



November 15, 2019

Dr. John Kelly
Florida Atlantic University
Office of the President
777 Glades Road
Boca Raton, Florida 33431

Sent via U.S. Mail and Electronic Mail (President@fau.edu)

Dear President Kelly:

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 concerned by the threat to freedom of expression at Florida Atlantic University (FAU) posed by the university's practice of requiring faculty, staff, and student athletes to seek approval from the Department of Media Relations or the Department of Athletics before granting an interview with the press. We are also concerned by the practice of requiring journalists to submit interview questions to Media Relations via email, rather than interviewing individuals in-person or via phone.

These practices restrict not only the free expression rights of faculty members, but also the free press rights of journalists, including student journalists from the *University Press* and other student media.

I. FAU Demonstrates a Pattern of Policies and Practices that Burden the Press, Including the Student Press

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. However, if the facts here are substantially accurate, FAU's media relations practices are inconsistent with the university's First Amendment obligations and must be revised.

FAU maintains a set of “Media Relations Policies,”¹ which govern the ways in which university employees communicate with the media. Expressing “FAU’s desire to maintain an attitude of openness with the press,” the Policies instruct that “[p]ersonnel in all departments and areas should feel free to respond to questions posed by the media concerning their departments or areas.”² However, the Policies go on to state that “[t]he proper procedure to release information to the media is to go through Media Relations.”³

It is perhaps this confusion that has led to FAU’s onerous media relations practices, including requiring student journalists to go through Media Relations for interviews with university personnel and mandating that some interviews be conducted via email, with Media Relations employees copied on the email exchange.

The *University Press (UP)*, FAU’s flagship student newspaper, has encountered many of these issues in its reporting. For example, while reporting on the FAU program Owls Care being named a top peer education group by a national organization,⁴ *UP* had trouble securing interviews, according to editor Cameren Boatner. *UP* discovered that Owls Care student development coordinator Thomas Elton had sent a Slack message to Owls Care student employees warning them against granting interviews.⁵ That message warned students: “you may be terminated.”⁶

In a similar experience, *UP* reached out to FAU’s Office of Environmental, Health, and Safety Director Wendy Ash Graves for comment on a story about asbestos being found in FAU’s oldest dormitory. Graves responded that such inquiries needed to be routed through Media Relations.⁷ When *UP* sought comment from Donald Kamm, the Executive Director of FAU’s Office of Equity, Inclusion and Compliance, regarding sexual assault on campus, *UP* was again told its requests for interviews needed to go through Media Relations.⁸ *UP* ran into a similar issue when reporting on alleged unfair employment practices at FAU related to student employees, when a student employee backed out due to fear of losing their job.⁹

In February 2018, Assistant Vice President for Media Relations and Public Affairs Joshua Glanzer told *UP* that Media Relations should be copied on all interview requests with “administration or staff.”¹⁰ This directive is contrary to FAU’s own Policies, which indicate that personnel are “free to respond to questions posed by the media concerning their

¹ FLORIDA ATLANTIC UNIV., *Media Relations Policies*, <http://www.fau.edu/publicaffairs/media-relations/policies.php> (last visited Nov. 14, 2019) (the “Policies”).

² *Id.*

³ *Id.*

⁴ Cameren Boatner, *Owls Care named No. 1 Peer Education Group*, UNIV. PRESS, Apr. 4, 2019, <https://www.upressonline.com/2019/04/owls-care-named-no-1-peer-education-group>.

⁵ Slack message from Thomas Elton (on file with author).

⁶ *Id.*

⁷ Email from Wendy Ash Graves to Cameren Boatner (June 11, 2019) (on file with author).

⁸ Email from Donald Kamm to Cameren Boatner (July 23, 2019) (on file with author).

⁹ Text message from anonymous student employee (on file with author).

