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## TRAINING BULLETIN

### SEARCH OF OFFICER'S PERSONAL CELL PHONE MAY VIOLATE 4<sup>TH</sup> AMENDMENT

***Larios v. Lunardi*, 2016 U.S. Dist. LEXIS 157385, November 14, 2016**

**United States District Court for the Eastern District of California**

Timothy Larios was a CHP officer. He was terminated and filed a lawsuit claiming the CHP violated his rights when his personal cellular phone was searched.

Larios was issued a CHP work cell phone and also had a personal cell phone. In September 2014, Larios was removed from his position, and was told that he was the subject of an internal investigation. During the course of that investigation, Larios was ordered to relinquish his work-issued phone. As part of the investigation, that phone, his thumb drives, locker, work truck, and desk were all searched.

Two months later, on November 6, 2014, Larios met with investigators. The purpose of the meeting was to confiscate Larios' personal cell phone. Larios refused to give up his phone on the grounds that it contained purely personal information.

In response, an investigator provided Larios with a memorandum directing that his phone be turned over, so that the CHP could "conduct a data extraction to retrieve all work product." The memo warned Larios that he would be subject to "charges/disciplinary action" if he failed to cooperate. Larios again objected to the order, and offered to voluntarily show the investigator any and all work product stored on his personal phone. The investigator, in turn, rejected that offer and assured Larios that his personal phone would only be confiscated for 3-4 hours. Larios, concerned that he might be subject to criminal prosecution if he failed to obey the directives, relinquished his personal phone to the investigator.

Approximately 8 hours later, Larios had his phone returned to him. Larios noticed that phone calls had been made from his device during the time

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it was in CHP custody, and that **all** of the information stored on the phone had been searched and downloaded.

Larios was subsequently informed that he was suspected of violating a number of Penal Code sections and a criminal investigation ensued. Larios was then interviewed twice by CHP investigators who questioned Larios about personal information discovered on his phone. The investigators admitted that the reason Larios' phone had been searched was to gather the personal information about which he was questioned. As a result of the investigation, Larios was terminated.

Larios filed a federal lawsuit alleging among other things that the Defendants violated his Fourth Amendment rights to be free from unreasonable search and seizure.

The analysis of whether a government employer has violated the Fourth Amendment involves two steps. "First, because some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable, a court must consider the operational realities of the workplace in order to determine whether an employee's Fourth Amendment rights are implicated." Whether the employee has a reasonable expectation of privacy is determined on a case-by-case basis. "Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the *standard of reasonableness* under all the

circumstances." (*Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614, 756-757 (1989).)

Larios' reasonable expectation of privacy as to his personal cell phone: The analysis of reasonableness turns on the operational realities of the workplace (i.e whether the employee has a reasonable expectation of privacy in his files, office or devices that are open to others) and a review of Department policies. In this case, the Defendants argued that Larios had a diminished expectation of privacy in his personal cell phone, because he was on notice that he would have to relinquish any work on personal devices upon demand. That argument, taken to its logical conclusion would permit the government to search an employee's house if he is permissively keeping work files at home. Knowing that work product would remain open to inspection, in no way puts an employee on notice that the government will also have carte blanche to review everything an employee keeps on his or her phone. "A cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form - unless the phone is." (*Riley v. California*, 134 S.Ct. 2473, 2491 (2015).)

"[W]hen conducted for a noninvestigatory, work-related purpos[e] or for the investigation of work-related misconduct, a government employer's warrantless search is reasonable if it is justified at

its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.” (*City of Ontario v. Quon*, 560 U.S. 746, 761 (2010).) The Court concluded that a jury could find that the search in this case was not justified at its inception. The Court remarked that even if the search was originally justified because it was initiated for some permissible purpose, the measures adopted by Defendants to search the phone were not at all reasonably related to the objectives of the search and were, to the contrary, excessively intrusive under the circumstances. In this case, the Defendants confiscated the device, extracted all data, and made phone calls. Defendants did not appear to be looking for a particular type of data or limiting their search to a particular time frame. The Defendants’ motion to dismiss was denied, permitting the case to proceed. If the allegations in the complaint are proven correct, Defendants clearly overstepped the bounds of the Fourth Amendment.

**REMINDER:** If possible, only use your work phone for government business, and your own phone for personal purposes.

***Stay Safe!***

***Robert Rabe*** is Stone Busailah, LLP’s writs and appeals specialist. His nearly 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

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