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"OFFICER'S PERSONAL CELL PHONES – SUBJECT TO DISCOVERY?"

118th Annual Conference
Chicago – October, 2011

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"Officer's Personal Cell Phones – Subject to Discovery?"

With the phenomenal growth of ownership of personal cell phones throughout the United States an issue, which is perhaps unique to law enforcement, has recently arisen. The issue focuses on whether or not information, whether audio or photographic, which is captured by an on duty law enforcement officer (or, perhaps, while off duty) could be considered evidentiary and, therefore, subject to disclosure to the officer's employer, or to the defense in a subsequent criminal prosecution?

This issue took on great significance late last year when photos of a young woman who was killed in a car accident were shared on the internet by a public safety officer and, in fact, was sent to the young woman's parents. One of the first responders to the scene, a firefighter, took a video on his personal cell phone containing graphic images of the young woman taken moments after her death. Although the video was, apparently, taken without any intent to cause harm to the family, it was shared amongst numerous people who had no official role to fulfill. Officials indicated they did not believe there were any laws, nor internal rules, broken but if that were done by a law enforcement officer, a contrary conclusion might be reached.

A Police Officer's Duties

More than seventy years ago the California Court of Appeal very eloquently described the duties of a police officer. In the case of *Christal v. Police Commission* (1939), 33 Cal.App.2d 564, the Court stated the following:

> "The duties of police officers are many and varied. Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of ***disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws."*** (Emphasis added.)

This language has been included in numerous appellate court decisions in the ensuing years. Although it is, obviously, not binding on all law enforcement officers, it certainly articulates the responsibilities of peace officers in a succinct and meaningful way.

Discovery in an Administrative Investigation

On March 8, 2011, a team of Deputy U.S. Marshals, along with police officers from St. Louis, Mo. went to the home of Carlos Boles, to serve him with a felony warrant. Boles shot two U.S. Marshals and a St. Louis police officer and subsequently one of the U.S. Marshals died from his wounds. Boles was killed when officers returned fire. A photo of the bullet ridden body of Boles, lying in a pool of blood, ended up being circulated around St. Louis. It was initially brought to the attention of the police by a St. Louis University student and it then became apparent that other citizens had been exposed to it, as were a TV news station, the Boles family itself, and it also appeared to be circulated on Facebook.

The St. Louis Police Department initiated an internal affairs investigation to determine who took the photo and how it was leaked to citizens and the media. Both the department and the U.S. Marshal's service have policies which state that photos taken of a crime scene are for investigative purposes only. Additionally the photos are deemed to be evidence and official records and can be disclosed only for investigative purposes.

The internal affairs investigation was able to identify the police officer who took the photo but he said that he had sent it to only one other person, another police officer. However, the photo then traveled from that second officer to, ultimately, five different individuals. Although each officer admitted sending the photo to others, none of them "could recall" the identities of those to whom they had forwarded the pictures. The department contended that the officers were not cooperating in determining who sent the photo out of the department, nor why they were sent to the public.

Therefore, the department demanded that the history of messages sent from the personal cell phones of the involved officers, which included photos, be disclosed, to be used as evidence in the internal affairs investigation, or the officers faced dismissal for insubordination. The officers sought an injunction against the department in Federal Court, asserting that the cell phones were not department issued, were personal and, therefore, the department's demand to access their phone's history violated their Fourth Amendment Right against unreasonable searches and seizure.

On April 1, 2011, U.S. District Court Judge Nanette Laughrey ruled that the four officers must turn over those phone records related to the text messages that contain photographs for the periods from March 8th through March 18, 2011. Manasco v. Bd. of Police Cmsnrs., #4:11-CV-00557 (E.D. Mo.).

The court concluded that such a search would be limited and reasonable. Furthermore, the court held that the officers should have known that their private phone information could be sought in an investigation involving work related misconduct. The court compared it to a piece of vital evidence taken from a crime scene and hidden in a peace officer's personal car.

City of Ontario v. Quon

The United States Supreme Court recently addressed the issue of whether an officer has a right of privacy regarding *personal communications made on a department issued piece of equipment*? In the case of *City of Ontario v. Quon*, 130 S.Ct. 2619, 2010 U.S. Lexis 4972, the U.S. Supreme Court ruled, on June 17, 2010, that when the department accessed on-duty text messages sent on a department issued cell phone it constituted a search under the Fourth Amendment of the U.S. Constitution. The Chief of Police had ordered that an audit be conducted on the department issued cell phones to determine if the City should expand its contract with the service provider. The Chief wanted to be sure that the excess number of messages being made were business related, as mandated by the department's policy, or of a personal nature.

