

District Court Finds Personal E-Mail From Work Still Privileged

A federal prosecutor has won his fight to conceal e-mails he sent to his attorney over the government's computers, contradicting a popular belief that employees have no expectation of privacy on work computers.

The U.S. District Court for the District of Columbia ruled on Dec. 10 that Assistant U.S. Attorney Jonathan Tukul had a reasonable expectation of privacy in those e-mails because federal prosecutors were allowed to use work e-mail for personal matters. Therefore Tukul's messages to his private lawyer sent from work are covered by the attorney-client privilege and can remain confidential.

The party trying to get the e-mails is former federal prosecutor Richard Convertino, who lost his job after his convictions in a high-profile terrorism trial in Detroit were overturned in 2004 due to prosecutorial misconduct. Convertino, who believes he was retaliated against for blowing the whistle on incompetence in the Bush administration's war on terror, is trying to find out who leaked confidential information about an investigation into his conduct to the Detroit Free Press. Convertino believes Tukul's e-mails to his lawyer may shed some light on the matter.

According to court documents, Tukul was the prosecutor in Detroit who reviewed Convertino's cases, and he was "one of the original parties that initiated confidential personal matters" related to Convertino.

Tukul has denied in an affidavit that he's the source of the leak. But Convertino still wants the emails. He argued that Tukul had no privacy expectations in e-mails sent over a government computer.

The court disagreed.

"The DOJ maintains a policy that does not ban personal use of the company email. Although the DOJ does have access to personal emails sent through this account, Mr. Tukul was unaware that they would be regularly accessing and saving emails sent from his account. Because his expectations were reasonable, Mr. Tukul's private emails will remain protected by the attorneyclient privilege," wrote Chief Judge Royce Lamberth.

Tukul's lawyer, James K. Robinson, a partner in the Washington office of Cadwalader, Wickersham & Taft, said the judge got it right—"Where someone who uses their company e-mail, whether with the Justice Department or someone else, intends the communication to be confidential and takes reasonable steps to ensure the confidentiality...there is no waiver of the attorney-client privilege."

Robinson said the judge also recognized that in many instances, work e-mail is the only e-mail people have. "It's one thing if the employer has a rigid rule that says you can never use your email for anything personal, but most employers don't," he said.

Convertino's lawyer, Stephen M. Kohn of Washington's Kohn, Kohn & Colapinto, was

unavailable for comment.

Plaintiffs' lawyers see the ruling as a boost for employees, both federal and private. "We've had to constantly warn our clients, 'Don't email me,' " said Debra D'Agostino of the Washington office of Tully Rinckey, who represents federal employees in workplace disputes. "And there have been a number of times where I get an e-mail from a client and I say, 'Goodness, opposing counsel is going to grab this and use it.' "

"The fact that we have clarity now is a very good thing," she said.

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