June 28, 2019

Dr. Kindred Murillo
Office of the Superintendent/President
Southwestern Community College District
Room 100
900 Otay Lakes Road
Chula Vista, California 91910

Sent via U.S. Mail and Electronic Mail (kmurillo@swccd.edu)

Dear President Murillo:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is alarmed by Southwestern Community College District's efforts to compel student journalists, responsible for the operation of *The Sun*, to furnish its administration with unpublished materials. The district's use of a directive under the California Public Records Act is an astonishing affront to the rights of student journalists, betraying the institution's obligations under the First Amendment and California law.

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

I. Southwestern Issues a Public Records Act Request to a Student Newspaper, *The Sun*

The Sun is an award-winning[1] student newspaper edited, written, and produced by students at Southwestern College, advised by a faculty member, Prof. Max Branscomb.

On May 11, 2019, *The Sun* published an article that documented your "abruptly" cancelling a student government election on May 2, after "learning about a fake Instagram post that made

[1] SOUTHWESTERN COLL., *The Southwestern College Sun Inducted Into the ACP Hall of Fame*, Mar. 6, 2019, http://news.swccd.edu/2019/03/the-southwestern-college-sun-inducted-into-the-acp-hall-of-fame.

it appear a slate of black candidates was attempting to incite racial violence. . . ."[2] *The Sun* did not publish video or audio of the May 2 meeting.

On May 23, 2019, Gloria Y. Chavez, Southwestern College's Director of Employee Relations and Title IX, sent a letter to David Washburn, who was then serving as temporary faculty adviser to *The Sun* while Max Branscomb was on medical leave. The May 23 letter purported to be a request under the California Public Records Act (Gov. Code § 6250 *et seq.*) ("CPRA") requiring *The Sun* to produce any "[v]ideo footage, including audio, taken during" the May 2 meeting of the student government.

On June 4, Washburn responded to the letter, asserting that *The Sun* would not produce the requested records, if they exist at all, because they were privileged under, at least, California's shield law. Washburn also informed Chavez that Branscomb was resuming his role as faculty adviser.

On June 12, Southwestern College hand-delivered, to Branscomb, a second letter concerning the matter. In that letter, Chavez pointed out, correctly, that Southwestern Community College District "is bound to comply with" the CPRA. She averred that "because The Sun operates as an entity that is part of the larger Southwestern Community College District, it is thus subject to the" CPRA. Chavez argued that *The Sun* "operates as a student news media publication and student organization of" the District, is an "integral part of the instruction" of the District, and is "engaged in activities 'funded by the College District, and produced by students.'" As a result, Chavez charged, *The Sun* was engaged in "subversion of the public's right to access" which Chavez said "directly violate[s]" the Code of Ethics promulgated by the Society of Professional Journalists.

On June 21, the San Diego Society of Professional Journalists issued a public statement explaining that *The Sun* "has not committed any violation of the SPJ Code of Ethics," and that the newspaper's staff's protection of unpublished material followed a "basic tenet of journalism."[3]

II. Southwestern's CPRA Request Is a Novel Attempt to Abrogate Student Journalists' Well-Established Rights

Southwestern's use of a public records request to compel the production of records from its student newspaper is as puzzling as it is novel. Even assuming *The Sun* were a public agency under the CPRA, the newspaper could withhold the requested material because of the profound public interest in protecting journalists' rights.

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[2] Katy Stegall, *President cancels ASO elections*, THE SUN, May 11, 2019, https://www.theswcsun.com/president-cancels-aso-elections.

[3] SAN DIEGO SOCIETY OF PROF'L JOURNALISTS, *College Newspapers Entitled to Full Press Freedoms*, June 21, 2019, https://spjsandiego.org/2019/06/21/college-newspapers-entitled-to-full-press-freedoms.

A. Student newspapers are private, auxiliary entities not subject to the CPRA.

The novel theory underlying the District's request—that student organizations are subject to the California Public Records Act (CPRA) because they are entities that are "part of the larger Southwestern Community College District" and are engaged in activities "funded by the College District, and produced by students"—finds no support in the CPRA.

