

GENERAL COUNSEL NEWSLETTER

BREAKING NEWS: PERSONAL PHONES, COMPUTERS AND TABLETS MAY HAVE PUBLIC RECORDS

On March 2, the California Supreme Court ruled that public entities (like Los Rios) must produce records related to public business that exist on private email servers, personal smart phones and personal computers.

The Court explicitly stated that public records that are created by or contained in employees' personal electronic devices are public records and must be produced in response to a public records act request. At this time, the best practice is to use your official work email and your work computer to create official documents and communications. At the very least, you should copy your work email if you use a personal email to communicate about business related to the District/Colleges, and store duplicate copies of official documents and communications on your work computer. This will allow you to look to your official work email and computer rather than search your personal phone, computer, and other devices if we receive a public records act request.

The Court's ruling was specifically directed at personal electronic devices, so know that you may be requested to produce copies of these documents from your personal electronic devices, including, but not limited to, text messages. As always, personal devices containing information related to District/College business remain subject to a subpoena if litigation arises concerning those issues.

EVALUATIONS

Why do we evaluate our faculty, staff and managers? The LRCFT contract says: "The primary goal of faculty performance review is to improve the quality of the educational program." The LRCEA contract echoes this: "The overall purpose of evaluating the job performance of employees is the improvement of services in support of the education programs of the District."

Evaluations are how our employees receive information on how to do their jobs better, and thus should be truthful and accurate. Evaluations done well are a tool for continuous improvement to better serve our students by allowing our employees to understand and build on their strengths and fairly give them an opportunity to improve their weaknesses. If an employee cannot meet the required standards after being given fair notice and an opportunity to correct deficiencies, the appropriate consequences will follow.

From the General Counsel's perspective, evaluations done poorly serve neither the employee nor the District/College. Evaluations that falsely say the employee is doing a satisfactory job impair the District's/College's ability to take corrective action in a timely fashion—to the detriment of our students—and do not provide fair notice to employees of issues they need to fix. It is human nature to want to spare feelings, but in order to be useful tools, evaluations must be done fairly and timely.

ICE JUST SHOWED UP! NOW WHAT?

If Immigration and Customs Enforcement (ICE) or any law enforcement *other than LRPD* shows up at your office and demands records or information about students, politely ask them to show you their identification and collect a business card. Next ask them for a copy of the warrant or signed consent authorizing them to obtain those records or information. Without a warrant or a signed consent, you should provide nothing more than directory information about students they specifically identify. Directory information is the student's name, identification number, age, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and most recent school attended.

If ICE agents or outside law enforcement provide you with a signed and dated consent to release records, review the signature with signatures on file and, if they match, provide the information. If signatures don't match (or you don't have a signature on file), ask them to bring you a new form or a copy of identification with a signature on it (i.e. a driver's license).

If outside law enforcement shows you a warrant, immediately notify the General Counsel's office and request that the search not begin until the General Counsel has been notified. Warrants allow government agents to enter the premises, search for evidence, and seize documents, but District employees are not required to speak to agents. Be sure to scan and send a copy of the warrant to the General Counsel's office. In order for a warrant to be valid, it must be signed by a judge and contain a description of the records or things sought. If you cannot reach the General Counsel immediately and the officers state they will not wait, do not stand in the way of officers executing a warrant that is signed and specifies what is being requested. In that instance, check in with your College Vice President and Police Captain, or the Chief of Police. Throughout the process, stay out of the way, but document the nature of the areas searched and items seized. Ask whether investigators are willing to accept copies in place of originals, and if so, who will make the copies; ask whether the District will be permitted to make its own set of copies of documents being seized; and ask about arrangements for access to seized records.

LRPD is part of the District and has been instructed on their rights regarding student records. You should cooperate with them when they request information from you.

OCR/EEOC/DFEH INVESTIGATIONS

What do you do if you receive a request from the Office of Civil Rights, Equal Employment Opportunity Commission, or Department of Fair Employment and Housing to provide information about a student or employee? First, note the deadline in the request. If it is tomorrow or in a couple of days, call the office that has asked for the information and ask for an extension. Generally, most public agencies will allow you a reasonable extension of time to respond if you ask for one.

Second, immediately send a copy of the request to your Vice President, Human Resources (for employees) and the General Counsel's office. We must ensure that we have reviewed the important documents and spoken to the relevant people before we respond to OCR, EEOC, DFEH or any other investigatory agency. Typically, in addition to providing the information requested or setting up witness interviews, we will want to add a cover letter to our response explaining why our process was in compliance with the law and our policies. These steps will ensure we have our best foot forward when responding to these types of inquiries and minimize further investigation or work.

ADA & OUR EMPLOYEES

Every first Wednesday of the month, members of Human Resources, Risk Management and Benefits meet to discuss employees who have disabilities or injuries that affect their ability to do their jobs. This includes work-based injuries as well as injuries that happened outside of work. Our goal is to ensure that all employees can

do their jobs with or without reasonable accommodations and to document necessary accommodations.

For employees with injuries or disabilities, the District/Colleges engage in conversations with these employees about what their physician says their limitations are, what their job requires, and how we can best match those two things and provide reasonable accommodations, where appropriate.

Reasonable accommodations can be modifications of job responsibilities that do not impact the essential functions of the job and/or the use of leaves, and include many other ideas that allow employees to work. Ultimately, the District/College decides what is or is not reasonable, but we work to make sure we are consistent in these determinations. It is important that you let Human Resources and/or General Services (for Workers' Compensation cases) know about your employees who have injuries, illnesses or disabilities so we can include them in these conversations, ensure we get everyone to work that we can, and try to find other solutions for those who cannot work.

PAPER WAIVERS

Why do we have to sign the GS 89 Agreement to Participate and Waiver/Assumption of Risk form for our labs and kinesiology classes or every time we go on a field trip? Why can't we just use an electronic copy?

This document is an important line of defense to liability for someone who is injured during one of these activities. In the past, these signed forms have prevented lawsuits, saving the District hundreds of thousands of dollars that are better spent on our students. In order for the Agreement/Waiver to be effective, our faculty and staff need to explain the risks of the particular class or field trip so the waiver and assumption of the risk is knowing and voluntary.

We still use paper forms for two reasons: first, courts are more inclined to honor a document that is presented for signature in the context of the first day of class or at an orientation where the risks of an activity are spelled out. There is more solemnity in the actual signing of that document. Second, with a signed agreement, you can prove who actually signed the document and compare the signature to others on file. The "I didn't sign it" argument is harder to make in that instance.

SERVICE ANIMALS; QUESTIONS YOU CAN ASK

Students who need service animals to attend school are allowed to do so by federal and state law and District policy. Service animals are only service dogs and miniature horses. If a person has a service animal, there are only two questions we can ask that person:

1. Do you need that service animal because of a disability?
2. What service does that animal provide for you?

You may only ask the second question if the animal's service is not obvious (i.e. do not ask a blind person what their seeing eye dog is doing for them). Recently, the District changed its rules about service animals and no longer requires that animals be registered. If you have a concern about a service animal, please refer your concerns to a Vice President so they can take the appropriate next steps.