



Privacy In The Age Of Surveillance:

Legal Developments For Public Safety Employees

Richard Poulson
LRIS Executive Director
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July 31, 2024

Presented by
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PRIVACY IN THE AGE OF SURVEILLANCE:

Legal Developments For Public Safety Employees

July 31, 2024

10:00 AM PT (1:00 PM ET)
60 minutes

LRIS Director Richard Poulson will review recent cases addressing the privacy rights of public safety workers related to technological advances and discuss practical solutions to addressing those potential problems in bargaining.

- **CELL PHONES:** What are the risks of using personal cell phones in public employment, and where does the expectation of privacy begin/end?
- **ANONYMITY:** Do public safety personnel have the right to remain anonymous given the nature of their work? How have the courts answered this question?
- **BODY CAMERAS:** Can police officers prohibit or limit the distribution of images captured by their BWCs? What are the officer's rights versus the public's right to access information?
- **SURVEILLANCE:** How has the rapid development of artificial intelligence threatened the privacy of public safety workers at work and at home?
- **GROUP TEXTS:** Are "private texts" to a group of friends or coworkers really private? Can they result in discipline?

Presented By Richard Poulson

Mr. Poulson has been representing labor unions for his entire career, representing union clients in collective bargaining, interest and grievance arbitration and employment-related litigation. He is a partner with the Philadelphia, Pennsylvania firm of Willig, Williams & Davidson, where he focuses on advising and representing police, fire, paramedic and other uniformed employees regarding municipal affairs and public employment. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick is the Executive Director of LRIS. Since its inception in 1981, LRIS has been a valuable resource for public safety labor relations. LRIS conducts labor seminars, publishes a monthly newsletter, and currently has five books in print.

[Richard G. Poulson | Willig, Williams & Davidson \(wwdlaw.com\)](http://www.wwdlaw.com)

Privacy In The Age Of Surveillance: Legal Developments For Public Safety Employees

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DEVELOPMENTS IN PRIVACY, PART ONE: SPEECH RIGHTS AND ANONYMITY

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Developments From Around The Country Privacy Issues – Speech and Political Beliefs

What do THESE GUYS have
to do with Seattle PD?



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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- Six Seattle police officers attend former President Trump’s “Stop the Steal” political rally on January 6, 2021 in Washington, D.C.
- Upon returning to Seattle, the Does received complaints from the SPD’s Office of Police Accountability alleging that they might have violated the law or SPD policies during their attendance at the rally.
- Police Department initiates investigation.

PSLN, Dec 2023, John Doe I v. Seattle Police Dep’t, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- The Does are forced to submit to OPA interviews.
- Does are asked about their whereabouts and activities on January 6.
- Does are also asked about their political beliefs and associations, including whether they attended the rally “to articulate their political views,” whether they were “affiliated with any political groups,” and “their impressions of, and reactions to, the content of the Rally.”
- Does answered all questions.

PSLN, Dec 2023, John Doe I v. Seattle Police Dep’t, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- Two of the officers were fired because the investigation found they broke the law by crossing barriers set up by the Capitol Police.
 - Married officers Caitlin and Alexander Everett were standing next to the Capitol Building while the riots raged.
- Investigators said three other officers had not violated policies and the fourth case was ruled “inconclusive.”

PSLN, Dec 2023, John Doe I v. Seattle Police Dep't, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- Members of the public filed public records requests seeking disclosure of the Does' investigatory records.
- City informed the Does that it intended to disclose the investigation records as well as the Does' personnel files.
- The Does sought an injunction prohibiting the proposed release.

PSLN, Dec 2023, John Doe I v. Seattle Police Dep't, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- The Washington Court of Appeals agreed with the Does:

“The Does assert that the disclosure of their identities in the requested records will violate their First Amendment right to political anonymity. . . . We agree.”

PSLN, Dec 2023, *John Doe I v. Seattle Police Dep’t*, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

“Both the Does’ attendance at the January 6 rally and their compelled statements to investigators implicate the First Amendment.