The Supreme Court said that the issue of whether the audit was reasonable would depend on whether the Chief used the information for legitimate purposes of determining a work related issue. The Court stated that even where an employee has a legitimate expectation of privacy, "an employer's intrusion on that expectation for non-investigatory, work related purposes, as well as for investigations of work related misconduct, should be judged by the standard of reasonableness under all of the circumstances."

In the *Quon* case the Court declined to resolve the dispute over whether there was a reasonable expectation of privacy and admonished that "prudence counsels caution before the facts in this case are used to establish far reaching premises that define the existence, and extent, of privacy expectations of employees using employer provided communication devices." The Court said that even assuming that

Quon had a reasonable expectation of privacy, the City's review of the transcript of the text messages sent by the employee did not constitute an unreasonable search. The Court said that the City had a legitimate interest in insuring that it "was not paying for extensive personal communications" made by the employees.

The Supreme Court also stated that ***"as a law enforcement officer, he (Quon) 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."*** (*Emphasis added*.) The Court held that "it would be necessary to consider whether a review of messages sent on police pagers, ***particularly those sent while officers were on duty***, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions and, perhaps, compliance with State Open Records laws. (*Emphasis added*.)

Although the *Quon* case deals with personal use of a business cell phone, logic dictates that the same analysis would be applied to the business use of personal cell phones. The issue of whether there is evidentiary value to what is contained on that personal cell phone doesn't change merely because it's a personal cell phone.

Discovery in a Criminal Case

It appears to be fairly easy to make the argument that information contained on department issued equipment would be considered agency "property" and accessible by the department. Written policies articulating that fact, however, will make it easier to be able to enforce that concept. However, the argument regarding *personal* cell phones appears to consistently be that there is a right of privacy held by the employee and that the employer has no right to access that information. In all candor, it seems like an incredibly illogical argument since, once again, the premise is that an employee has recorded and/or documented something that is, or could be, related to a criminal investigation, or to an internal administrative investigation. Case law supports the policy that such information is subject to discovery by the employer or by a defendant in a criminal case.

That issue was addressed and decided by the New Mexico Court of Appeals, in the case of *State of New Mexico v. Marty Ortiz*, 146 N.M. 873, 215 P.3d 811. In the *Ortiz* case, a Santa Fe New Mexico police officer, John Boerth, pulled over a car and arrested the driver (Oritz) for a DUI. During the

prosecution of Ortiz, and during discovery, the defense attorney demanded access to all communications made between the officer and any other persons leading up to the traffic stop, "including personal cell phone calls that Officer Boerth had with anyone."

The defense's argument was that Officer Boerth knew the defendant and was "out to get him." The defense alleged that a confidential informant alerted the officer on his personal cell phone about Ortiz's location and that the traffic stop was a mere pretext with no probable cause to support it.

The prosecutor opposed the motion and "asserted that the defendant was not entitled to private communications on an officer's private cell phone number." The defense attorney argued that "he was only asking for records of communications the officer had within the relevant six minute period" in question. Defense counsel further argued that "the officer did not have an expectation of privacy of his cell phone records while on duty, on patrol, in a marked unit, during an emergency or arrest situation."

The trial court granted the defendant's motion for discovery stating in part that (1) it was for a very finite period of time and (2) "if there were personal matters irrelevant to the case, the state could file a motion for an in-camera review." Surprisingly, the state continued to refuse to comply with the order and ultimately the court stated that it "found that the state had flaunted the court's order for simple discovery and that the defendant was prejudiced." As such, an order was entered granting the defendant's motion to dismiss with prejudice.

The Court of Appeals held that "defendant showed that the cell phone records were in the control of the state because they were in the possession of the officer during the time in question." The Court went on to state that "the officer was an arm of the state" and, therefore, his private telephone records were within the possession, custody, or control of the state, making them subject to disclosure ..."

The Court also held that "defendant showed that the cell phone records were potentially material to his defense..." and "... a defendant need only show circumstances that reasonably indicate that records may contain information material to the preparation of the defense" to allow discovery.

An Agency's Cell Phone Policies

There are numerous issues which have arisen over the last several years involving various aspects of social networking. These issues deal with officers posting photos to the internet which were obtained

either as a result of police action, or which are of a personal nature and bring embarrassment or discredit upon the officer and/or the agency. These kinds of incidents are not only embarrassing to the organization but may, in fact, interfere with police operations.

It is becoming more and more commonplace for photos or videos of a personal nature to be used by defense counsel to challenge the credibility of a police officer as a witness. But, for our purposes, we are focusing on police officers obtaining information in the course and scope of their employment and, thereafter, either refusing to inform their agency of the existence of the information, or actually posting it to the internet or circulating it in some other way. The need for policies addressing both of these issues becomes more and more important with each passing day.