¹⁰ Email from Joshua Glanzer to Ilene Prusher, *UP* adviser (Feb. 19, 2018) (on file with author).

departments or areas” without consulting Media Relations. Glanzer explained that all interview requests are “routed through” Media Relations. *UP* faced similar challenges in 2016, when Glanzer insisted that “UP queries should go through media relations,” explaining that Media Relations maintains the same practice with professional journalists, also requiring them to reach out to Media Relations rather than the appropriate source, again in contravention of FAU’s own Policies.¹¹

Similarly, FAU Media Relations has required journalists to conduct interviews with FAU personnel via email so that Media Relations may review interview questions and responses before personnel respond to the requests. For example, in January, Owls Care Women and Gender Coordinator Jill Rubin indicated to a *UP* staffer that she must have her email interview answers approved by Media Relations before sending them.¹² Last October, Boatner requested an interview with an administrator about how FAU handles sexual assault cases. Chief Press Officer Lisa Metcalf informed Boatner that she would not be allowed to interview an official in-person, but would instead have to submit her questions to Media Relations via email for a response.¹³

Further, FAU appears to maintain similar concerning practices related to athletics media relations, although FAU does not appear to have a specific athletics media relations policy.

When *UP* covered the lack of locker rooms for FAU’s cheer and dance teams in the university’s new sports complex in November 2018, cheerleaders and dancers declined interview requests, citing “strict orders” from coaches to decline interviews on the issue.¹⁴ In October, assistant athletic director for communications Katrina McCormack told *UP* that freshman football players are not allowed to be interviewed.¹⁵

II. Florida Atlantic University’s Media Relations Practices are Inconsistent with Its Obligations Under the First Amendment

The First Amendment is binding on public colleges like FAU. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). Regarding faculty expression at public universities, the

¹¹ Email from Joshua Glanzer to Andrew Fraieli, 2016 Managing Editor, University Press (Oct. 20, 2016) (on file with author).

¹² Email from Jill Rubin to Cameren Boatner (Jan. 8, 2019) (on file with author).

¹³ Email from Lisa Metcalf to Cameren Boatner (Oct. 30, 2018) (on file with author).

¹⁴ Text message from anonymous student athlete (on file with author).

¹⁵ Email from Katrina McCormack to Zachary Weinberger, Sports Editor, University Press (Oct. 21, 2019) (on file with author).

Supreme Court has made clear that academic freedom “is of transcendent value to all of us and not merely to the teachers concerned” and therefore is a “special concern of the First Amendment.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

A. *FAU’s Press Policies and Practices Impose an Unconstitutional Prior Restraint on Speech*

FAU’s media relations Policies encourage employees to “feel free to respond to questions posed by the media concerning their departments or areas,” but go on to require “release of information to the media” to be conducted “through Media Relations.”¹⁶ In this respect, FAU’s regular practice deviates from the Policies, as FAU regularly requires faculty and staff to clear interviews with Media Relations.

i. *Faculty members and student employees retain a First Amendment right to speak to media on matters of public concern.*

Under the First Amendment, government employers may not punish employees for speaking on matters of public concern in their capacity as private citizens. *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968). A government employer may only punish employee expression, including interviews with members of the news media, if the government employer shows, among other things, that the employee’s speech had a substantial and material negative impact. *Id.* at 568, 573. If the speech “neither [was] shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally,” then “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public,” and the employee’s speech is protected by the First Amendment. *Id.* Thus, FAU may not punish faculty and staff for declining to seek approval of Media Relations before speaking with the media without demonstrating these conversations have a substantial negative impact on the educational operations of the university.

The expressive rights of faculty are even broader. In *Garcetti v. Ceballos*, the Supreme Court expressly reserved the question of whether limits on employee speech would extend to expression “related to academic scholarship or classroom instruction” voiced by faculty, because such speech “implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” 547 U.S. 410, 425 (2006). Lower courts have recognized this reservation and declined to apply the traditional *Garcetti* analysis to faculty members’ speech.¹⁷

¹⁶ *Media Relations Policies*, *supra* note 1.

¹⁷ *See, e.g., Adams v. Trs. Of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (“Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a processor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that

ii. Requiring permission to speak to journalists imposes a prior restraint on student and faculty speech.

Further, FAU’s policy dictating that only Media Relations may coordinate “release of information,” as well as its apparent practice of requiring interview requests to be approved by Media Relations are not simply a punishment of employees’ speech. Rather, they serve as prior restraints on the free expression of university personnel. Where a policy or practice acts as a prior restraint on government employee speech, the government employer bears an even heavier burden than in instances of *post hoc* punishment of employees’ speech. *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 (1995). This is because “unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens.” *Id.*

Policies and practices that bar faculty members, students, and staff from speaking to journalists, including student journalists, impose a prior restraint on speech. Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Practices that require individuals to seek approval from officials before speaking are “offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.” *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). FAU cannot condition faculty members’ communication with members of the media, including student media, on receipt of an administrator’s prior approval. This practice impermissibly burdens the First Amendment rights of those subject to the practice.

