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Some Courts Raise Bar on Reading Employee Email

Companies Face Tougher Tests to Justify Monitoring Workers' Personal Accounts; Rulings Hinge on 'Expectation of Privacy'

By [DIONNE SEARCEY](#)

Big Brother is watching. That is the message corporations routinely send their employees about using email.

But recent cases have shown that employees sometimes have more privacy rights than they might expect when it comes to the corporate email server. Legal experts say that courts in some instances are showing more consideration for employees who feel their employer has violated their privacy electronically.



Steve Munday

Driving the change in how these cases are treated is a growing national concern about privacy issues in the age of the Internet, where acquiring someone else's personal and financial information is easier than ever.

"Courts are more inclined to rule based on arguments presented to them that privacy issues need to be carefully considered," said Katharine Parker, a lawyer at Proskauer Rose who specializes in employment issues.

In past years, courts showed sympathy for corporations that monitored personal email accounts accessed over corporate computer networks. Generally, judges treated corporate computers, and anything on them, as company property.

Now, courts are increasingly taking into account whether employers have explicitly described how email is monitored to their employees.

That was what happened in a case earlier this year in New Jersey, when an appeals court ruled that an employee of a home health-care company had a reasonable expectation that email sent on a personal account wouldn't be read.

And last year, a federal appeals court in San Francisco came down on the side of employee privacy, ruling employers that contract with an outside business to transmit text messages can't read them unless the worker agrees. The ruling came in a lawsuit filed by Ontario, Calif., police officers who sued after a wireless provider gave their department transcripts of an officer's text messages in 2002. The case is on appeal to the U.S. Supreme Court.

Lawyers for corporations argue that employers are entitled to take ownership of the keystrokes that occur on work property. In addition, employers fear productivity drops when workers spend too much time crafting personal email messages.

"Employers are right to expect their employees when they are paid for their time at work are actually working," said Jane McFetridge, a lawyer who handles employment issues for the Chicago office of Jackson Lewis.

Many workers log in to personal email accounts from the office. In a 2009 study by the Ponemon Institute, a Traverse City, Mich.-based data-security research firm, 52% of employees surveyed said they access their personal email accounts from their work computer. Of those individuals, 60% said they send work documents or spreadsheets to their personal email addresses.

Data security experts say such actions could invite viruses or security leaks.

More corporations are monitoring employees' email traffic. In a June survey of 220 large U.S. firms commissioned by Proofpoint Inc., a provider of email security and data loss prevention services, 38% of companies said they employ staff to read or otherwise analyze the content of outgoing email, up from 29% last year. More companies also say they are worried about information leaks: Thirty-four percent of respondents said their businesses had been affected by the exposure of sensitive or embarrassing information, up from 23% in 2008.



The growing concerns about security and privacy comes as expanding technology muddies the waters between personal and professional.

"Computers are becoming recognized as being so much a part of the ongoing personal as well as professional life of employees and everyone else that courts are more sympathetic all the time to granting greater recognition to privacy," said Floyd Abrams, a First Amendment attorney at Cahill Gordon & Reindel LLP. Employees often assume their communications on personal email accounts should stay private even if they are using work-issued computers or smart phones. But in most instances when using a work device, emails of all kinds are captured on a server and can be retrieved by an employer.

Still, in some cases courts are finding that unless they have explicitly told the employee they will monitor email, they don't have the legal right to do it -- even if the email in question was a personal one sent using a work account, rather than a personal address.

In a case earlier this year in New Jersey, a worker on the brink of resigning from her job at the Loving Care Agency Inc. used a personal, password-protected Yahoo account on a work laptop to email her lawyer to hash out the details of a workplace discrimination suit she was planning to file against the agency. After the employee, Marina Stengart, left her job and filed suit, her employer extracted the emails from the hard drive of her computer laptop.

A lower court found that the emails from Ms. Stengart were company property, because the company's internal policies had put her on sufficient notice that her emails would be viewed.

But a New Jersey appellate court disagreed, ruling in her favor in June, ordering the company to turn over the emails to Ms. Stengart and delete them from their hard drives. The court's ruling went so far as to dissect the company's internal policies about employee communications and decided they offered "little to suggest that an employee would not retain an expectation of privacy in such [personal] emails."

"We reject the employer's claimed right to rummage through and retain the employee's emails to her attorney," the appellate court ruling said.

Loving Care, which declined to comment, has appealed the ruling. The case is pending in the New Jersey Supreme Court.

In another case this year, Bonnie Van Alstyne, a former vice president of sales and marketing at Electronic Scriptorium Ltd., a data-management company, was in the thick of a testy legal battle in Virginia state court with the company over employment issues when it came to light that her former boss had been accessing and reading her personal AOL email account. The monitoring went on for more than a year, continuing after Ms. Van Alstyne left the company. Ms. Van Alstyne sometimes used her personal email account for business purposes, and her supervisor said he was concerned that she was sharing trade secrets.

The supervisor, Edward Leonard, had accessed her account "from home and Internet cafes, and from locales as diverse as London, Paris, and Hong Kong," according to legal filings in the case.

Ms. Van Alstyne sued Mr. Leonard and the company for accessing her email without authorization. A jury sided with her, and the case eventually settled.

Nicholas Hantzes, a lawyer for the company and Mr. Leonard, said employers could learn from the case that to avoid legal tangles they "should do everything they can to discourage employees from using personal email for business purposes."

—Sarah Needleman contributed to this article.

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