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*Quon*daries of Employee e-File Searches: *City of Ontario v. Quon* and Its Progeny

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The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means is a new frontier in Fourth Amendment jurisprudence that has been little explored.[1]

I. Introduction

In the summer of 2010, in *City of Ontario v. Quon*,[2] the United States Supreme Court addressed, for the first time, a Fourth Amendment case involving government-employer searches of employee electronic records. In a unanimous decision written by Justice Kennedy, the Court ruled that a city police department audit of a SWAT officer's pager text messages was reasonable at its inception and in its scope. This was due to a legitimate need to determine the sufficiency of the pager service and the limited manner by which the city audited the employee's records.[3] Although the case did not break significant new legal ground, the facts and the Court's analysis have presented some legal uncertainties and warnings regarding government-employer Fourth Amendment electronic file searches, unresolved issues that I call *Quon*daries. Since that time, a number of courts have applied *Quon* to various circumstances. This article reviews the *Quon* decision, considers subsequent cases interpreting and applying *Quon*, and offers concluding thoughts and recommendations to school and other government employers regarding their acceptable use and technology policies and practices.

1. Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 904 (9th Cir. 2008).
2. 130 S. Ct. 2619 (June 17, 2010).
3. *Id.*

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II. The *Quon* Case

The Computer Usage, Internet and E-Mail Policy of the city of Ontario, California, 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.

In October 2001, the city purchased twenty pagers to enable users to send and receive work-related text messages. The city contracted with Arch Wireless Operating Co. (Arch Co.) to provide the pager services; the agreement allowed each user a 25,000-character text limit (overage limit), beyond which additional charges would apply. Text messages generated and received by city pagers were sent through and distributed by, and electronic file copies were stored in, Arch Co.'s computer network via its wireless receiving stations. The contract apparently afforded the city no ownership or right of access to Arch Co.'s stored text files generated from city pagers. Thus, unlike the city's e-mail services, which were transmitted via the city's own computer network, pager messages were processed directly through Arch Co.'s wireless receivers and computer network.[4]

The city, through the Ontario Police Department (OPD), distributed the pagers to officers on the OPD SWAT team, including Jeff Quon, a sergeant at the time. The city did not, however, amend its computer policy in writing to include them. An OPD lieutenant responsible for supervising the city's contract with Arch Co. informed OPD members at a staff meeting that text messages "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." Officials memorialized these comments in a follow-up memorandum to Quon and other city personnel.

In the first two months after receiving his pager, Quon exceeded his text message overage limit. The lieutenant reminded him of the limit and the fact that text messages were "considered e-mail and could be audited." Quon was told that "it was not [the lieutenant's] intent to audit [an] employee's text messages to see if the overage [was] due to work-related transmissions." Officials also informed Quon and other employees that rather than have their text messages audited, employees could reimburse the city for any overage fees incurred by their pager use.

In subsequent months, Quon continued to exceed his text limits and to reimburse the city accordingly, believing that his messages would not be audited if he did so. Over time, however, because of the regularity of overages and additional payments, the lieutenant informed the OPD chief that "he was tired of being a bill collector." The chief then ordered an audit of pager usage records spanning just the two months prior (August and September 2002) to determine if the text limit was too low and needed to be increased. The report from that audit indicated that, in August, Quon sent or received 456 text messages, of which no more than 57 were work related; that on one day he sent as many as 80 messages; and that in an average day Quon sent 28 messages, of which only 3 were work related. Consequently, the audit concluded that Quon had violated company rules, for which he was disciplined. Among Quon's personal pager messages, many were sexually and romantically explicit.[5] Quon and the others whose identities and

4. Such a contractual arrangement by itself poses significant legal and practical challenges to schools and other government employers. These challenges are mentioned at the end of this bulletin but are not addressed in detail.