Exposure by the government of this information, through disclosure of the unredacted requested records, would impinge the Does’ constitutional right to anonymity in their political beliefs and associations.”

PSLN, Dec 2023, *John Doe I v. Seattle Police Dep’t*, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

“The Does have a First Amendment privacy right in their identities in the requested records. . . . [The] mere compelling of an individual to disclose beliefs, expressions or associations is a measure of governmental interference. When these ‘forced revelations’ concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of that individual may be disastrous.”

PSLN, Dec 2023, John Doe I v. Seattle Police Dep’t, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

“While we have no sympathy for those who sought to undermine our democracy on January 6, 2021, the fact here is that the allegations that the Does were engaged in unlawful or unprofessional conduct were not sustained. They did not forfeit their First Amendment rights.”

PSLN, Dec 2023, John Doe I v. Seattle Police Dep’t, 27 Wn. App. 2d 295 (June 2023)

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Speech Rights and Anonymity – January 6th

John Doe 1 v. Seattle Police Department

- But not so fast ... In November 2023, the Washington Supreme Court accepted an appeal of the decision.
- Case argued on June 25, 2024. Here is the question:
- *Public records requests were made regarding the activities of Seattle police officers on January 6, 2021. Are the officers entitled to a preliminary injunction preventing disclosure of the public records? Can they litigate under pseudonym? What is an agency's obligation when disclosure may implicate a third party's constitutional rights?*

PSLN, Dec 2023, *John Doe I v. Seattle Police Dep't*, 27 Wn. App. 2d 295 (June 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- October 2014. MPD adopts body worn camera (BWC) program.
- January 2016. City Council enacts legislation granting Mayor discretion whether to release BWC footage in certain instances.
- July 2020. City Council enacts emergency “police reform” legislation.
 - Required Mayor to publicly release officer names and bodycam recordings w/n 5 business days of any use of force.
 - Required public release of names and recordings of all eligible instances retroactive to October 2014.

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- FOP sought an injunction preventing the release of the names and BWC videos (“BWC Info”) and sought a declaratory judgment that:
 - 1. Eliminating the Mayor’s discretion whether to release BWC Info violated separation of powers.
 - 2. Release of the BWC Info violated police officers’ and the public’s fundamental rights to privacy.

FOP Metro. Police Dep’t Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- FOP argued that injunction stopping the mandatory release of BWC Info was necessary to prevent irreparable harm to its members:
- Release of BWC Info *"could result in significant bodily harm to officers because the immediate public release of [an] officer's name and the [BWC] footage will allow criminal suspects and their associates to identify [an] officer and potentially seek retribution against the officer and his or her family."*

FOP Metro. Police Dep’t Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- FOP cited evidence of threats against officers in response to a high-profile September 2020 OIS:
 - Threat #1: *"shit gone be turnt up when found out address and where children go to school at!"*
 - Threat #2: *"we need the police officer picture so we can see who he is . . . it's not going never be safe for him no more . . . Street Justice is the best Justice for this cop we need to know who he is a address and everything."*

FOP Metro. Police Dep't Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- Court of Appeals rejected the FOP's privacy argument:
 - *"We are unable to conclude that FOP members' privacy interest in their names and in videos of their interactions with the public implicates a fundamental right."*
 - *"We are not aware that any court has ever held that police officers have a fundamental right to the privacy of information about their involvement — while on duty and while in contact with the public they serve — in a shooting or other serious use of force."*

FOP Metro. Police Dep't Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- *“Moreover, there is, quite to the contrary, a ‘growing consensus’ of circuit courts holding that ‘there is a First Amendment right to record police activity in public’ subject to reasonable time, place, and manner restrictions.”*
- Reflects general rule that officers will lack privacy protections related to their on-duty conduct unless it concerns undercover work.

