

Evidence and Privacy in a Digital World: Silha Spring Forum

When Google's users log onto their Gmail accounts, some believe their communications are "private." Others might not share that expectation, but think they are anonymous because only their intended recipients are interested in their content. But to what extent can digital information be collected and used as evidence against them in court? At the Silha Center Spring Forum on March 13, 2013, Mary Horvath, an FBI Senior Computer Examiner, and Dick Reeve, General Counsel/Senior Chief Deputy District Attorney for computer crimes in Denver, Colo. considered questions about digital evidence and expectations of privacy. Stephen Cribari, a criminal and evidentiary law professor at the University of Minnesota Law School, moderated.

More than 90 attendees filled the auditorium at the University of Minnesota School of Journalism and Mass Communication for the forum, "Digital Evidence: Privacy, Acquisition, Proof." Cribari began by asking whether individuals can expect privacy in their digital communications, such as email. "There is no privacy in a digital world," Horvath replied. She emphasized that when individuals choose to use online service providers like Google or Facebook, they must agree to terms of service that allow the provider to hand over data to law enforcement. "The content of those contracts says what will be provided to law enforcement," Horvath said. "[By using the service], you've already agreed to give information away." Cribari observed that many terms of service are lengthy and many users agree to these terms without reading them. Reeve said, "If you had read the policy, you would know you have signed away so much more privacy than you've ever realized." The panel emphasized that terms of service or contracts often specify that the user has waived remedies for violation of the privacy torts — intrusion on seclusion, false light, misappropriation, and publication of private facts. As a result, individuals may have little or no expectation of privacy when they use these services.

The panel also discussed how the United States courts have addressed privacy issues in recent years. According to the Supreme Court, "the expectation of privacy is based on what you keep secret," Cribari said. He argued that keeping personal information secret is more unpredictable and challenging in an increasingly digital world. He then posed the question, "Do we need to rethink this secrecy approach to privacy in a digital world?" Horvath pointed out that mobile devices and cell phones are constantly communicating information, even without users' knowledge. For example, cell phones often send out GPS

information to websites and applications, even when the user is not using location services or aware that his or her location is being tracked. “Your cell phone is talking all the time,” Cribari said.

Horvath and Reeve described the types of information the government is able to collect about individuals during an investigation. Horvath explained that in her role as a computer examiner, she can recover practically everything a user has ever done by looking at a computer’s hard drive. “[Information] is not gone even when you implement processes to delete it,” she said. Reeve pointed out that to retrieve an email, he and his investigators do not have to find the email on an individual’s computer or cell phone. Service providers also keep copies of emails on their servers. “The low-hanging fruit is on devices,” Reeve said. “But an email being on a server is also pretty low-hanging fruit.” Horvath and Reeve emphasized that search warrants must be tailored to searches for relevant evidence on computers, and examiners must not exceed the scope of the warrant. “In order for me to look for evidence, I have to look through much of the data on a computer, but what I can turn over [to the investigating agent] is limited by the warrant,” Horvath said.

The panel concluded by offering their differing views on privacy. Horvath contended that sacrificing a little privacy for security reasons might be important. But Reeve emphasized that when lawyers and other professionals question the government’s actions, it keeps government accountable. Reeve said, “Having people work hard and ask the tough questions is what makes the system work well.”

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– Cassie Batchelder
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