5. Other plaintiffs in this case included Quon's wife, from whom he was separated, another female OPD employee with whom Quon was romantically involved, and a fellow male officer.

personal messages were audited filed suit in federal district court against the city, the OPD, and OPD officials under state and federal laws, claiming, in part, violations of their Fourth and Fourteenth Amendment rights. The parties filed cross motions for summary judgment.[6]

The federal district court in California concluded that Quon had a reasonable expectation of privacy regarding his pager messages. The reasonableness of the search, however, depended on the OPD chief's purpose in conducting it—to determine whether employees were abusing the pagers for personal use or, alternatively, whether employees were paying the cost of legitimate work-related texts. After a trial, the jury answered the question by finding for the latter: that the search was to determine if the overage limit was insufficient to cover work-related texts. Consequently, the trial court ruled that the search was reasonable. Quon appealed to the Ninth Circuit, which reversed in part, ruling that the search was not reasonable in scope because the OPD could have used a number of less invasive methods to determine whether usage limits were adequate.[7] After the circuit court subsequently denied a petition for rehearing en banc, the Supreme Court granted the city's, the OPD's, and the police chief's petition for certiorari.[8]

Choosing an Analysis

Before diving into the sticky analytical issues, the Supreme Court began by reviewing clearly established constitutional principles and precedents, starting with the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In addition, the Fourth Amendment's protection

- extends beyond the sphere of criminal investigations;[9]
- guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function;[10]
- applies as well when the Government acts in its capacity as an employer;[11] and
- is limited by "special needs" of government employers, making the search warrant and probable cause requirements impractical in such contexts.[12]

The Court then reviewed its 1987 decision in *O'Connor v. Ortega*.[13] *O'Connor* involved a physician employed by a state hospital who was subject to a workplace search of his desk and filing cabinet as part of an investigation into suspicious misconduct. In that case, the Court failed to establish a majority-supported analytical framework for determining the constitutionality of

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6. Quon v. Arch Wireless Operating Co., Inc., 445 F. Supp. 2d 1116 (C.D. Cal. 2006). The district court framed the legal issue this way: "What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family *via* hand-held, computer-assisted electronic devices?" *Id*. at 1121.

7. Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892 (9th Cir. 2008). The Ninth Circuit did uphold the district court's determination that Quon had a reasonable expectation of privacy.

8. City of Ontario v. Quon, 130 S. Ct. 1011 (Dec. 14, 2009). The Court rejected a similar petition filed by Arch Co. based on the Ninth Circuit's determination that Arch Co. had violated state law. USA Mobility Wireless, Inc. v. Quon, 130 S. Ct. 1011 (2009). The Arch Co. claims are not addressed in this article.

9. Camara v. Mun. Ct. of City and Cnty. of San Francisco, 387 U.S. 523, 530 (1967).

10. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 613–14 (1989).

11. Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989).

12. O'Connor v. Ortega, 480 U.S. 709, 725 (1987).

13. *Id.*

government non-investigatory employee searches (i.e., those not related to a criminal investigation but, instead, involving searches for workplace misconduct or other employer-related reasons). Instead, a four-member plurality relied on a two-part test: (1) whether the employee had a reasonable expectation of privacy (Privacy Expectation) that triggered the Fourth Amendment based on "operational realities of the workforce" (to be determined on a case-by-case basis) and, if so, (2) whether the search was reasonable at its inception and in its scope (Reasonableness). In his concurring opinion in *O'Connor*, Justice Scalia propounded a different framework. He opined that the offices of government employees are generally covered by Fourth Amendment protections but that such searches are constitutional so long as they are "reasonable and normal in the private-employer context."

The Court in *Quon* acknowledged that two decades of cases following *O'Connor* had failed to clarify the scope of employee Fourth Amendment rights. Lacking a clearly accepted analytical test, the Court determined that it could resolve the case based solely on the Reasonableness test as applied to Jeff Quon (and fellow plaintiffs).

> Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. . . . It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. . . . The two *O'Connor* approaches—the plurality's and Justice Scalia's—therefore lead to the same result here.[14]

A Teachable Moment: The Court's "Instructive" Dicta

Despite having declared it unnecessary to address *Quon*'s Privacy Expectation, the Court nevertheless could not pass up a pedagogical opportunity.

> Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The record does establish that OPD, at the outset, made it clear that pager messages were not considered private. The City's Computer Policy stated that "[u]sers should have no expectation of privacy or confidentiality when using" City computers. . . . Chief Scharf's memo and [Lieutenant] Duke's statements made clear that this official policy extended to text messaging. The disagreement, at least as respondents see the case, is over whether Duke's later statements overrode the official policy. Respondents contend that because Duke told Quon that an audit would be unnecessary if Quon paid for the overage, Quon reasonably could expect that the contents of his messages would remain private.
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> At this point, were we to assume that inquiry into "operational realities" were called for, . . . it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty,

14. City of Ontario v. Quon, 130 S. Ct. 2619, 2628–29 (June 17, 2010). In similar language, the Court stated that "[t]hough the case touches issues of farreaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable." *Id*. at 2624.

> might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws . . . These matters would all bear on the legitimacy of an employee's privacy expectation.[15]

The Court expressed great caution about declaring universal principles regarding the expectation of privacy when dealing with the "changing realities" of the workplace and technology.[16] In fact, one is left to wonder whether the Justices' own lack of experience and, perhaps, insecurity about their technological awareness is to blame. Why they could not simply deal with the case's specifics in order to render a more definitive statement is unclear.

The Court bypassed the issue of Privacy Expectation in the context of technology use, proceeding, instead, from a series of "propositions, *aguendo*." The last proposition is particularly significant for the purposes of cyberlaw.

> It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions *arguendo*: First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to *a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere*.[17]

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15. *Id*. at 2629.

16. "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . . In *Katz* [*v. United States*, 389 U.S. 347 (1967)], the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. . . . It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

"Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. . . . Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. . . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

"Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. . . . Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." *Id*. at 2629–30 (citations omitted).

17. *Id*. at 2630 (emphasis added).

Reasonableness

Having instructed the parties, readers, and, presumably, other courts and future litigants, the Court addressed the primary legal issue in this case: whether the text audit was reasonable at its inception and in scope.

> [Whether the search] when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "justified at its inception'" and if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of" the circumstances giving rise to the search.[18]

At its inception, the Court succinctly concluded, the OPD acted with a reasonable "noninvestigatory work-related purpose" to determine if the text limit was adequate and fair to both employees (i.e., not charging them for legitimate work-related texts) and to the department (not having to pay for extensive personal communications).

Regarding the scope of the search, the Court acknowledged an overlap between the Privacy Expectation and Reasonableness analyses, stating that "the extent of an expectation is relevant to assessing whether the search was too intrusive."[19] The Court concluded that Quon's "limited" privacy expectation opened the door wider to a search of his pager records.

> Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.[20]

The Court then summarily reasoned that the audit was an "efficient and expedient" way to make its determination, especially in light of some of the accompanying, self-imposed, restraints. These restraints included examining only records for the previous two months (even though Quon had exceeded his limits on more than those occasions) and only text messages sent or received during hours that Quon was on duty. The Court also noted that the discovery of sensitive personal information does not inherently imply unreasonableness.[21] The Court observation (quoted above) that Quon "received no assurances of privacy" is odd. This seems to ignore

18. *Id*.

19. City of Ontario v. Quon, 130 S. Ct. 2619, 2631 (June 17, 2010).

20. *Id*.

21. Regarding the other plaintiffs—Jerylyn Quon (Quon's wife from whom he was separated), April Florio (Quon's lover and OPD staff member), and Steve Trujillo (Quon's colleague), the Court quickly disposed of their claims. Because Quon's privacy rights were not violated, neither were theirs. Oddly, the Court's conclusion seems to hinge on technical hair-splitting regarding their "litigating position"; that is,

or minimize the significance that Quon relied on department communications and practices indicating that it would not search his records if he paid for his overages. It is not clear why the Court did not consider these to be at least *some* "assurances of privacy."

