

Memo

To: PFT
From: Bob
Re: Proposed Computer Use Procedure
Date: Thursday, March 22, 2012

I have reviewed the District's proposed computer usage procedure. The procedure violates employees' statutory and Constitutional rights, and contains heavy-handed rules which are intrusive of the right of the privacy, and which are divorced from the real world. This Memo addresses only the Procedure. The Policy is addressed in a separate memo.

Several provisions of the Procedure are illegal, or unreal.

1. Paragraph 1. The procedure says it applies to all telephone, computer and computer communication facilities "owned, operated, or contracted *by the District*," regardless of the purposes of them.

The procedure says it applies to all students, faculty and staff. So, as drafted, the procedure appears to apply to personal telephones, smart phones, netbooks, computers and other electronic devices owned by the faculty, students and staff.

Change: The procedure should only apply specifically to equipment owned or leased by the District, not to electronic communication devices owned or leased by faculty.

2. Property

Paragraph I.A. states that computers are the "sole property" of the District. Not so - computers are given to faculty to use and they have essentially a license to use them for any and all purposes, except for illegal purposes. Thus, they are not the sole property of the District.

This paragraph should state that they are the joint property of the District and faculty.

This same paragraph continues the error of the Policy, by stating that the computers and "systems" are for instructional and work related purposes only. This is not true and must be changed.

Instead, it should state: "Computer and Network systems are for instructional and work-related uses, and for personal or private uses which should not be engaged in during work time."

3. Paragraph I.B. Conditions of use. This provision says that individual units may provide additional guidelines. Such additional guidelines must be presented to PFT, which shall be

entitled to demand negotiations.

4. I.A.C. - This paragraph confirms that any user is subject to disciplinary suspension or termination, for violating “any” administrative procedure.

This policy should state that any such action must be for “good cause.”

5. I.C.4. states that users shall not attempt to remove equipment “without management authorization.” This phrase is not defined.

6. II.A. The term “chain letters” is undefined. Sending an email to friends or colleagues and asking that it be forwarded shall not be considered a “chain letter.”

7. II.D. Other District policies and procedures deal with harassing, or threatening, messages. This section is redundant and hence unnecessary.

8. II.D.2. This provision needs a caveat: , “unless the release of information is otherwise not in violation of the law.”

9. II.D.3. Faculty have the right to distribute anonymous protests. Anonymous speech in America "has a long and rich history." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995). The Founding Fathers depended on anonymity to spread their messages about independence. Benjamin Franklin, Alexander Hamilton, and Thomas Paine were among the patriots for whom anonymity was essential to the communication of their messages. Anonymous speech is considered an essential right in the United States, as it sometimes offers the only way a particular viewpoint can be communicated. *McIntyre*, 514 U.S. at 342. Anonymous speech "opens positive new avenues of dialogue" for marginalized speakers.¹

The U.S. Supreme Court has recognized this right in hand billing and leafleting. *Talley v. California* (1960) 362 U.S. 60, 64; California similarly recognizes a constitutional right to anonymous distribution of literature. *Krinsky v. Doe* 6, 159 Cal. App. 4th 1154, 1163-1164 (2008)

10. D.5. Political Use - This provision is too broad. The District cannot make violation of laws a violation of District rules, without first giving notice of the Federal, State, or other applicable laws.

10.D.6. Provision says email cannot be used to transmit personal or commercial advertisements, solicitations or promotions. This should be struck, as we have explained that personal or commercial use is common and protected by law.

11. III.A. The provision declaring faculty have “No Expectation of Privacy” should be removed.

¹ Unmasking Jane and John Doe: *Online Anonymity and the First Amendment*, 8 *Communication Law and Policy Journal* 405 (2003), Victoria Smith Elkstrand

12. III.D. Public Records

The provision is unclear, but suggests that all nonexempt communications made on the “District network and computers must be disclosed” upon request.

First, private communications from one’s own computer, transmitted via a District network, are not public records and should not be disclosed.

Second, records sent via a district computer are not automatically public records, and hence should not automatically be disclosed.

In *Marken v. Santa Monica Unified School District* (2012) 202 Cal. App. 4th 1250 , the court held that a member of the public could obtain, through a Public Records Act request, *complaints and investigative reports concerning public employees*. However, *the right is not absolute. The court employer must balance the private rights of the employee against the public’s right to know.*

In general, if the complaint is “substantial,” and “well-founded,” then the public may have a right to know which outweighs privacy rights of employees. The court held that because a teacher occupies “a position of trust and responsibility as a classroom teacher, ... the public has a legitimate interest in knowing whether and how the district enforces its sexual harassment policy.” *Id.*

It also concluded that because the employee had been found not to have engaged in sexual harassment, but nevertheless had been issued a written reprimand, disclosure of the reprimand was mandatory because the investigation’s information was reliable, well founded and substantial.

The court also held that the affected employee had standing to seek to enjoin or intervene in a Public Records Act lawsuit over such material. Thus, demand negotiations of the following proposed language:

1. The District shall promptly notify faculty members of any Public Records Act request which arguably requests production of employee personnel records, investigatory records, complaints, or disciplinary action.

2. Notice shall be given before the material is provided to the requestor. The notice shall be made no less than 7 work days before the material is to be provided to the requestor, in order to allow the faculty employee sufficient time to: (1) make known any objection to release of the requested documents; (2) explain the justification for withholding or redacting any part of the requested documents, and, (3) seek judicial or other relief to prevent disclosure of all or part of the requested materials.

3. If the employee objects to production, the District shall, if it deems appropriate, join as an interested party, in any resulting litigation.

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It also concluded that because the employee had been found not to have engaged in sexual harassment, but nevertheless had been issued a written reprimand, disclosure of the reprimand was mandatory because the investigation's information was reliable, well founded and substantial. How it could really know this is open to debate. [FIND EXACT QUOTE]

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13. Dissemination and User Acknowledgment

Needs to be revised to include protections negotiated.