The CPRA does not confer a public right to access records of private entities, but instead allows public access to *public agencies*. (Gov. Code § 6252 subd. (f).) Just as not every student is a state actor by virtue of being granted admission to a public college, not every entity within a college's community is a state agency subject to the CPRA. *See, e.g.*, *Cal. State Univ., Fresno Ass'n., Inc. v. Sup. Ct. (McClatchy Co.)*, 90 Cal. App. 4th 810, 825–30 (2001) (nonprofit organization created by university was not a "state body" or "state agency," under the CPRA, which "simply do[es] not include a nongovernmental organization"). To the contrary, student newspapers are unincorporated entities[4] imbued with constitutional rights of their own, even when their host institutions provide substantial support, including funding, instruction, and offices.[5]

The District itself recognizes that *The Sun* is an "entity" distinct from the college. If the College sincerely believed *The Sun* to be an extension of the College, and not an entity in its own right, the College's policies would require that the CPRA request be directed to the Office of Institutional Effectiveness, which would be responsible for determining whether to produce records. That the College instead directed the request to the newspaper's adviser reflects its recognition that *The Sun* is not an entity derivative of Southwestern College.[6]

B. The Unpublished Materials Would Be Exempt from the CPRA if It Applied.

Even if the CPRA applied, *The Sun* would be justified in refusing to produce the unpublished records because the public interest served by not disclosing the records—including the statutory and First Amendment privileges attendant with the students' roles as journalists—considerably outweighs the marginal public interest that would be served by producing the records. (Gov. Code § 6255 subd. (a).)

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[4] *The Sun*, like the nonprofit organization in *McClatchy Co.*, is an auxiliary organization, not a state entity. Community college districts may "establish auxiliary organizations for the purpose of providing supportive services and specialized programs for the general benefit of its college," even where an employee of the district participates in managing the organization. (Ed. Code § 72670 subd. (a).)

[5] *See,* e.g., *Mazart v. State*, 109 Misc. 2d 1092, 1011–12 (Ct. Cl. 1981) (university not liable for student newspaper's libelous publication, even though the university granted course credit, furnished office space, and facilitated funding); *Doe v. New York Univ.*, 786 N.Y.S.2d 892, 895 (Sup. Ct.) (court order directed to a private university was not binding on its campus newspaper, an "unincorporated association" over which the university lacked control).

[6] SOUTHWESTERN COMM. COLL. DIST., A.P. 3300 (rev. June 13, 2018), *available at* https://go.boarddocs.com/ca/swccd/Board.nsf/files/B3MT9F59E8D3/$file/3300%20-%20(AP)%20Public%20Records.pdf.

The deference afforded to journalists' protection of confidential sources and unpublished information cannot be understated. There is a "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters . . . ." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 489, 495 (C.D. Cal. 1981). Even leaving aside the considerable First Amendment right to resist government efforts to compel the release of unpublished information, as discussed below, California has elevated a journalist shield law in its state constitution. (Cal. Const., Art. I § 2 subd. (b).)[7] Similarly, California goes to great lengths to place barriers between student newspapers and their host institutions. (Ed. Code § 66301 subd. (a) & (f) (barring administrators from taking action to penalize students or faculty advisers for students' protected expression).) Southwestern may not make an end-run around these barriers by resorting to an unorthodox application of the CPRA.

In weighing an asserted need to access unpublished information, courts examine the significance of the need and the availability of alternative methods of obtaining the information. "[C]ompulsory disclosure" from a journalist is a "last resort" permitted "only when the party seeking disclosure has no other practical means of obtaining the information." *Mitchell v. Sup. Ct. (Syanon Church)*, 37 Cal. 3d 268, 282 (1984). That is not the case here. Southwestern has ready access to alternative means of learning what transpired at the May 2 meeting: It can interview the numerous employees—including its president—who were present.