The Court determined that a workplace-related need to do a search of pager records, even when those records are likely to include personal messages, was reasonable, particularly when the inquiry was confined to only portions of records sufficient to make an informed decision. What the Court chose not to address, what it addressed extraneously regarding the expectation of privacy, and its criticism of the Ninth Circuit decision are, to borrow the Court's term, instructive.

The Bottom Line

The Court's decision that the employer's limited search of text messages generated by employer-owned pagers was property motivated and reasonable is the result of a relatively straightforward analysis: based on a very subjective Reasonableness standard.[22] Courts will continue to vary in how they apply it, since the *Quon* decision is highly fact-specific and offers very few new legal contours. One critical factual question is this: if the OPD had never sent mixed signals to Quon as to whether his personal pager use would not be audited, would the law be clear? In other words, if the city had simply communicated to employees (orally and in writing) that its "no expectation of privacy" computer policy included pagers, and had never deviated from that practice, would the search of Quon's messages be clearly constitutional? It appears so.[23]

Expectation of Privacy

Because the *O'Connor* and subsequent Court opinions do not provide a definitive analytical framework, and because the *Quon* Court did not take the opportunity to adopt one,[24] we are left with very little certainty about how to apply the highly subjective Reasonableness standard to the issue of employee searches.[25] Why the Court felt the need to address the Privacy Expectation question as a pedagogical opportunity is unclear.[26]

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although they argued that their rights were violated because Quon's were, they had not argued that their rights were still violated even if Quon's were not.

22. Chief Justice Roberts reportedly noted at oral argument, "I just don't know how you tell what is reasonable. . . . I suspect it might change with how old people are and how comfortable they are with the technology." *New York Times*, Apr. 19, 2010.

23. The Court did note one preliminary issue that was necessary to resolve in the Privacy Expectation analysis, and that was whether the OPD official who bargained with officers to pay their overages was authorized to change official city policy. *Quon*, 130 S. Ct. at 2629.

24. Justice Stevens, in his concurrence, noted that the Court "sensibly" declines to resolve whether the *O'Connor* plurality Privacy Expectation is correct.

25. Whether the Court will consistently apply it in the future, therefore, remains unclear, though it seems likely.

26. Justice Scalia criticized the majority's discourse, characterizing it as "exaggerated" issue-dodging:

> [The Court] inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question [of Privacy Expectation]. That discussion is unnecessary. (To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated [regarding its difficulty]. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication . . . that where electronic privacy is concerned we should decide

Misreading the Ninth Circuit?

As noted above, the reasonableness of a search is determined, in part, by its intrusiveness in terms of both the circumstances of the search and the extent of the expectation of privacy. The Court criticized the Ninth Circuit's analysis in this regard, in particular, its identification of several less intrusive alternatives available to the OPD.

> As *O'Connor* makes clear, a search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." . . . "*[I]f less intrusive methods were feasible*, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes . . . the search would be unreasonable."[27]

The Ninth Circuit appears to equate the availability of "less intrusive methods"—for example, warning Quon that he was not allowed to use his pager for personal messages or asking him to count the characters himself or to provide redacted messages for audit—with the assessment that a search may be unreasonably intrusive. Does this language necessarily imply a least restrictive search standard, as the Supreme Court seemed to state?

> This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." . . . Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.[28]

It is possible that the Supreme Court either mischaracterized or misinterpreted the Ninth Circuit's reasoning. One can read the Ninth Circuit case as declaring a common sense notion that the feasibility of *multiple*, *less restrictive* search alternatives, when added to other important privacy-sensitive factors, makes a more invasive search unreasonable.[29]

> less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty. . . .
>
> In short, in saying why it is not saying more, the Court says much more than it should. *Quon* at 2634–35.