In order to justify a prior restraint on speech by government employees, including employees of public universities, the government entity must demonstrate “reasonable ground to fear that serious evil will result if free speech is practiced[.]” that these “recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *NTEU*, 513 U.S. at 475 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) and *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)). In cases considering blanket prior restraint on government employee speech, courts have consistently struck down such bans as violative of the First Amendment.¹⁸

While the section of FAU’s written Policies stating that employees may “feel free to respond” to interview requests is permissible, the section barring employees from releasing

no individual loses his ability to speak as a private citizen by virtue of public employment.”); *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (“We hold that *Garcetti* does not apply to ‘speech related to scholarship or teaching’”).

¹⁸ See, e.g., *Harman v. City of New York*, 140 F. 3d 111, 116 (2d Cir. 1998) (striking down a policy requiring that “[a]ll contacts with the media regarding any policies or activities of the Agency” be referred to Media Relations); *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981) (holding unconstitutional an overbroad employee speech policy). For further discussion of government employee ban cases, see *Protecting Sources and Whistleblowers: The First Amendment and Public Employees’ Right to Speak to the Media*, BRECHNER CENTER FOR FREEDOM OF INFORMATION, Oct. 7, 2019, <http://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf>.

information to the media and its practice of requiring interview requests to be approved by Media Relations impose unconstitutional prior restraints on employees' right to speak to the media.

iii. FAU must refrain from prohibiting student athletes from speaking with the press.

Because student-athletes are students first,¹⁹ their right to free expression should be commensurate to other students on campus.²⁰ Similar to campus employees, while the university can restrict student-athletes' interactions with the media as official team spokespeople, it cannot restrict student-athletes' ability to express their views to the media as private citizens. In other words, FAU may no more impose a prior restraint on the speech of student-athletes than it may impose such a restraint on its employees.

B. FAU's Press Policies and Practices Inhibit the Student Press From Exercising its Role as a Campus Watchdog

The right of government employees to speak freely, including to speak freely to the media, finds a close corollary in the public's right to know. As the Supreme Court has observed, blanket infringements on government employees' speech "also impose[] a significant burden on the public's right to read and hear what Government employees would otherwise have written and said." *NTEU*, 513 U.S. at 470; *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (it is "well established" that freedom of expression "protects the right to receive information and ideas.").

The press, including the student press, is an important conduit for the public's right to know. Courts have recognized that the press act as "surrogates for the public" in keeping a watchful eye on the operations of government. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). Thus, obstructing journalists' access to FAU personnel and student athletes not only violates employees' and students' right to speak out, but also violates the public's right to know about FAU's operations, a process which usually occurs through the press. As members of the campus community, student journalists are an important part of the process of informing the public of the undertakings of government officials at public colleges and universities.

As a direct result of FAU's practices, the *UP's* ability to cover important campus issues has been burdened by journalists' lack of access to university personnel and student athletes. Blocking journalists' access to campus employees and student athletes is not only contrary to the freedom of expression, but it is also unwise, casting into doubt the university's

¹⁹ *Frequently Asked Questions about the NCAA*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Nov. 14, 2019).

²⁰ *See B.L v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019).

commitment to transparency regarding campus decisions and events, which—because FAU is a public university—affect its immediate community and the broader public.

FAU may require that official statements made on behalf of the institution itself be made only through Media Relations, and it may offer to field requests from journalists on behalf of willing employees—as it does in the first part of its current written media relations Policies. It cannot, however, effect a prior restraint on employees’ interactions with student journalists and other reporters without violating its obligations under the First Amendment.

III. Conclusion

The unique role of public universities as “peculiarly the ‘marketplace of ideas,’” *Keyishian*, 385 U.S. at 603, cannot be squared with burdens on student journalists’ right to seek information and employees’ right to share that information. FAU’s policy and practices that restrict relationships between university personnel and the press call into question its stated “desire to maintain an attitude of openness with the press.” FAU must revise its Policies to make clear that university personnel are free to speak with the press in their capacity as individual citizens, and it must ensure FAU employees—including Media Relations employees—are trained in practices that comply with these revised Policies.

We request receipt of a response to this letter no later than the close of business on December 2, 2019.

Sincerely,



Lindsay Rank
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Cc:

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