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TO THE POINT

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"There's a lovely scene in "The Castle," the Australian movie about a family fighting eviction, where its hapless lawyer, asked by the judge to point to the specific part of the Australian constitution that the eviction violates, says desperately, "It's . . . just the vibe of the thing." In most cases justice ought to be just the vibe of the thing—not one procedural error caught or one fact worked around. The criminal law should once again be more like the common law, with judges and juries not merely finding fact but making law on the basis of universal principles of fairness, circumstance, and seriousness, and crafting penalties to the exigencies of the crime."

– Adam Gopnik, *The Caging of America* *in the New York Magazine*

Monitoring Emails

June 9, 2014

Dear Counsel:

The United States Attorney's Office for the Eastern District of New York (the "Office") writes to apprise you of this Office's policy regarding emails sent by inmates at the Metropolitan Detention Center (the "MDC") to their attorneys using the Bureau of Prisons' ("BOP") Trust Fund Limited Inmate Computer System ("TRULINCS"). As you may know, this Office routinely obtains inmates' TRULINCS emails, including those that may have been exchanged between inmates and their attorneys. For the reasons set fourth below, emails exchanged between inmates and their attorneys using the TRULINCS system are not privileged, and inmates have other means to communicatc with their attorneys in a privileged setting. Accordingly, this Office intends to review all email obtained from the TRULINCS system.

Inmates and Attorneys Are Provided Express Notice that Emails on the TRULINCS System are Monitored

As set forth below, inmates at the MDC and their counsel are provided with ample notice that their emails are being monitored. Thus, no attorney-client privilege attaches to such communications.

Prior to gaining access to TRULINCS, an inmate must consent to the monitoring of all emails placed using TRULINCS. In order to gain access to TRULINCS, each inmate must execute the "Inmate Agreement for Participation in TRULINCS Electronic Messaging Program." That one-page agreement includes seven separate conditions of participation. One of those conditions is the "Consent to Monitoring" conditíon, which providcs in relevant part:

I am notificd of, acknowledge and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, retained by Bureau staff and otherwise handled as described in [BOP directives]. **I am notified of, acknowledge and voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not he treated as privileged commuuications.**

(emphasis added). The BOP retains, and is able to access, the Inmate Agreement for each inmate at the MDC.

Moreover, each time an inmate logs onto TRULINCS, the system generates a message to the inmate with the following warning:

The Department may monitor any activity on the system and search and retrieve any information stored within the system. By accessing and using this computer, I am consenting to such monitoring and information retrieval for law enforcement and other purposes. I have no expectation of privacy as to any communication on or information stored with the system.

Further down the page, the same warning banner states:

I understand and consent to having my electronic messages and system activity monitored, read, and retained by authorízed personnel. **I understand and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privleged communications, and I have alternative methods of conducting privileged legal communication.**

(emphasis added). In order to continue using the system and access their email, the inmate must c1ick "I accept."

Similarly, non-inmate users of TRULINCS, including attorneys, are provided with notice that all communications on the system are monitored. In order to use TRULINCS, non-inmate users must be added to an inmate's "contact list." Once the.inmate adds someone to his or her contact list, the TRULINCS system sends a generated message to the proposed contact's email address. That generated email states, ínter alía, "[b]y approving e1ectronic correspondence with federal prisoners you consent to have the Bureau of Prison staff monitor the content of all electronic messages exchanged." The message is written in both English and Spanish. The recipient of the email is then directed to a website where he or she must insert a specific code in order to be given access to TRULINCS (In addition, BOP's TRULINCS Program Statement 5265.13 specifically states that "special mail" recipients or other legal representatives on an inmate's contact list may be added to the TRULINCS system, with the acknowledgment that electronic messages exchanged with individuals will not be treated as privileged communications und will be subject to monitoring.)

Inmates Have Adequate Alternative Means to Communicate in Unmonitored Settings

The MDC's policy of monitoring all email on TRULINCS comports with the suggestion in the case law that an inmate must have the means to communicate with his or her attorney in an unmonitored setting. The MDC specificaIIy provides multiple methods for an inmate to do so: (i) unmonitored, in-person visíts; (ii) unmonitored telephone calls, which must be approved by a staff member; and (iii) "Special Mail" correspondence, which can only be opened in the presence of an inmate.

Conclusion

For the above reasons, emails between inmates and their attorneys sent over the TRULINCS system are not privileged, and thus the Office intends to review all emails obtained frim the TRULINCS system.

Cellphone Tracking

NYTIMES Editorial, June 13, 2014

The capacity of cellphones to track people's movements and provide a vivid picture of their private lives poses a substantial and growing threat to privacy.

That is why a federal appeals court ruling on Wednesday restricting the government's access to location data stored by cellphone companies is so important. In a case involving a man convicted of several robberies in South Florida, the United States Court of Appeals for the 11th Circuit said law enforcement agencies could get location records from cellphone companies only if they first obtained a probable cause warrant from a judge.

The United States attorney's office in Miami had built a case on the basis of records obtained from his cellphone company showing where he had used his phone over 67 days. The records placed him at the site of the robberies. Prosecutors got access to the data after obtaining an order from a federal magistrate judge by demonstrating that the information was "relevant and material" to their investigation, which is easier to demonstrate than probable cause.

The appeals court did not overturn the conviction because, it said, the government had acted in good faith by first obtaining a court order. But, significantly, it also ruled that "cell site location information is within the subscriber's reasonable expectation of privacy" under the Fourth Amendment, which protects people "against unreasonable searches and seizures." This ruling was based in part on a 2012 Supreme Court ruling that said placing a tracking device on a suspect's car constituted a search under the Fourth Amendment.

The decision breaks from previous appellate rulings siding with the government and ordering phone companies to provide location information under the Stored Communications Act, without a warrant. Many legal experts believe the Supreme Court will ultimately have to step in and resolve the disagreements.

This newsletter is written for our readers. It's your newsletter so we eagerly seek your comments, suggestions, and questions.

Send your information to davidzapp@aol.com.com or jszapp@aol.com. Tell us what YOU want to know.

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