Justice Scalia worried that the majority's digression was "self-defeating" because "lower courts will likely read the Court's self-described 'instructive' expatiation . . . as . . . a heavy-handed hint about how *they* should proceed. Litigants will do likewise." *Id.* at 2635.

27. Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 908 (9th Cir. 2008) (citations omitted) (emphasis added).

28. City of Ontario v. Quon, 130 S. Ct. 2619, 2632 (June 17, 2010).

29. Nowhere in the Ninth Circuit's opinion does it use the term "least restrictive," "least intrusive," or, for that matter, "least." Whether the Ninth Circuit is stressing the existence of *any* less restrictive alternative versus a variety of less intrusive options—two very different standards—is not absolutely clear, though the latter seems more likely because the Ninth Circuit emphasized the existence of multiple alternative options rather than the existence of just one.

III. Later Cases Interpreting and Applying *Quon*

Where, specifically, does *Quon* leave, as well as lead, courts in determining the contours of Fourth Amendment analysis of government-employer e-file searches? In the words of one lower court, "the Supreme Court [in *Quon*] made clear that the contours of a reasonable expectation of privacy within the sphere of digital communications [are unclear] both in the courts of law and in the court of public perception."[30] The majority in *Quon* cautiously, perhaps overly so, chose not to extend its analysis and holding any further than necessary, to the consternation of some lower courts left to do the heavy lifting.

The Eleventh Circuit sardonically cites *Quon* for its "marked lack of clarity in what privacy expectations . . . are reasonable"[31] and seems to chide the Justices for cautiously remaining on dry ground on several difficult issues while leaving lower courts to swim on their own; in other words, the Court missed an important opportunity.

> Instead, the Supreme Court (1) assumed *arguendo* that plaintiff Quon had a reasonable expectation of privacy, (2) assumed that the government's review of a transcript of his text messages was a search under the Fourth Amendment, and even (3) assumed principles governing a search of [a] physical office applied to "the electronic sphere."[32]

Thus, it remains a case-by-case determination, without a clear standard to follow, whether a reasonable expectation of privacy pertains in governmental e-files generated by government employees on government-owned electronic devices. In *Quon*, the Court identified two analytical frameworks from its prior decision in *O'Connor v. Ortega*:[33] one adopted by *O'Connor*'s four-judge plurality, the other adopted by Justice Scalia in his concurrence. The *Quon* court failed to formally accept or reject either of them.

The *O'Connor* plurality framework requires, first, that it be determined whether an employee has an expectation of privacy based on the employer's "operational realities of the workplace" and, if so, whether an employer's work-related search is reasonable under the circumstances.[34] The second framework, proposed by Justice Scalia, assumes that government employees are generally covered by Fourth Amendment protections (i.e., that they have an expectation of privacy) and that any work-related search must be judged by a reasonableness standard based on normal private employer standards.[35] Both frameworks require searches to be reasonable at their inception and in their scope.[36]

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30. Corsair Special Situations Fund, L.P. v. Engineered Framing Sys., Inc., No. 09-1201-PWG, 2011 WL 3651821, at *3 (D. Md. Aug. 17, 2011).

31. Rehberg v. Paulk, 611 F.3d 828, 844 (11th Cir. 2010), *cert. granted*, 131 S. Ct. 1678 (2011), *aff'd*, 132 S. Ct. 1497 (2012) ("Even after the briefs of 2 parties and 10 amici curiae, the Supreme Court declined to decide whether the plaintiff's asserted privacy expectations were reasonable." *Id*. at 845.). *See also* State v. Patino, No. P1-10-1155A, 2012 WL 3886269 (R.I. Super. Ct. Sept. 4, 2012) ("In staying its hand, the Supreme Court [in *Quon*] deprived this Court of the very guidance that it seeks today to resolve the novel and important issues presented," www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/10-1155.pdf *at* 45.).

