4-24-2015

Shoulder Surfing: A Fourth Amendment Violation

Nicole Pozzi
Cardozo Arts & Entertainment Law Journal

Shoulder Surfing: A Fourth Amendment Violation

BY NICOLE POZZI / ON APRIL 24, 2015

With the advent of social media, people have taken their personal lives online. With photos, wall posts, "likes," and friend requests, a plethora of information detailing the innermost thoughts of a person are available with just a username and password.

Employers, in an effort to learn more beyond an applicant's resume and cover letter, use information available through social media to their advantage. Employers ask, or even require, applicants to provide their passwords to social media sites.

As a result of strong public criticism against passwords requests, some employers "shoulder surf" as a way to circumvent any backlash or newly imposed social media legislation. Shoulder surfing is a practice by which a prospective employer will ask an applicant, usually during an interview, to log onto their social media pages in front of them. The employer will then hover over the applicant as the applicant scrolls through their pages and accounts.

Needless to say, employers who engage in shoulder surfing face tremendous public disapproval. In 2012, the Maryland Department of Corrections (MDOC) revised its shoulder surfing policies after the American Civil Liberties Union (ACLU) publicly criticized the practice.[1] In their press release, the ACLU argued that shoulder surfing "is akin to opening an applicant's mail or listening in on his telephone calls. Such eavesdropping intrudes on the privacy of not only the job applicant, but his online friends and correspondents."[2] The ACLU further suggests that shoulder surfing is a violation of the Fourth Amendment.

The practice of shoulder surfing is, indeed, a violation of the Fourth Amendment. However, the practice of shoulder surfing is only a violation when it is construed in the public employment context. Public employment, by definition, is a branch of a governmental service or agency. As a result, there can only be a Fourth Amendment violation when the applicant in question is looking to fill a governmental or other public employment position.

The Fourth Amendment prohibits unreasonable searches and seizures, and requires all warrants to be judicially sanctioned and supported by probable cause. The underlying purpose of the Amendment is the right of a citizen "to be secure in their persons, houses, papers and effects" against "unreasonable searches and seizures."[3] Since the enactment of the Fourth Amendment, its protections have been extended and now apply to different types of "property" than were originally conceived by the Framers, including intellectual property and property associated with social media accounts.

In *Katz v. United States*, the Supreme Court held that the Fourth Amendment protects an individual's "reasonable expectation of privacy."[4] While many argue that there should be no expectation of privacy when it comes to social media, this argument is unpersuasive. When a user posts personal content on their social media account, with the proper privacy settings to limit the audience who has access to the user's social media account, they do not expect, or want, that their post or tweet will reach potentially millions of users. Under *Katz*, this is all that matters in determining the expectation of privacy within a Fourth Amendment analysis.

To further examine shoulder surfing in a Fourth Amendment context, two questions must be asked: 1) what government activities constitute a search? And 2) what government activities constitute a seizure?

A search occurs, for Fourth Amendment purposes, when the government violates a person's reasonable expectation of privacy. In *O'Connor v. Ortega*, the Court laid out a two-prong test to analyze whether a public employee's Fourth Amendment rights had been violated.[5] Part one analyzes whether the employee had a reasonable expectation of privacy in the area intruded on by the employee or in the object of the search. As previously established, there is a reasonable expectation of privacy surrounding social media accounts and usage. Indeed, this is the fundamental goal of privacy barriers established by all social media companies. In order to prove that there has been an unlawful search, the applicant must show that safeguards were employed to protect the privacy of his or her social media account. This could be in the form of a password, or security controls limiting the scope of the audience. Once a reasonable expectation of privacy has been established, the Court will then move onto the second prong of the test, which looks to whether the employer's intrusion was reasonably justified. The intrusion is looked at through a balancing test – namely the employer's explanation for the search balanced against the conduct of the search. Once these two prongs are satisfied, the applicant has proven that an unlawful search has taken place as a result of shoulder surfing.

According to the Fourth Amendment, a seizure of property occurs when there is "some meaningful interference with an individual's possessory interest in that property."[6] Essentially, this portion of the analysis queries how the information acquired from the applicant's social media page is utilized, specifically in the hiring process. In the aforementioned MDOC case, the Department commented that the primary reason they ask applicants to log onto their social media accounts is to ensure that guards and officers do not have any gang affiliations. Despite this seemingly valid justification, it is unlikely that a governmental agency or public employer will voluntarily disclose what they do with the information seized from applicant's social media pages. However, when the seizure is unjustified, or no valid reason is proffered, it constitutes an unlawful governmental seizure and therefore, a Fourth Amendment violation as a result of shoulder surfing.

When defending an unreasonable search and seizure, many employers argue that they have obtained the applicant's consent. The employer must prove the voluntariness of the consent, and the awareness of right of choice. The Court must then look at the facts and determine whether consent has been voluntary or coerced. In shoulder surfing scenarios, no consent is truly voluntary – it is "coerced consent." Employers enjoy a position of great bargaining power and pressure, and such pressure eliminates any "meaningful choice" an applicant may have in electing whether or not to provide access to their social media account. Furthermore, public employment provides comprehensive benefits including health and life insurance and access to a retirement fund, thereby adding to the applicant's pressure. Anything other than pure, voluntary disclosure on the part of the applicant could qualify as coerced consent, and therefore a Fourth Amendment violation. Such a demand to shoulder surf by an employer makes evident that a real, meaningful choice has been taken out of the applicant's hands, and that coercion has taken place.

Shoulder surfing is a serious issue in the context of public employment hiring. It poses grave threats to privacy, and acts as a coercive tactic against applicants vying for a job. Federal legislation is needed to rectify the issue, as state legislation is not doing enough to tackle the problem. Such safeguards are necessary for applicants in the public hiring process who are subjected to the intrusiveness of shoulder surfing.

Nicole Pozzi is a second-year law student at Benjamin N. Cardozo School of Law, and a Staff Editor of the Cardozo Arts & Entertainment Law Journal. She plans to go into real estate law and development. She graduated from George Washington University in 2013.

[1] *ACLU Asks State Police to Stop "Shoulder Surfing" Practice*, American Civil Liberties Union. (Mar. 27, 2012), https://www.aclu.org/technology-and-liberty/aclu-asks-state-police-stop-shoulder-surfing-practice.

[2] *Id.*

[3] U.S. Const. amend IV.

[4] Katz v. United States, 389 U.S. 347 (1967).

[5] O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

[6] Jacobson v. United States, 466 U.S. 109, 113 (1984).