FOP Metro. Police Dep't Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and Anonymity – Body Cams

FOP Metro Labor Committee. v. District of Columbia

- *“MPD officers have long been required while in uniform to wear or display the nameplate and badge issued by the MPD and may not alter or cover ... or otherwise prevent or hinder a member of the public from reading the information.”*
- *“Since the inception of the BWC Program, the Mayor has had express discretionary authority to release such videos and information to the public ... “*

FOP Metro. Police Dep't Labor Comm. v. District of Columbia, 290 A.3d 29 (March 2023)

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Privacy Rights and “Self-Care”

Demill v. Peace Officer Standards and Training Council

- Utah DOV investigates complaint of officer lewdness, including allegation that officer masturbated on duty and in front of female officers.
- Officer denies allegation but **VOLUNTEERS** that when too excited he would instead masturbate privately in the staff restroom.
- Officer receives reprimand (!) but certification suspended for 4 years.
- Officer appealed and lost. Appealed to court and lost.

2023 WL 3637408 (Utah App. 2023).

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Privacy Rights and “Self-Care”

Demill v. Peace Officer Standards and Training Council

- Officer argued that under the Supreme Court’s decision in Lawrence v. Texas, there was “no legitimate reason why what somebody does in a private bathroom should be constrained by the State.”
- Court recognized the Lawrence Court determined that sexual conduct between consenting adults in a home is entitled to protection under the fundamental right to privacy, BUT ...

2023 WL 3637408 (Utah App. 2023).

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Privacy Rights and “Self-Care”

Demill v. Peace Officer Standards and Training Council

- Demill’s actions occurred at his place of employment, a **State correctional facility**, and did not implicate a privacy interest of the sort that obtains when one is in one’s own home. . . . [Demill failed] to demonstrate that the Lawrence doctrine has been or should be expanded to include workplace restrooms as having the same level of privacy protections as homes.
- *Wait until you get home!*

2023 WL 3637408 (Utah App. 2023).

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DEVELOPMENTS IN PRIVACY, PART TWO: PERSONAL CELL PHONES

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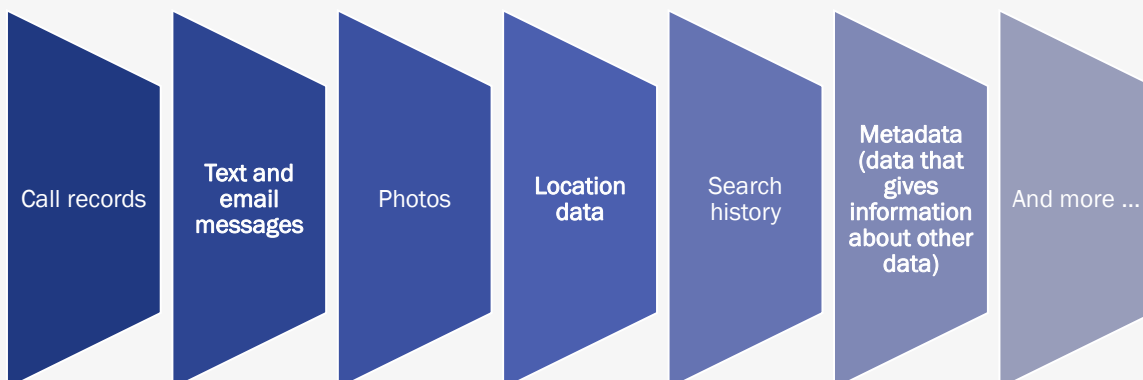
Developments From Around The Country Privacy Issues, Cell Phones

Why would an employer want to examine the contents of an employee's cell phone?



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Developments From Around The Country What's On A Cell Phone?



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Developments From Around The Country Privacy Issues, Cell Phones

Riley v. California (2014)

- The Supreme Court holds that cell phones are unlike other forms of property for purposes of searches incident to an arrest, and the search of a cell phone will almost always require probable cause and a warrant.

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Developments From Around The Country Privacy Issues, Cell Phones

Riley v. California (2014)

- How does *Riley* apply to employer requests during discipline investigations to examine the personal cell phones of employees?
- The traditional difference in standards between criminal and disciplinary searches.
- Does the employee have a reasonable expectation of privacy?
- Is the search consistent with “the standard of reasonableness under all of the circumstances.”