32. *Paulk*, 611 F.3d at 845.

33. 480 U.S. 709, 725 (1987).

34. *Id*. at 709–10.

35. *Id.* at 731–32.

36. For an explanation of the *Quon* framework, see Looney v. Washington County, Or., CIV. 09-1139-HA, 2011 WL 2712982, at *9 (D. Or. July 13, 2011).

Regarding text messages, specifically, one trial court within the Fourth Circuit has noted:

> With regard to the contents of the text messages . . . this Court's research has not disclosed . . . any case law in the Fourth Circuit holding that a party has a protected privacy interest in the contents of text messages that the party sent or received. Nor is there consistency among the other Circuits.[37]

Perhaps most helpful in the lower court opinions citing and discussing *Quon*, so far, are the ways in which those courts have applied or distinguished *Quon*. Regarding the expectation of privacy and the reasonableness of a search, the facts in *Quon* that seem most significant include (1) that the employer had a policy in place that gave employees notice that they had no expectation of privacy in e-mails sent on employer-issued equipment (though the employer interpreted this policy to include text messages and communicated that interpretation to employees orally but not in writing), (2) the employer in *Quon* significantly limited its search of the plaintiff's text messages to those occurring only during working hours, and (3) the search was for valid work-related reasons and limited in scope to satisfy those requirements.

Cases favoring employers include *Ciralsky v. C.I.A.*,[38] which involved an allegation that an employer was monitoring an employee's use of government computers to determine if the employee could be trusted with national security information.[39] The court ultimately found that the plaintiff's claim was not supported by the Fourth Amendment due to the fact that, as in *Quon*, the employer search had a legitimate, work-related purpose and involved an employer-issued computer.[40] Another such case is *Alexander v. City of Greensboro*,[41] where the plaintiff, contrary to the record established in Quon, failed to allege the context and reasons for the employer search or the existence of an employer policy regarding employees having no expectation of privacy. Finally, in *Holmes v. Petrovich Development Co.*,[42] where a California court of appeal found no expectation of privacy or attorney–client privilege by an employee who used the employer's computer to send e-mail messages to her lawyer,[43] especially because the employee had previously been warned that such messages were not private and were accessible by her supervisor.[44] Namely, the court found that "[t]his is akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open."[45]

Cases applying *Quon* in favor of the employee include *Carter v. County of Los Angeles*,[46] where an employer secretly videotaped an employee's sexual conduct in a break room.[47] In contrast to *Quon*, this conduct was found to have unreasonably invaded the employee's expectation of privacy on several grounds: it was overly invasive because less intrusive methods to serve the employer's interest were available, no employees were made aware of the video surveillance by

37. Corsair Special Situations Fund, L.P. v. Engineered Framing Sys., Inc., 09-1201-PWG, 2011 WL 3651821, at *3 (D. Md. Aug. 17, 2011).

38. No. 1:10cv911 (LMB/JFA), 2010 WL 4724279 (E.D. Va. Nov. 15, 2010), *aff'd sub nom.*, Ciralsky v. Tenet, 459 F. App'x 262 (4th Cir. 2011).

39. *Id.* at *1.

40. *Id.* at *6.

41. 762 F. Supp. 2d 764 (M.D.N.C. 2011).

42. 119 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011).

43. *Id.* at 882.

44. *Id.* at 896.

45. *Id.*

46. 770 F. Supp. 2d 1042 (C.D. Cal. 2011).

47. *Id.* at 1046.

the employer, and the employer extended the surveillance to employees not under suspicion for misconduct.[48] Another case that ruled for the employee is *Cunningham v. Terrebonne Parish Consolidated Government*,[49] which includes an extensive discussion of and comparison to *Quon*, ultimately distinguishing it by noting that the employer did not have a "no expectation of privacy" policy and that the employer did not own the employee's cell phone used in generating text messages.[50]

IV. Practical Implications of *Quon*

How Broadly Does *Quon* Apply?

