

## **COUNSEL'S REPORT**

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### **Be Careful When Using Your Cell Phone on Duty**

All those calls, texts, and other wireless messages made while on duty can be seized by your Employer and used against you in a disciplinary forum if your Employer had a legitimate work related purpose for seizing them.

The US Supreme Court recently decided in City of Ontario, CA v. Quon even though the police officer had a reasonable expectation of privacy to his text messages the City could seize them because they had a legitimate work related purpose to search and seize. Some examples of legitimate work related purposes are: performance evaluations, litigation concerning lawfulness of police action, and compliance with FOIL laws.

#### **City of Ontario, CA v. Quon**

Ontario Police Department ("OPD") provided pagers to some of its police officers that allowed them to send text messages. Its contract with the service provider, Arch Wireless, provided for a monthly limit on the amount of characters each pager could send or receive, and specified that if the number was exceeded it would result in an additional fee. The City issued a pager to officer Quon and other officers. When Quon and others exceeded their monthly character limits for several months OPD's chief (Scharf) sought to determine if the monthly limit was too low i.e. whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal use.

OPD requested and Arch Wireless provided transcripts of Quon's texts and another employee's texts from August and September 2002. Many of Quon's texts were not work related, and some were sexually explicit. Chief Scharf referred the matter to OPD's internal affairs division. The investigating officer used Quon's work schedule to redact any messages he sent while he was off duty, but the transcript showed few of his on-duty messages related to police business. Quon was discipline for violating OPD rules.

The Supreme Court held the search of Quon's text messages was reasonable – to determine whether the monthly character limit was too low – and therefore the City did not violate the 4<sup>th</sup> Amendment. How does this decision affect you and your personal cell phone on duty? One could argue you have a greater expectation of privacy using your personal cell phone while on duty. But, don't be lulled into a false sense of security that your Employer would not be able to justify a legitimate work related purpose and search and seize your phone records and messages. Again, if you use a cell phone at work be careful what you say and when you say it.

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