C. The Sun Has an Independent First Amendment Privilege to Refuse to Disclose Unpublished Information.

The United States Court of Appeals for the Ninth Circuit—the decisions of which are binding on Southwestern—recognizes a "qualified journalist's privilege" under the First Amendment. *Shoen v. Shoen*, 48 F.3d 412, 415 (9th Cir. 1995). Under the privilege, a journalist may refuse to produce material unless it is (1) "unavailable despite exhaustion of all reasonable alternative sources"; (2) "noncumulative"; and (3) "clearly relevant to an important issue . . . ." *Id.* at 418. The privilege extends to student journalists[8] and to unpublished information.

The government's relationship with a journalist does not dilute the journalist's First Amendment right to protect sources and information. For example, although *Stars and Stripes* is "owned and controlled by" the Department of Defense, its status as a "government-controlled" entity does not limit the rights of its journalists to invoke a reporter's privilege.

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[7] The shield is a "virtually absolute protection" which "need never yield to any superior constitutional right" of the state. *Fost v. Sup. Ct. (Hunter)*, 80 Cal. App. 4th 724, 731 (2000). Southwestern takes pains to urge that California's shield doesn't establish a privilege, but only immunizes against being held in contempt. This is a "largely academic" point, as "contempt is generally the only effective remedy" for a journalist's refusal to comply. *New York Times Co. v. Sup. Ct. (Sortomme)*, 51 Cal. 3d 453, 464 (1990).) Even if a court agreed with Southwestern, it would be powerless to hold *The Sun* in contempt for refusing to comply with injunctive or declaratory relief — the only remedies available under the CPRA. (Gov. Code § 6258).

[8] *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1271–72 (W.D. Wash. 2010) (as "other circuits have not differentiated professional journalists from students," graduate student journalist was eligible for the privilege).

Tripp v. DOD, 284 F. Supp. 2d 50, 55–59 (D.D.C. 2003). If the military's operation of a news outlet does not diminish the First Amendment rights of a military journalist, it naturally follows that a college has no greater ability to limit its journalists' rights.

Southwestern cannot meet the heavy burden required to overcome a student journalist's First Amendment rights. As noted above, the college can interview any of the dozens of persons in attendance at the meeting to learn what transpired. Further, it's unclear what Southwestern believes a recording would show that witness testimony would not, or how that information is critical to advancing the college's investigation.

III. Southwestern May Not Retaliate Against *The Sun* or Its Adviser for Activity Protected Under the First Amendment

It has long been settled law that the First Amendment is binding on public colleges like Southwestern. *Healy v. James*, 408 U.S. 169, 180 (1972). Accordingly, Southwestern is barred by both the First Amendment and California statutes from retaliating against a student newspaper or its faculty adviser for engaging in expressive activity protected by the First Amendment. (Ed. Code § 66301).

Newsgathering necessarily involves expressive activity. The First Amendment not only protects the spoken and written word, but encompasses the "act of making an audio or audiovisual recording" as a necessary "corollary of the right to disseminate the resulting recording." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The "act of creating an audiovisual recording is . . . speech protected by the First Amendment," which embraces a "right to film matters of public interest." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

As the First Amendment establishes a journalist's rights to record and to resist efforts to compel disclosure of unpublished material, Southwestern may not retaliate against a student for these activities, nor penalize any adviser to *The Sun* for protecting these rights.

IV. Conclusion

We appreciate that Southwestern has an obligation to investigate and remedy claims of harassment and discrimination. That duty, however, does not grant it a license to transform student journalists into sources. The college's puzzling pursuit of its CPRA request will not only undermine its reputation, but risks both miring the District in litigation that offers it no possibility of success and exposing its administrators to personal liability.[9]

[9] A public college administrator who violates clearly established First Amendment rights will not be shielded by qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

We request receipt of a response to this letter no later than the close of business on July 8, 2019, confirming that the College has withdrawn its request.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program