



Conducting Searches of Community College Employees and Students¹

Community college employees and students are protected by both the United States and Texas Constitutions from unreasonable searches. U.S. Const. amend. IV; Tex. Const. art I, § 9. A community college may, however, conduct searches under certain circumstances. This article answers frequently asked questions about when and how a community college may conduct a search of an employee or student.

Employees

1. When may a community college search an employee or their property?

The Fourth Amendment to the U.S. Constitution protects community college employees from unreasonable searches. For a search to be unreasonable, the person must exhibit an actual expectation of privacy and that expectation must be objectively reasonable. *Katz v. United States*, 389 U.S. 347 (1967). If an employee has a legitimate expectation of privacy, a community college may conduct a search if it has reasonable grounds to believe the search is necessary as part of an investigation into alleged work-related misconduct, such as searching an employee's internet search history to determine if they were visiting adult entertainment websites. A community college may also conduct a search if it has reasonable grounds to believe the search was necessary for a non-investigatory, work-related purpose, such as searching an employee's internet history to determine if the college needs to add additional bandwidth to accommodate work needs. The scope of the search must be reasonably related to the circumstances initially giving rise to the search. So, a community college may not search an employee's belongings for illegal drugs during an investigation into the employee's improper use of the internet. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010); *O'Connor v. Ortega*, 480 U.S. 709 (1987).

2. May a community college search an employee's technology?

Yes, as long as the college's search remains within the bounds of the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. §§ 2701-12, in addition to the Fourth Amendment to the U.S. Constitution.

¹ An electronic version of this document is available on [TASB College eLaw](https://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/conducting-searches-of-cc-employees-and-students.pdf) at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/conducting-searches-of-cc-employees-and-students.pdf.

A college commits an offense under the Stored Communications Act if it;

“intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.”

18 U.S.C. § 2701.

3. When is access to an employee’s technology authorized?

Access to communications in electronic storage is prohibited unless the person accessing the message is the intended recipient of the message, is the electronic service provider, or has the consent of the intended recipient to access the message. 18 U.S.C. § 2701. So, without seeking consent, a community college can only access information on personal technology that (1) is not an *electronic communication* or (2) is an *electronic communication* but is stored on the technological device and not only in the service provider’s electronic storage.

4. What is electronic communication?

Electronic communication is defined as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.” 18 U.S.C. § 2510(12). Items that would likely not be considered an *electronic communication* are items like phone logs, contact lists, and photographs taken with a cell phone camera and stored on the phone for the user’s reference and not transmitted electronically. Items that would be considered *electronic communications* are e-mails, voicemails, text messages, instant messages, and the like that have traveled over wi-fi or through the service provider’s network.

5. What is *electronic storage*?

Electronic storage is any temporary, intermediate storage incidental to the electronic transmission of wire or electronic communications, and any storage of such communications by an electronic communication service for backup protection. 18 U.S.C. § 210(17).

Electronic communications that have been sent to a person, but not yet opened, are in *temporary intermediate storage* and are considered electronic storage under the Stored Communications Act. See *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994).

Electronic communications that are opened and stored separately from the provider are considered to be in *post-transmission storage*, not electronic storage. See *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2004). When a communication is no longer in electronic storage, a community college may then access it.

6. Is a community college considered an electronic service provider?

Maybe, if a community college provides a manner for electronic communication such as college email accounts on its servers. If those emails are the subject of a search, then a college is authorized to access the messages because the Stored Communications Act permits an electronic service provider to access its own facilities with proper notice.

7. May a community college conduct random drug testing of employees?

Yes, if the test serves special governmental needs that outweigh the employee's privacy expectation, because drug tests of public employees are considered searches under the Fourth Amendment. In this situation, a community college may conduct a search without a warrant or individualized suspicion. *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602 (1989), *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

A community college may conduct random alcohol and drug testing of employees in safety-sensitive positions such as those that involve handling potentially dangerous equipment or hazardous substances. A college may conduct this testing if the intrusiveness is minimal and the board of trustees demonstrates that the drug-testing program furthers its interest in ensuring the physical safety of students. *Aubrey v. Sch. Bd. of LaFayette Parish*, 148 F.3d 559 (5th Cir. 1998).

Students

1. May a community college employee conduct a search of a student?

Yes, if the search is reasonable under the circumstances. Reasonable cause exists if a student is suspected of violating a rule, and the college believes a search will uncover evidence of the suspected violation. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

The search must be justified at its inception, and must be reasonably related in scope to the circumstances giving rise to the search. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004).

2. May a community college search a student's technology?

Yes. A community college may search a student's technology as long as the college's search remains within the bounds of the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. § 2701-12, in addition to the Fourth Amendment to the U.S. Constitution. As previously discussed, without seeking consent, a community college may only access information on the technology that is not an electronic communication, or is an electronic communication but is stored on the technological device and not only in the service providers electronic storage.

3. When may law enforcement conduct a search of a student?

Generally, law enforcement may conduct a search if they have probable cause to believe that a person has violated or is violating the law. However, courts differ on what standard should apply to a community college's search of a student in which law enforcement is involved.

For example courts have held that the reasonable suspicion test should be used when (1) college officials initiate a search or police involvement is minimal, and (2) college police act on their own authority. Courts have held that probable cause should apply when outside police officers initiate a search or college officials act at the direction of outside law enforcement agencies. *Russell v. State*, 74 S.W.3d 887 (Tex. App.—Waco 2002, pet. ref'd).

4. May a community college conduct a search of a student's dormitory room?

Yes. However, a student occupying a community college dorm room has the same expectation of privacy as any adult has in the privacy of their home, and is therefore protected by the Fourth Amendment from unreasonable searches. A college may adopt reasonable college housing regulations that are limited in application to further the colleges function as an educational institution, but the regulation cannot be construed or applied to give consent to a search for evidence primarily for criminal prosecution. *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *Grubbs v. State*, 177 S.W.3d 313 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

5. What TASB Policies apply to searches of employees and students?

See TASB Policies CR(LEGAL) and (LOCAL), DHB(LEGAL) and (LOCAL), and FLC(LEGAL) and (LOCAL).

6. Where can I get more information on conducting searches of employees and students?

If you have questions about these or other legal issues, community college representatives may contact Community College Services at 800.580.1488 or colleges@tasb.org.

For more information on community college law topics, visit TASB College eLaw online at colleges.tasb.org/elaw.

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