Most agencies currently have some form of policy dealing with department issued computers and/or cell phones stating that they belong to the department, should be used exclusively for business purposes, and can be accessed and reviewed by the agency at its will. Learning from the *Quon* case, however, it is also helpful to include that text messages sent on department equipment have no privacy rights attached to them, whether they are of a personal or business nature. The issue of posting information and/or photographs on social networks, which would bring discredit upon the organization or the officer, should be addressed by policy and strictly regulated. The concern is not only to protect the agency but to protect the officer as well.

The policy should not prohibit the use of social networks, or even postings by officers, so long as they're not in conflict with the directions set forth in the policy. However, the policy should prohibit any type of posting or dissemination of information which the officer claims is the position of his or her employing agency. It should prohibit comments of a sexual nature, or ones that attack other members of the employing agency, or which could bring question upon the operation of the agency, or which discloses information obtained by the officer in the course and scope of the officer's duties.

The policy should also state that if officers take their personal cell phones with them when they go on duty, the officers should be aware that the phone's records and information will be subject to discovery by both the agency, as well as opposing counsel. The easiest way for the officers to avoid anyone attempting to access their personal cell phone is to ***not*** take it with them when they are on duty and to not make use of it in any job related matter, such as providing that personal phone number to a confidential informant.

The policy should also note that while on duty, personal phone calls, even on an officer's own cell phone, should be restricted to only essential communications and limited in length. Such a restriction is no different than restricting an officer from stopping and engaging in personal business while on duty. The making of personal calls, while on duty, should be limited to emergency calls or text messaging and not just to pass the time of day.

Free Speech and Public Employees

The First Amendment and the right of free speech or expression, when applied to public employees is analyzed differently than when it is applied to members of the general public. Although there is no doubt that when becoming a public employee one does not give up his or her constitutionally protected rights, there is in fact a modification of those rights. For example restricting a police officer from posting his or her opinion on the internet on matters such as race, legalization of drugs, enforcement of immigration laws, status of a pending case, and the like, are matters which are directly related to the ability of the officer to carry out his or her job functions and can be reasonably regulated. Even if the officer doesn't identify himself or herself as an officer, in many small jurisdictions, that fact is apparent and, therefore, still a concern to the employer.

Restrictions on a public employee's First Amendment rights was raised in 2006, in *Garcetti v Ceballos* 547 U.S. 410, where a First Amendment claim was brought by a deputy district attorney in the Los Angeles DA's office. He had been transferred and denied a promotion because of his statements to supervisors criticizing the credibility of statements made in an affidavit prepared by a deputy sheriff. The Supreme Court, in a 5 - 4 decision, rejected the employee's claim, holding that the First Amendment does not protect public employees for "statements made pursuant to their official duties."

According to Justice Kennedy, the critical fact in the case was that "his expressions were made pursuant to his duties as a calendar deputy. That consideration--the fact that Ceballos spoke as a prosecutor fulfilling his responsibility to advise his supervisor about how to proceed with a pending case--distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline."

Additionally, under the U.S. Supreme Court decision of *Brady v. Maryland*, 373 U.S. 3 (1963), certain statements by employees may be used to challenge them on questions of bias and may even rise to the level, pursuant to *Brady*, where the prosecutor will be required to disclose such potential impeachment evidence to defense counsel. In developing a policy, officers should be reminded that their conduct, both on and off duty, must meet a high standard and that they are accountable and responsible for their statements and their actions.

Conclusion

Again, there appears to be little dispute that if a police officer has been issued a cell phone by his or her agency, and the agency has a policy stating that it is to be used only for official business, any information contained on that phone (text messages, phone numbers, photographs) belongs to the agency. Additionally, in the absence of unusual circumstances there is, normally, no reasonable expectation of privacy on the part of an officer to information contained on a business owned piece of equipment.

However, there is an ongoing dispute centering on whether there's a reasonable expectation of privacy on the part of an officer, if he or she has and is using a personal cell phone while on duty. It would appear that, if it can be shown that the information contained on that personal cell phone is job related, employees should assume that the information contained on those personal cell phones can be accessed either by the employer or by others through court proceedings.

To reduce this from becoming a significant problem, law enforcement agencies should adopt policies which state, in words or substance, that information gathered by its officers and/or employees, who are acting in the course and scope of employment, belongs to the agency. That would include information on a department issued piece of equipment, information on their personal equipment, or even information just known to them but not recorded. In any event the officer has an obligation to bring that information forward to his or her agency and to understand that actions and information incurring while in the course and scope of employment are likely to come under legal scrutiny.

Again, to reduce the uncertainty about this, agencies should generate a clear and concise policy which prohibits the sharing or dissemination of such material to any person or entity not legally entitled to receive it and that such information should be shared only with agency personnel.

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