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Employee-Owned Cell Phones

Turiano v. City of Phoenix, (2022)

- During a protest, Officer Christopher Turiano shot a protester in the groin with a 40 mm OC less impact round.
- Someone (not Turiano) made up a challenge coin depicted a caricature of the protester being hit in the groin by Turiano's munition, along with the words "Good Night Left Nut."
- On the other side, the coin stated the date and location of the protest and the phrase "Make America Great Again One Nut at a Time."



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Employee-Owned Cell Phones

Turiano v. City of Phoenix

- The City hired an outside investigator, concerned (among other things) by the potential connection between the inscription on the challenge coin and the neo-Nazi slogan "Good Night Left Side."
- When the investigator's report was inconclusive, the City conducted an IA investigation. When Turiano refused to turn over the image of his cell phone, the City threatened to discipline him. Federal court litigation ensued.

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Employee-Owned Cell Phones

Turiano v. City of Phoenix

- Court easily concludes that Turiano had reasonable expectation of privacy in the data on his personal cell phone.
- *“City did not purchase the phone and does not pay for the data plan, Turiano generally does not use the phone for work purposes, and no other City employees have access to the phone or its data. And the imaged data contains an enormous amount of deeply personal information that is entirely unconnected with [his] employment.”*

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Employee-Owned Cell Phones

Turiano v. City of Phoenix

- *“A personal cell phone, far more than even a closed briefcase or locked safe, contains sensitive personal information that is entirely unrelated to an individual’s employment.”*
- *“Cell phones are so pervasive an aspect of modern life that virtually any public employee will have, and occasionally use, a personal cell phone during business hours.”*
- *“Even under the workplace exception set forth in O’Connor, the City’s proposed search is **unconstitutional**.”*

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Employee-Owned Cell Phones

Prince George's County v. Brooks, PSLN Oct 2023

- Officers file complaint against Officer W after use of force.
- Surveillance video revealed that Officer W had used his personal cell phone to take pictures of the victim.
- Department sought and obtained a warrant to seize W's cell phone and search its contents.
- While searching the content of W's cell phone, the Department discovered a text chain with a series of 16 racist and demeaning messages written by Officer B and sent to Officer W's cell phone.

2023 WL 5318327 (Md. App. 2023)

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Employee-Owned Cell Phones

Prince George's County v. Brooks, PSLN Oct 2023

- Department initiates charges against Officer B.
- Officer B sues to halt the discipline. Argues using his private text messages to discipline violated his free speech rights under the First Amendment.
- Officer B wins at trial court – private texts were a matter of public concern.
- Appeals court overturns and clarifies “public concern” standard:

2023 WL 5318327 (Md. App. 2023)

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Employee-Owned Cell Phones

Prince George's County v. Brooks, PSLN Oct 2023

- Department initiates charges against Officer B.
- *"The caselaw uses the phrase 'public concern' to mean that the subject matter of the speech objectively 'pertains to the public welfare,' rather than to merely private interests or viewpoints. Thus, while we have no doubt that a police officer sending racist text messages would cause the public to be concerned, further inquiry is needed to determine whether the subject matter of the text messages objectively pertained to the public welfare."*

2023 WL 5318327 (Md. App. 2023)

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Employer-Owned Cell Phones

- **Smith v. City of Pelham (Alabama 2021).** An officer plugs her personal cell phone into her work computer. Unknown to her, the phone backs up its files to the computer, including nude photographs of her "with other people." The employer uses the files to terminate her. No expectation of privacy.
- **State v. Bowers (Wisconsin, PSLN 2023).** Detective had a property interest and expectation of privacy in Dropbox account on a work computer. *"By using a password that is not shared, these users expect their cloud-storage accounts to remain private unless the user shares the files with others, even if the information is stored by a third party."*

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Some Cell Phone Advice

Because of privacy and public records law concerns, employers and unions would be well-advised to counsel employees/members that:

- Personal cell phones should never be used for employer business.
- Employer cell phones should never be used for personal business.



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Presenter Richard Poulson

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