

Former Assistant US Attorney's Email Communications with Private Counsel Recovered from DOJ's Email Server Are Privileged

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After granting a motion to intervene, the court in *Convertino v. United States Department of Justice*, 2009 WL 4716034 (D.D.C. Dec. 10, 2009) ruled that the plaintiff in a Privacy Act lawsuit was not entitled to discovery of various emails sent by Jonathan Tukul, a former Assistant United States Attorney and dismissed individual defendant, to his private counsel at Cadwalader, Wickersham & Taft. According to the court, even though Tukul and his private counsel exchanged emails using Tukul's DOJ email address, Tukul had a "reasonable expectation" that these email communications were private and were therefore protected by the attorney-client privilege. Noting that the DOJ does not ban personal use of its email and that Tukul did not know that the DOJ could access and save the

alleged prosecutorial misconduct as lead counsel in *United States v. Koubriti*. According to the court, while Tukul was serving as an Assistant United States Attorney, he was one of the "original parties that initiated confidential personal matters" with Convertino and was "part of the committee that drafted and sent allegations to OPR..." Tukul was named as a defendant in Convertino's complaint, but was later dismissed from the case. However, before Convertino filed the lawsuit, Tukul "in anticipation of litigation" retained Cadwalader and used his DOJ email address to communicate with Cadwalader. Following a discovery request, the DOJ retrieved from its email server, 36 emails between Tukul and Cadwalader.

"Noting that the DOJ does not ban personal use of its email and that Tukul did not know that the DOJ could access and save the emails from his account, the Convertino court held that Tukul's 'subjective' expectation of privacy was reasonable...."

emails from his account, the *Convertino* court held that Tukul's "subjective" expectation of privacy was reasonable under the circumstances. The *Convertino* court's ruling is the third decision in recent months to consider whether an employee's email communications sent to counsel on an office computer are privileged. See, e.g. *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super 54, 973 A2d. 390 (N.J. Super. A.D. 2009), and "*Court Rejects Employer's Claimed Right to 'Rummage Through' Employee's Private Emails Sent to Her Attorney Via Company Laptop*" (qubit October 2009) and *Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009) and "*Attorney-Client Privileged Waived as to Emails on Client's Office Email*" (qubit November 2009).

In this case, plaintiff Richard G. Convertino, an Assistant United States Attorney for the Eastern District of Michigan, sued the Department of Justice for allegedly leaking to the Detroit Free Press an investigation by the Office of Professional Responsibility (OPR) regarding Convertino's

Since Tukul was no longer a defendant in the lawsuit, he first moved to intervene in the case to assert the attorney-client privilege and work product doctrine as to the 36 emails exchanged with Cadwalader. The *Convertino* court granted Tukul's motion finding that he had a "legal interest" in the assertion of the attorney-client privilege and work product protection.

The court next examined the issue of whether the 36 emails were protected from disclosure to the plaintiff by either the attorney-client privilege or work product doctrine. According to the *Convertino* court, a party may waive the privilege by disclosing the confidential information to a third party unless, under Rule 502(b) of the

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Evidence Code, the disclosure was “inadvertent” and “the holder of the privilege took reasonable steps to prevent disclosure.” In this case, the court concluded that:

the disclosure was inadvertent. Tukul had no intentions of allowing the DOJ, his employer, to read the emails he was sending to his personal attorney through his work email account.

Additionally, the court stated that Tukul “also took steps to delete the emails as they were coming into his account-failing to realize that his employer had the emails.” As to the reasonableness of Tukul’s action, the court stated that:

since discovering that the DOJ still had access to his emails in April 2009, Tukul

and monitoring policies. In view of the “variety of work environments” whether an employee’s expectation of privacy is “reasonable” must be “decided on case-by-case basis.”

Applying these considerations, the court held that Tukul’s expectations that his email communications with the Cadwalader firm on his DOJ email would remain private were “reasonable.” In particular, the court noted that:

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, Tukul was unaware that they would be regularly accessing and saving emails sent from this account.

“As to the reasonableness of Tukul’s action, the court stated that: ‘since discovering that the DOJ still had access to his emails in April 2009, Tukul has taken reasonable steps to prevent disclosure to more parties by filing a motion and memorandum of law to intervene.’”

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The court then addressed whether Tukul “reasonably expected” that his emails with his personal attorney would remain confidential. According to the court, case law in its jurisdiction is “not directly on point but New York gives the Court some direction.” Quoting *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005) that *Convertino* court noted that “[T]he question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable.” In other words, the court stated that “[i]n order for documents sent through email to be protected by the attorney-client privilege there must be a subjective expectation of confidentiality that is found to be objectively reasonable.” Factors to be considered under *In re Asia Global Crossing* are whether: (1) there is a company policy banning personal email use; (2) the company monitors employee computer use and email; (3) third parties have access to the email; and (4) the employee was notified of the use

The *Convertino* court’s reasoning and decision contrast with Idaho District Court’s ruling in *Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009), where the court held that it was “unreasonable” for an employee to contend in “this technological age” that her email communications to her attorney on her office email would not be stored and available for retrieval by the county.

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For questions or comments regarding this issue of qubit, please contact Susan Ardisson at Susan.Ardisson@bit-x-bit.com.

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