

*City of Ontario v. Quon*, \_\_\_ S.Ct. \_\_\_, 2009 WL 1146443, 77 USLW 3619, 78 USLW 3011 (U.S. Dec 14, 2009) (NO. 08-1332).

*Jerilyn Quon et al. v. Arch Wireless Operation Company, Inc. et al.*, 529 F3d 892 (9<sup>th</sup> Circuit 2008).

This important case addresses a pertinent issue facing public employers today – namely a public employer’s desire to provide modern and efficient means of communication for its employees, and the extent to which a public entity may audit and review those communications. The 9<sup>th</sup> Circuit’s 2008 decision was appealed to the United States Supreme Court, which accepted certiorari on December 14, 2009.

In this case, the City of Ontario, California (“City”) received twenty two-way pagers and contracted with Arch Wireless to provide wireless text-messaging services. While the City had no official policy regulating text messaging per se, it did have an internet, email and computer usage policy. All employees signed documents agreeing to the policy. The policy made it clear that City-owned property is to be used for City business only and not for personal use, that the City had the right to audit such use with or without notice, and that the City’s employees had no expectation of privacy associated with such use.

However, the Ontario Police Department (“OPD”) established an informal policy governing the use of text messaging and the pagers for its officers. The contract with Arch Wireless limited each pager to a 25,000 character limit per month. The OPD’s informal policy permitted its employees to go over this limit, as long as they paid the overage charges. OPD Officer Quon consistently went over the limit. The OPD conducted an internal investigation to determine the purpose of the overages, and whether the 25,000 character limit was too low. During the course of the investigation Quon’s text messages were audited. Quon ultimately sued the City, claiming that its search of his texts was an illegal search under the 4<sup>th</sup> Amendment.

A federal district court jury determined that the search did not violate the 4<sup>th</sup> Amendment because the OPD’s intent was to determine the efficacy of the character limit under its Arch Wireless plan, and not to uncover misconduct under the internet policy.

The 9<sup>th</sup> Circuit disagreed, in part. It agreed that Quon had a reasonable expectation of privacy with respect to his text messages, based upon the OPD’s informal policy described above. However, it held that the OPD’s search of Quon’s text messages was unreasonable and thus violated the 4<sup>th</sup> Amendment. The 9<sup>th</sup> Circuit concluded that there were other less-intrusive methods for determining the reasons behind the character overages. The OPD reviewed the contents of all the messages without the consent of the plaintiff-appellants, which the 9<sup>th</sup> Circuit found to be particularly intrusive due to the non-investigatory nature of the search.

For cities, the big issue to be resolved by the Supreme Court is whether an informal policy such as the OPD’s can trump or negate a formal policy stating electronic data is the City’s property, can be audited at the City’s will, and that an employee has no privacy expectation in the use of such data. It is important for jurisdictions to establish such policies and important for managers to ensure that informal exceptions to such policies are not being created. We will follow-up once the Supreme Court has ruled.