obtaining the transcripts was to determine whether the established quota was too low or whether employees exceeded the quota because they were sending personal text messages. After reviewing the transcripts, the City discovered that many of Quon's text messages during business hours were not work-related, and many were sexually explicit. On an average day, Quon sent or received 28 text messages, of which only three related to police business. The City disciplined Quon for violating departmental policies. Quon then sued the City for obtaining and reviewing the transcripts, claiming that it violated his Fourth Amendment right of privacy, as well as the federal Stored Communications Act (the "SCA"). Quon also sued the City's outside phone carrier for violating the SCA, contending that the carrier should not have provided the transcripts without his consent.

### B. The Court's Ruling

The Supreme Court unanimously concluded that the City's search of Quon's text messages was reasonable and did not violate his Fourth Amendment rights. The Court initially observed that the Fourth Amendment guarantees a person's privacy, dignity, and security against certain arbitrary and invasive acts by officers of government. Further, the Fourth Amendment applies when the government acts in the capacity of an employer.

The Court held that the warrantless search of the text messages was reasonable under the circumstances because it was conducted for a “noninvestigatory, work-related purpose” and was not excessive in scope. As the Court noted, the supervisor ordered the search in order to determine whether the character limit on the City’s contract with the phone carrier was sufficient to meet the City’s needs. The search was reasonable in scope because the review was an “expedient way to determine whether Quon’s overages were the result of work-related messaging or personal use.” The Court noted that even if Quon may have had some expectation of privacy in the text messages (which the Court did not decide), it was not reasonable for him to assume that his messages were immune from scrutiny, given the City’s computer policy and the warnings that text messages could be audited. Based on the Court’s finding the search was reasonable, the Court concluded that the City did not violate Quon’s Fourth Amendment rights.

### C. Implications and Lessons of *Quon*

Justice Kennedy, who authored the opinion in *Quon*, was careful to note that its holding was decided on “narrow grounds,” and that “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society is made clear.” Despite the narrow holding, the decision certainly provides public employers with comfort that in appropriate circumstances, they may monitor an employee’s use of employer-provided technology without running afoul of the Fourth Amendment. The holding similarly conveys to public employees that their privacy rights on employer-provided technology have limits. If public employees want complete privacy in their communications, they should use their own communication devices.

The Court’s analysis was filtered through the lens of the Fourth Amendment’s protections. The Fourth Amendment does not protect private sector employees from their employers. Nevertheless, the Court’s basic pronouncements regarding employee privacy expectations in the new age of technology certainly has some overlap to the private sector. Private employers can anticipate courts will rely on *Quon*’s reasoning in determining the scope of employee privacy expectations, even though through a lens different from the Fourth Amendment.

Both private and public employers should take away from *Quon* the importance of having a strong technology use policy that advises employees not to have an expectation of privacy in company technology, and also advises them that their use of the technology may be monitored. The policy should be written broadly to include emerging forms of technology. The policy should also take into account what technology the organization’s employees use, such as text messaging. Employers should keep records, including employee acknowledgments, showing that employees have been informed of these policies.

In addition, before searching an employee’s use of the employer’s technology, the employer should assess whether the employee has a reasonable expectation of privacy in the technology, and balance that expectation against the reason for reviewing the employee’s use of the technology. Employers will have a better chance that monitoring will be found legal if the purpose is business-related, rather than simply snooping. If an employee has a reasonable expectation of privacy, the employer should consider obtaining the employee’s consent to review the use of the technology before unilaterally taking action that potentially would invade those privacy rights.

The *Quon* Court did not address the legality of the outside communications carrier having furnished the City with the text messages without Quon's consent. In the appellate court ruling before the case reached the Supreme Court, however, the Ninth Circuit concluded that the carrier's conduct did violate the SCA. Both employers and their outsourced communication carriers should accordingly be cautious in having an outside communications carrier provide information regarding an employee without the employee's written consent.

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