**MEMORANDUM**

FROM: DENNIS HUFFER

DATE: AUGUST 4, 2003

RE: SEARCH OF OFFICES BY MAYOR

You forwarded me a letter from the Mayor in which he asks whether he may go through the desks and files of city employees to retrieve public records and to do investigatory work that might turn up evidence of employee misconduct or misuse of time. It is my opinion that the Mayor and other city employees may enter an employee’s office or cubicle to retrieve public documents in the normal course of conducting city business. When the Mayor’s intent is to look through the office and the documents and items in the office to turn up evidence of employee misconduct, however, the Mayor must be more cautious because this type of intrusion is a search. A search of this sort implicates the Fourth Amendment to the U.S. Constitution and possibly 42 U.S.C. § 1983, which can mean potential liability for the city and personal liability for the Mayor if the search violates an employee’s reasonable expectation of privacy.

The leading case on the issue of the application of the Fourth Amendment, which prohibits unreasonable searches by government actors, to public employees and their work spaces is O’Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987). In this case, the Supreme Court notes that “some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.” 480 U.S. at 718. The Court further notes that because of differences in office configuration, office policies, and practice, “the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.” *Id.* 718. Therefore the result in any given situation would depend on the particular facts of that case. As a general proposition, however, it can be said that a person in an office with walls that reach the ceiling and a door for privacy would have a greater expectation of privacy than a person working in a cubicle without a door. Office policies can also affect the employee’s expectation of privacy. If a policy stated, for example, that supervisors would always have access to employees’ offices for work purposes or to uncover evidence that an employee was or was not doing his/her job, this would go a long way toward eliminating an employee’s expectation of privacy. An employee who shares space with another employee would also have a reduced expectation of privacy. And in a situation in which employees and members of the public are constantly in and out of a particular office, the occupant would have a reduced expectation of privacy.

The O’Connor case rejected the contention “that public employees can never have a reasonable expectation of privacy in their place of work.” 480 U.S. at 717. The Court noted that the Fourth Amendment applies in civil situations as well as criminal ones, citing Camara v. Municipal Court, 386 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), which held that building inspectors must obtain an administrative inspection warrant when a building owner or person in control of a premises refuses consent to do a safety inspection.

Dr. Ortega brought suit under 42 U.S.C. § 1983 against state hospital officials for a search of his office that he had occupied for seventeen years. The Supreme Court held that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets because he did not share these with others and kept personal as well as work items there. The Court also observed that the hospital had no rules that discouraged keeping personal items in offices, desks, or filing cabinets or other rules that would reduce the employee’s expectation of privacy, although the absence of these rules would not create an expectation of privacy where none otherwise existed.

The Court held that in cases where there is a reasonable expectation of privacy on the part of public employees:

[W]e must balance the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace. 480 U.S. at 719, 720.

The Court delineates two (2) situations that arise in the public workplace in which the Fourth Amendment comes into play when there is a reasonable expectation of privacy: (1) routine retrieval of papers, records, etc., in the normal course of carrying out the public business during the workday and (2) situations in which an employee’s space is being surveyed for the purpose of discovering employee misconduct or other reasons that could lead to some sort of action relative to the employee.

In the first situation, the Court says that “public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.” 480 U.S. at 723. The Court says that probable cause has little meaning in this situation. The Court reasons that, even if there is a reasonable expectation of privacy, it is simply reasonable for the public employer to enter offices and look for papers and records that are necessary to carry out the public’s business.

With regard to both situations mentioned above, but particularly the second one, the Court says:

A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. 480 U.S. at 725.

The Court goes on to indicate that to be reasonable, the search must be justified at its inception and must be reasonably related in scope to the circumstances that justified the search in the first place. According to the Court, a search to find evidence of employee misconduct will be justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct... .” 480 U.S. at 726. The scope of the search will be reasonable if it bears a relation to the reasons for the search and is not excessively intrusive in light of the suspected misconduct.

Other lower court cases that have applied the principles enunciated in O’Connor include: American Postal Workers Union, Columbus Area Local AFL-CIO v. United States Postal Service, 871 F.2d 556 (6th Cir. 1989), which held that parties to a collective bargaining agreement that gave the employer the right to inspect lockers at any time for any reason had waived their Fourth Amendment rights and had no expectation of privacy relative to the lockers; State v. Stoddard, 909 S.W.2d 454 ( Tenn. Cr. App. 1994), which held that a Memphis police officer had no expectation of privacy in a suitcase located in his squad car because the car belonged to the city, contained equipment issued by the police department, and there was an oral policy that had been communicated to officers that searches of their vehicles could take place; People v. Duvall, 428 N.W. 2d 746 (Mich. Ct. App. 1988), which held that a deputy sheriff did not have a reasonable expectation of privacy in an office he shared with two (2) other officers and did not have standing to object when documents were taken from the desk; and Brannen v. Kings Local School District Board of Education, 761 N.E. 2d 84 (Oh. Ct. App. 2001), which held that school custodians did not have a reasonable expectation of privacy in a break room that was open to fellow employees.

The Mayor is concerned in his letter about whether the records are public records or whether they are personal. As indicated above, the O’Connor case says that the Mayor or other employees may enter another public servant’s office at any time necessary to retrieve documents needed to carry out the public’s business. This is a reasonable intrusion. When the purpose of entering the office is investigatory, as long as there is a reasonable suspicion that there is employee misconduct and the search is done reasonably, any information found should be usable as evidence either for or against the employee. The Court notes in O’Connor that “The employee may avoid exposing personal belongings at work by simply leaving them at home.” 480 U.S. at 725. So the question whether it is a public record or personal one is irrelevant here.

These cases indicate that there are several things a public employer can do to reduce its exposure to liability in doing searches of employee offices. I do not necessarily advocate doing these things because I think the possible tension and distrust, and in some cases disruption and inefficiency, caused by implementing them would in most cases offset any potential benefits. Perhaps the most effective measure would be to adopt policies that diminish or eliminate the employees’ expectations of privacy in city offices. These policies could say that city offices are to be used exclusively for city business and are subject to being inspected at any time by the Mayor or other supervisors to make sure this is happening and that an employee would have no expectation of privacy in the office or items in the office. Policies could prohibit or discourage personal items in office space.

Additionally, the city could reconfigure offices so they are open and accessible by sight as well as personal presence by other employees and the public. This could be done with doorless cubicles or by space sharing, or both. If an office has a door, the door could be required to stay open or be removed. The city could place surveillance cameras in office spaces to monitor activity and reduce the expectation of privacy.

Some of these are draconian measures, and the adoption of any one of these measures to some extent would both indicate and exacerbate the erosion of trust and goodwill between the city and its employees. Perhaps the best response to this situation would be for the Mayor and City Council to set guidelines requiring reasonable suspicion of misconduct on the part of an employee before the Mayor or supervisor can search an office space for information verifying that misconduct. The guidelines should also require the search to be reasonable in scope. Once the pertinent information is found, the search should end. The search should not be a fishing expedition for all things that the employee has done that might be inappropriate.

I should note that it seems to me that some of the information the Mayor sought in the day planner could have been found easier through an investigation that did not include a search. The employee could simply have been asked about these things and her story verified, or disputed, by other sources. Since there is a possibility of unlimited liability for the Mayor and the city under 42 U.S.C. § 1983 if it is found that a search is unreasonable, it would be better policy to avoid searches to the extent possible.