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LEGAL UPDATE

October 19, 2018

To: **Superintendents/Presidents/Chancellors, Member Community College Districts**

From: **Ellie R. Austin, Associate General Counsel** ERA
Carl D. Corbin, General Counsel CDC

Subject: **Responding to Bargaining Units' Requests to Filter "Spam"**
Memo No. 13-2018(CC)

As referenced in our Legal Update 07-2018(CC), following the U.S. Supreme Court's decision in *Janus v. AFSCME*,[1] many of our clients reported receiving California Public Records Act ("CPRA") [2] requests from the Freedom Foundation and other third-party organizations that have no relationship to the district or its employees. Many of our clients also have reported receipt of correspondence or negotiations proposals from employee unions[3] asserting that the third-party organizations improperly seek information about employees to discourage union membership. In a memorandum dated July 11, 2018, from Andrew Kahn, Chief Counsel for CSEA, Mr. Kahn contends that districts have a duty to filter "spam" email from Freedom Foundation and other such third-parties.

The law governing use of a district's email system is not settled. However, we have concerns a district could violate the First Amendment if it limits otherwise lawful communications to district employees based solely on the viewpoint expressed in the communication. We strongly encourage districts to consult legal counsel before responding to proposals to censor email addressed to employees.

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[1] *Janus v. Am. Fed'n of State, Cty., and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.
[2] *See* Gov. Code § 6250 *et seq.*
[3] Such as the California Teachers Association ("CTA"), California School Employees Association ("CSEA"), and the Service Employees International Union ("SEIU").

First Amendment

Freedom Foundation and similar organizations have asserted it would be "view point" discrimination to block emails based on the expressed intention of these organizations to reduce union membership.[4] In *Perry Education Association v. Perry Local Educators' Association*, a decision involving the use of school mail mailboxes, the U.S. Supreme Court found:

> When speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used.[5]

In *San Leandro Teachers Assn. v. Governing Board*,[6] the California Supreme Court held school districts may prohibit a union from using internal mailboxes for the distribution of partisan political information because the mailboxes are a nonpublic forum. While the issue of a district's email system being a nonpublic forum has been discussed in other legal jurisdictions,[7] there is no judicial decision affecting California that directly addresses the issue of whether a district's email system is a nonpublic forum. Again, we recommend that districts consult with legal counsel before responding to union proposals that emails be censored based on viewpoint.

Practical Considerations

As a practical matter, district staff uses email to communicate with other district staff, parents, students, outside agencies, vendors, etc. in the course of their employment. In addition, district employees represented by a union have been found to have a right to use the district email system to engage in communications that are union-related under the Educational Employment Relations Act ("EERA").[8] It is our understanding that districts currently implement and maintain various computer programs ("filters") to limit students and staff from accessing pornographic material and from receiving various types of "spam." We are not aware of a program that could, as requested by CSEA, filter out "unsolicited emails from persons or entities not under contract with a district and not a parent or student writing about their own issue," without significantly impairing the ability of district staff to communicate with other staff, parents, students, vendors, outside agencies, and others for work-related purposes. Furthermore, CSEA's request to prohibit certain individuals and organizations from contacting district employees exposes a district to unnecessary legal risk regarding an unsettled area of law. Districts – not CSEA – would bear the burden of any associated legal challenges.

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[4] https://www.freedomfoundation.com/about/ - "The Freedom Foundation is working to reverse the stranglehold public-sector unions have on our government."
[5] (1980) 460 U.S. 37, 55.
[6] (2009) 46 Cal. 4th 822.
[7] For example, see the unpublished Seventh Circuit Court of Appeals decision in *Pichelmann v. Madsen* (2002) 31 Fed. Appx. 322. However, in this decision, the Court also stated: "Pichelmann argues that the e-mail system's connection to the Internet distinguishes it from the mail system in *Perry* because the Internet is used throughout the world. But we need not decide this issue here, however, because even if the school created a limited public forum, the restriction on Pichelmann's speech was reasonable and not viewpoint discrimination."
[8] *Napa Valley Community College Dist.* (May 25, 2018) PERB Decision No. 2563.

Duty to Bargain

CSEA has asserted that, prior to allowing represented district employees to receive "unsolicited emails" from certain third-party sources, the effects of receiving an email "must be bargained by the [d]istrict before it allows such emails to go through." CSEA has not provided and we are not aware of any legal authority for this sweeping assertion. Districts must respond to requests to bargain issues concerning workload and other terms and conditions of employment, but this obligation does not require a district to "turn off" its email system prior to reaching agreement on "unsolicited emails."

Conclusion

The post-*Janus* world continues to raise issues that will likely ultimately require further litigation to resolve.[9] Our office is a preventive law firm and we do our best to provide practical legally defensible advice. We appreciate that the *Janus* decision has resulted in complications for unions. However, we believe the appropriate response to some of the post-*Janus* complications is not to attempt to fruitlessly limit speech regarding union membership; rather the "…remedy to be applied is more speech, not enforced silence."[10]

Please contact our office with questions regarding this Legal Update or any other legal matter.

[9] Such as *Yohn v. California Teachers Association* (C.D.Cal. 2017) 2017 WL 2628946 (which among other issues, challenges the practice of a default "opt in" process for union membership).
[10] Concurrence of Supreme Court Justice William Brandeis, *Whitney v. California* (1927) 274 U.S. 357, 373.