

White-Collar Law

## Limited Expectation of Privacy Over Commercial Property

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In the United States, the right to be free from illegal searches and seizures is both fundamental and sacrosanct. Or is it? For business owners that right can be illusive. The U.S. Court of Appeals for the Third Circuit, in *United States v. Nagle*, No. 14-3184 and 14-3422 (filed Sept. 30, 2015), limited the circumstances under which a business owner can challenge the legality of a search executed at the business.

Joseph Nagle was the majority owner of concrete manufacturing and construction businesses. He was convicted of participating in a scheme with a minority-owned business whereby the minority-owned business would bid for subcontracts on Pennsylvania transportation projects as a disadvantaged business enterprise. If the minority-owned business was awarded the contract, Nagle's companies would perform the work and pay a fee to the minority-owned business.

In October 2007, FBI agents executed broad search warrants at Nagle's companies' joint office, which was located in a renovated house owned by Nagle's business partner. The agents located 11 computers used by employees and a server containing a shared network used by all employees. The agents mirror-imaged the data on the computers and the server. Nagle challenged the search, arguing, inter alia, that the warrants were overly broad and that the search was performed illegally. The district court denied Nagle's motion to suppress, holding that he lacked the legal ability to even raise a Fourth Amendment challenge because he had no personal expectation of privacy in the seized electronically stored information. After being convicted and sentenced to prison for 84 months, Nagle appealed to the Third Circuit.

A defendant who seeks to suppress evidence allegedly seized or discovered in violation of the Fourth Amendment must first demonstrate that he had a "legitimate expectation of privacy" in the area searched and the property that was seized. That expectation of privacy must be "objectively justifiable under the circumstances," or in other words, "one that society is prepared to recognize as reasonable."

There is no doubt that Nagle's companies have a legitimate expectation of privacy and could therefore challenge the searches. Nagle was charged individually, however, and his companies were not charged. Nagle therefore had to argue that he had a legitimate personal expectation of privacy as to the computer data. Nearly 40 years ago, the U.S. Supreme Court recognized that the owner of a business has an expectation of privacy in commercial property, but noted (without elaboration) that the expectation is "different from, and indeed, less than, a similar expectation in an individual's home." Prior to *Nagle*, the Third Circuit had not had the opportunity to explain this "difference."

Relying on opinions from five other circuits that spanned more than 80 years, the Third Circuit held that a business owner has a legitimate expectation of privacy in corporate property only if the owner demonstrates a personal expectation of privacy independent from his or her status as owner of the business. Specifically, a business owner must be able to demonstrate a personal connection to the places searched and the materials seized and that he or she took precautions to secure the seized materials from being used without his or her personal authorization.

The Third Circuit held that Nagle could not demonstrate he had a personal connection to the computers used by the employees, as the computers were maintained in the employees' offices and Nagle did not use the employees' offices or their computers. He therefore could not challenge the seizure of the data contained on these computers.

The computer server posed a "slightly more complicated" question. The server was not stored in Nagle's office, so he had no personal connection to it. He claimed, however, that he had a personal connection to the data stored on the server, both that which he created and stored in his own right, as well as that created and stored by other employees. In all, 25 employees used the server, which was password-protected and compartmentalized into separate drives. Only five people, including Nagle, had access to all of the drives on the network. The Third Circuit first held that Nagle failed to demonstrate that he accessed other employees' computer files stored on the server and therefore had no personal connection to those files. As to the files and emails that Nagle personally created or stored, the Third Circuit acknowledged Nagle had a personal connection but held that he failed to show efforts to keep these files private from others. Specifically, he failed to establish where on the computer his files and emails were stored and how many people had access to those files and emails. Accordingly, Nagle lacked standing to challenge the seizure.

The lesson for business owners is that they should maintain physical possession of and security over any corporate property for which they may wish ultimately to assert a legally recognized expectation of privacy. This means keeping personal files under lock and key and, if possible, in the owner's personal office. It also means segregating the owner's computer files and emails and limiting access to the locations on the server where those segregated files are stored. It could also mean limiting access to the company's general files and storing the files in a secure location. Taking a cue from Hillary Clinton, a business owner could store his files and emails on a separate server that is maintained at his home. Finally, the business owner may also choose to own personally (and lease to the company) the company's physical premises, as an individual owner of a property often has an individual right to challenge searches and seizures on the property. No matter the precautions taken, business owners simply cannot be confident in their ability to challenge searches and seizures conducted at their business.

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