To what extent does *Quon* apply to school and other government agency searches of electronic employee records? It seems safe to say that *Quon* will have far-reaching applications to most, if not all, government-employer searches of electronic files, including personal data. There seem to be few distinctions to be made, except to the extent that the employee's expectation of privacy and the reasonableness of the searches will vary depending on the type of agency involved and the context. We know this already. The *Quon* court does repeatedly consider the fact that Quon was a police officer who had to know that his pager use was susceptible to audits and review because of the nature of police work, the greater need to scrutinize police operations, and the increased likelihood of litigation. This may be an important distinction, leaving some doubt as to whether school employees (not subject to the same scrutiny, perhaps) are entitled to a greater expectation of privacy. Certainly, school employees know that their files are often open to public records requests (except for statutorily protected confidential information) and that school records, as with police records, may be subject to frequent internal audits and litigation.

School and University Acceptable Use Policies (AUPs) and Enforcement: Implications

One clear lesson from the facts in *Quon* is this: schools must regularly review and update their AUPs to ensure that they reflect current legal and technological changes—standard but oft-forgotten or disregarded legal advice. Does the AUP include school-issued pagers or other recently introduced electronic gadgets? Although there should be language in the AUP that applies to other, like devices not explicitly identified, the more specific a policy is, the greater and clearer employee expectations are likely to be and the greater the legal predictability will be. The Ninth Circuit case, holding against the agency, sounds an alarm to schools and other employers: it makes little difference what the policies *say*, if they are not enforced or, worse yet, enforced inconsistently or in unpredictable ways. The main lessons are these: (1) make sure that policy teams and/or officials regularly review the AUPs—not just for currency but also for consistency in application—and (2) ensure that employees are regularly informed and trained regarding those policies and their enforcement.

Private Vendor Roles and Contract Terms

The fact that the city of Ontario contracted with a private vendor to distribute and store electronic records generated by city-owned pagers is an extremely significant fact in *Quon*. The constraints of this bulletin do not allow a detailed discussion of this particular legal *Quon*dary.

48. *Id.* at 1050–51.
49. No. 09-8046, WL 651997 (E.D. La. Feb. 11, 2011).
50. *Id*. at *4–5.

Suffice it to say that any school agency contemplating a comparable arrangement involving any of its electronic records or devices must pay special attention to record keeping and other legal issues. Schools must weigh the costs and benefits—financially, legally, and otherwise—in having a private vendor engaged in such operations. There are other specific questions to be asked, among them, the following: (1) Who owns the records? (2) What are the responsibilities of the vendor in protecting and disclosing them? (3) How does the contractual arrangement comport with state and federal public records and confidentiality requirements? (4) Has the school improperly undermined or evaded its legal obligations? (5) Are the roles and rights of the school and the vendor specifically and legally identified in relation to the records issues? (6) To what extent does or should the school retain control of all aspects of the e-communications and files? These and other questions must be carefully addressed by legal counsel who is well versed in public education, contract, and technology law.

V. Conclusion

While *Quon* extends the *O'Connor* standard to an employer's search in cyberspace, requiring justification at its inception and limiting its scope, it does not bring us much closer to a bright-line test. Will subsequent cyberlaw cases prompt the Supreme Court to develop such a test, or is it unlikely that a single, twenty-first-century standard for Fourth Amendment protection will be established due to our technology-saturated world, especially given the Justices' apparent lack of technological savvy? For now, government employers must focus on reasonableness: this includes considering both the purpose and the intent of an employer search. At the very least, employers should have clear and up-to-date policies on the use of electronic devices in the workplace. Employers should always assume, at least for now, that an expectation of privacy does or may exist. Over time, as the Court addresses more school-agency cyberlaw cases, the boundaries and standards should become clearer, thus reducing the legal *Quon*daries.