

LEGAL ADVISORY FREEDOM FOUNDATION'S OPT OUT EMAIL BLASTS

The anti-union group Freedom Foundation has been sending unsolicited spam e-mails to teachers at employer-provided e-mail addresses, soliciting teachers to resign their union membership, and asking them to disclose private and personal information. The spam e-mail expresses open anti-union animus and urges members to terminate their membership. It also makes no assurances about whether Freedom Foundation will share or sell the employee information it receives to third parties. This advisory addresses 1) whether a school district must allow outside organizations like the Freedom Foundation to have access to the district's e-mail system, 2) the legal requirements placed on those who send unsolicited e-mails, and 3) steps to take if outside anti-union groups communicate with members through an employer's e-mail system.

Does an Outside Organization have a Right to Access the Employer's E-mail System?

As a general matter, the answer is no. Most employer e-mail systems and computer networks are not designed to be "public forums" that are open to all outside entities. Indeed, because such "spam" e-mail communications—often filled with commercial and/or political appeals—can be annoying and waste the time of employees, employers often prohibit such communications. In addition, these communications can be responsible for virus proliferation that can cause damage to individual computers and to business computer systems. The general rule is that an employer must neutrally, uniformly and consistently apply any policies it develops for use of its e-mail system—that is, it cannot discriminate against any particular viewpoints or messages.

Legal Restrictions on Spam: The CAN SPAM Act

An outside organization like Freedom Foundation has no affirmative right to use a school employer's email system, but that does not mean that the organization is legally prohibited from sending spam e-mails. Spamming is generally lawful so long as the entity sending the spam complies with a federal law that Congress passed in 2003 called the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN SPAM). The Act was aimed at protecting against the large amounts of unwanted, deceptive and pornographic e-mails that cause disruption in the workplace and damage to technical systems. Although the intent of CAN SPAM is to regulate commercial speech, the limited case law under the Act has included some broad interpretations of the meaning of "commercial," including communications by a union during an organizing campaign.

CAN SPAM requires, among other things, that communications not be materially misleading or false, that they not include deceptive “subject” headings, that they list an address for the sender, and that they provide “clear and conspicuous” notice that the recipient may unsubscribe from additional messages. If an individual unsubscribes, the sender is required to remove the individual’s e-mail address from the list within ten business days. At this time, based solely on the text of the Freedom Foundation emails that we have seen, we do not have reason to conclude that those emails violate the CAN SPAM Act. However, CTA is monitoring the situation to ensure that Freedom Foundation is not violating the Act.

How to Respond When Members Receive Unsolicited E-Mail

If you find out that your members have been targeted by these spam e-mails, please do the following:

- Work with CTA staff to send an email to all your members that warns them of the Freedom Foundation’s privatization agenda and anti-union purpose. In addition, inform members that they should take the following steps to protect themselves from unwanted spam:
 - Unsubscribe from the e-mails, by clicking the link in the message. Ask members to let you know if the unsubscribing process is difficult or onerous, or if they receive additional messages from Freedom Foundation more than ten days after unsubscribing. Please contact the Legal Department if your members report these problems to you.
 - Members should mark the e-mail as “junk” or “spam” in their inbox.
 - Members should forward the entire e-mail to Verve Mail (The Freedom Foundation’s email provider) at support@vervemail.com, with the following text:

The Freedom Foundation is spamming me and my coworkers. Please ask them to cease all spam emails ASAP.

- Find the District’s policies and regulations regarding use of e-mail, computers, and electronic systems and networks. Do the District policies prohibit the use of e-mail addresses and systems by non-District third parties, or for mass-marketing purposes? Do the District policies restrict access to District e-mail or computer systems based on security or confidentiality? If it appears that the spam e-mails have violated District policy, send a letter to the District requesting that the District block further spam or solicitations from the source e-mail address or domain, citing the District policies or rules that appear to have been violated. If the District has no written policies on point, the chapter can nevertheless presume that the District does not want its email system to be a public forum; and on that basis, the chapter can ask the District to block e-mails from the source e-mail address/domain.

- If a District refuses to comply with its anti-spam policies and claims that it has a legal obligation to allow the e-mails, please contact the Legal Department for guidance. Initially, the Chapter should make a request, under the California Public Records Act, Government Code §§ 6250 *et seq.*, and under the Educational Employment Relations Act (“EERA”), Government Code §§ 3540 *et seq.*, for (a) all third-party e-mail addresses and IP addresses (and the names of any associated entities) which have been blocked or restricted by the District pursuant to its computer and/or e-mail policies; (b) the name of the vendor (if any) which administers the District’s spam policy and e-mail system; and (c) all policies and guidelines related to the District’s administration of mass e-mails, personal solicitation e-mails, and/or e-mails from non-employee third parties.
- Claims of Neutrality on Issues of Union Membership: At least one large school district has claimed that it has a legal obligation to remain neutral on issues related to union membership and that it therefore cannot block the Freedom Foundation’s e-mails. This is wrong for at least three reasons: 1) Allowing the spam e-mail in violation of the school district’s neutral policies will convert its internal email system into a public or quasi-public form, available to ALL outside organizations, including pro-union groups; 2) in light of its neutral policies against outside spam, allowing the anti-union message in the Freedom Foundation’s e-mail violates California Government Code Section 3550, which states that public employers may not “deter or discourage public employees from becoming or remaining members of an employee organization;” and 3) Freedom Foundation is not an employee organization under EERA, and thus blocking spam from this outside organization does not involve encouraging employees to join one employee organization in preference to another.

The CTA Legal Department is available to answer further questions or advise as needed.