



## E-Discovery: Text Messages Not Off Limits

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### **PRACTICE AREAS**

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Most employees in this technological age recognize that the messages they send and receive through company e-mail accounts are the property of their employers. These employees may also recognize that as employer property, e-mails may be reviewed and, in some instances, produced during civil litigation. Yet, many employees operate under the mistaken belief that text messages sent through employer-provided cellular devices are private. With developing case law to the contrary, those employees may need a wakeup call.

In a recent opinion, United States District Court Judge Gerald E. Rosen held that text messages may be discoverable under the standards of Federal Rule of Civil Procedure 26(b)(1) if they are relevant to a pending lawsuit. *Flagg v City of Detroit*, No. 05-74253 (August 22, 2008). In *Flagg*, the plaintiff sought the production of text messages sent by City of Detroit officials and employees to support his claim that the defendants deliberately delayed and obstructed his mother's murder investigation. The text messages, sent through City-issued cellular devices, were stored and archived by the City's former cellular service provider, SkyTel. In an attempt to frustrate the plaintiff's requests, two of the defendants argued that the federal Stored Communications Act ("SCA") prohibited SkyTel from "knowingly divulging" the archived messages. The court disagreed and held that the text messages could be produced so long as they were relevant to the lawsuit.

The court further noted that while the SCA may limit a non-party service provider's ability to produce stored text messages, it does not override a party's own obligation to produce relevant, non-privileged electronic communications within their possession, custody, or control. The court clarified that parties responding to Rule 34 production requests are obligated to produce both information in their possession or custody and information reasonably available to them from their employees. As a result, the City had an obligation to produce, or consent to SkyTel's production of, all relevant text messages sent by City officials and employees through City-issued devices.

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Though only a limited number of cellular service providers currently archive text messages, employers themselves may be required to obtain and produce text messages saved within their employees' cellular devices if such information is deemed relevant and readily available. Consequently, employers should revise e-mail use and retention policies to include text messages sent through employer-issued devices, and inform employees that those text messages may not be so private after all.

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