



Production of Text Messages Protocol

The sensitivity courts are showing to text messages and public employees' reasonable expectation of privacy has been very impressive. This sensitivity is evident in cases such as *Quon v. Arch Wireless Operating Co., Inc.*, which found that a police officer had a reasonable expectation of privacy in his messages, due to the police department's informal usage policy on text messages. *Quon v. Arch Wireless Operating Co., Inc.*, 2009 U.S. App. LEXIS 2259 (9th Cir. Cal., 2009).

When a public entity is in litigation, how should those messages be produced and review? How do you protect public employees with a reasonable expectation of privacy in their text messages?

Flagg v. City of Detroit, 2008 U.S. Dist. LEXIS 67943 (E.D. Mich., Sept. 5, 2008) is helpful in seeing how one court addressed the situation.

In *Flagg*, the text messages at issue were sent or received by city officials on April 30, 2003, from the hours of 1:30 a.m. to 5:30 a.m. This focused date and time period appears narrowly tailored with reasonable particularity as required by traditional discovery rules.

The Court issued the following protocol in a discovery order:

1. Plaintiff was to serve a Rule 34 request for the text messages as narrowed to April 30, 2003 and for the 4 hour time period.
2. The City of Detroit was to forward the request to the text message service provider with the City's authorization to release the text messages to the court for in camera review.
3. The service provider was to send three copies of the text messages on CD to the District Court for two magistrate judges to review in camera.

This sort of protocol sounds reasonable to protect privacy expectations. More importantly, the narrowly tailored request should keep the text message review from spinning out of control with data.

If the facts were slightly different, it might be necessary for a computer collection expert to collect text messages or photos off a cell phone, BlackBerry or iPhone. In such situations, a collect expert can use a solution from [Paraben Forensic Tools](#) to harvest data off of mobile devices.

Courts will continue to consider issues of privacy, text messages and how to produce them when public employees are concerned. While cases like *Quon v. Arch Wireless Operating Co., Inc.*, had weak text message policies, it will be interesting to see how a court handles a company with a strict text message policy.