LEGAL MAILBAG – April 10, 2025

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The "Legal Mailbag Question of the Week" is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors. Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

One of the teachers in my school is a toxic personality, and he is always trying to stir up discontent. For example, he recently distributed a petition among teachers here, asking them to share their stories of "overwork and disrespect." He got nowhere with that, and he has now taken to social media with a blog in which he details the burdens he carries as a third-grade teacher in my school, including having to work for me!

This guy is so negative that I think that something else must be going on. He is on his computer a lot, and I wonder what he is saying to others on email. Our acceptable use policy expressly reserves to the school district the right to monitor use of district technology, including email. I am going to ask our IT person to download and send me this teacher's sent and received email items since the beginning of this school year. It will be time-consuming to go through all that, but one never knows what one will find. I write to Legal Mailbag to make sure that it is OK to do this.

Signed,
Poking Around

Dear Poking:

Legal Mailbag cannot provide that assurance on the limited facts that you have described.

We must start with the premise that the Fourth Amendment protects public employees from unreasonable searches. In 1987, the United States Supreme Court so ruled, announcing a "reasonableness" standard (as opposing to requiring probable cause or a warrant for such searches) as follows:

> We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees 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 the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

O'Connor v. Ortega, 480 U.S. 709 (1987). School officials may note that a similar "reasonableness" standard was established in 1985 in *T.L.O. v. New Jersey*, 469 U.S. 325 (1985), for searches of students and their possessions, and indeed the Court in *O'Connor v. Ortega* refers repeatedly to the *T.L.O.* case.

The question for you and Legal Mailbag, therefore, is whether your teachers have a reasonable expectation of privacy in their email communications notwithstanding your district's acceptable use policy. The answer to that question depends on the specific facts of your situation, but a 2010 decision of the United States Supreme Court gives pause.

In *City of Ontario v. Quon*, 560 U.S. 746 (2010), the City provided pagers to police officers for business use, and after months of incurring extra fees when limits on text messages were exceeded, the City contacted the pager service provider and obtained transcripts of the messages of two employees who had repeatedly exceeded the limit. Upon review, the City found that the majority of the messages were not work-related, and that one employee's messages were sexually explicit between himself and his wife, and between himself and his girlfriend. When confronted, the employees sued the City, arguing that their constitutional right to be free from unreasonable searches and seizures had been violated. The United States Supreme Court disagreed and found in favor of the City.

In its decision, the Court recognized that the special needs of an employer may be sufficient to justify searches for evidence of work-related misconduct. The Court found that the search in that case was reasonable for two main reasons. First, the search was motivated by a legitimate work-related purpose: the desire to assess the monthly usage limit. Second, the search was not overly intrusive: the pagers had been provided by the employer and were not private.

Significantly, in its decision in *City of Ontario v. Quon*, the Court cautioned in that the scope of privacy expectations in the workplace is evolving as we rely increasingly on technology in our daily lives:

> 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. . . . 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.
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> 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. . . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Given the evolving principles of privacy, Legal Mailbag is concerned that this teacher could establish some level of privacy expectation in his email communications notwithstanding the wording of your acceptable use policy. If the teacher can show that a legitimate privacy expectation exists, Fourth Amendment protections will apply. Therefore, Legal Mailbag advises against wholesale searches of employee emails without any specific cause. As the Court announced in *O'Connor v. Ortega*, however, the cause must simply be reasonable, and when you have a specific reason to review email messages by an employee, a court on review will likely conclude that such a search was reasonable.