



FIRE

Foundation for Individual
Rights and Expression

March 30, 2023

Kloe Witt
The Maroon
Loyola University
6363 Saint Charles Avenue
Campus Box 64
New Orleans, Louisiana 70118

URGENT MEMORANDUM

Dear Ms. Witt,

At your request, the Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ has conducted an analysis of the actions Loyola University New Orleans has taken against you for recording an interview in the normal course of newsgathering. We conclude that your actions would not violate even the strictest recording statute, and your punishment contradicts the university's strong promises of expressive freedom, including freedom of the press.

I. Alleged Violation of Loyola's Recording Policy

Based on our understanding of the pertinent facts, you went to the campus police station on the evening of March 2, as the breaking news editor for Loyola's editorially independent student newspaper, *The Maroon*, to interview an officer and gather information about a student's arrest. You arrived at the station after hours on the advice of *Maroon* editor Jackie Gallie, based on her prior conversation with an officer, who told her to send a reporter to the station to gather information. When you arrived, you identified yourself as a reporter and an officer let you in. Shortly after you entered, Assistant Director for Residential Community Standards Marquita Morgan-Jones arrived at the station separately, also seeking information about the arrest.

After Morgan-Jones entered the station lobby, a second officer came into the lobby to brief you on the incident. You opened your phone to a recording app and interviewed the officer with the phone clearly visible to those present. During the interview, Morgan-Jones at times interjected with her own questions about the incident, which the officer also answered. When you asked

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

the officer for permission to take a picture of arrest documents, he volunteered to make you a photocopy. The officer handed you the copied documents, at which time Morgan-Jones became concerned and asked you to identify yourself. You again identified yourself as a reporter for *The Maroon*. Morgan-Jones demanded you remit the documents and leave, and you complied.

The Maroon published your story on March 2.² Eleven days later, on March 13, you received notice from Akila Jones, Loyola’s Director of Student Conduct, stating that the university was charging you (1) falsification or misuse of university records and (2) unauthorized recording.³

Loyola held a conduct hearing on March 20, and found you not responsible for the first charge, but responsible for unauthorized recording. During this conduct hearing, Morgan-Jones testified that she had seen your phone out with a recording app on during your interview of the officer.

II. Loyola’s Punishment for Normal Newsgathering Activities Violates Its Strong Commitments to Freedom of Speech and of the Press

As a private university, Loyola is not bound by the First Amendment to uphold student expressive rights. It is, however, legally and morally bound to adhere to promises it voluntarily makes—including to preserve student journalists’ free press rights.

Loyola’s Student Code of Conduct plainly states that “Student media is to be a free and independent voice acting in the best interest of the University in the pursuit of truth.”⁴ Regarding sharing information with student journalists, Loyola requires that “the community [] share [non-privileged] information so that these students may perform their functions to the fullest.”⁵ This is in keeping with the Loyola Student Code of Conduct’s general commitment that “Students and student organizations are free to examine and discuss all questions of interest to them and to express opinions publicly and privately. Freedom of speech and freedom of assembly are principles which Loyola has traditionally upheld and reaffirms.”⁶ Loyola has violated these clear policies by charging you with “misuse of university records” for simply gathering documentation in the course of ordinary newsgathering, and by charging and punishing you for openly recording an interview after clearly identifying yourself as a reporter.

Recording statutes are generally a matter of state law, with some states maintaining laws that only one party to a private conversation must consent to its recording, and other states

² Kloe Witt, *Loyola student arrested in dining hall*, THE MAROON, Mar. 2, 2023, <https://loyolamaroon.com/10037952/news/loyola-student-arrested-in-dining-hall>.

³ Letter from Akilah Jones to Kloe Witt, Mar. 13, 2023 (on file with author).

⁴ *Student Media, Student Code of Conduct 2022-2023*, LOYOLA UNIV. NEW ORLEANS, <https://studentaffairs.loyno.edu/sites/default/files/2022-08/student-code-of-conduct-complete-2022-2023.pdf> [<https://perma.cc/NLG4-JDBD>].

⁵ *Id.*

⁶ *Student Rights and Freedoms, Student Code of Conduct 2022-2023*, LOYOLA UNIV. NEW ORLEANS, <https://studentaffairs.loyno.edu/sites/default/files/2022-08/student-code-of-conduct-complete-2022-2023.pdf> [<https://perma.cc/NLG4-JDBD>].

maintaining laws that require all parties to a private conversation to consent. However, both forms of these laws generally have two things in common: First, the right to not be recorded attaches to only *private* conversations, that is, those in which one has a reasonable expectation of privacy. Second, the statutes restrict only the ability to *surreptitiously* record conversations.

Louisiana maintains a “one-party consent” statute that also gives journalists additional protections, including the right to secretly record private interviews without seeking consent of those interviewed.⁷ Under Louisiana law, therefore, there can be no question your actions in recording the interview with the officer and Morgan-Jones’ questions were fully protected and legal. As you were party to the conversation between you and the officer—the conversation into which Morgan-Jones interjected—you had the legal right to consent to record.

However, while *Louisiana* requires only one-party consent for surreptitious recording, Loyola’s policy mirrors many “all-party consent” laws, prohibiting the use of “electronic or other devices to make an audio or video still frame or photographic record of any person without their prior knowledge or without their effective consent when the person or persons being recorded have a reasonable expectation of privacy and/or such recording is likely to cause injury or distress.”⁸ But even under a more restrictive all-party consent scheme such as that enacted under Loyola policy, your actions should still be permissible for two reasons: (1) those present at the police station had a diminished expectation of privacy because an identified, on-the-job reporter was present and had identified herself; and (2) your recording was not surreptitious, as even Morgan-Jones testified she had seen your phone open to a recording app and was aware the encounter was being recorded.

The “Reasonable expectation of privacy” standard referenced in Loyola’s recording policy is a legal term of art, and the key term is “reasonable.” In this situation, the question is whether a reasonable person would presume that conversations had in the presence of a journalist—or even an unknown stranger—would remain private. Such a presumption is plainly unreasonable.⁹ Considering Morgan-Jones’ testimony that she saw your recording app open, the reasonable expectation of privacy of those present was obliterated.

You did not secretly record your interview with the officer, and the reasonable expectation of privacy of those in the police station lobby was diminished by the presence of an identified reporter with a recording device clearly visible. Thus, your recording would unlikely be considered unlawful under any recording statute. Loyola’s own recording policy suggests the

⁷ La. Rev. Stat. Ann. § 15:1303.

⁸ *Unauthorized Recording, Student Code of Conduct 2022-2023*, LOYOLA UNIV. NEW ORLEANS, <https://studentaffairs.loyno.edu/sites/default/files/2022-08/student-code-of-conduct-complete-2022-2023.pdf> [<https://perma.cc/NLG4-JDBD>]. A student familiar with Loyola’s posture toward expressive freedoms would likely presume the university would have a similarly speech- and press-protective recording policy, but unfortunately, Loyola has chosen to be unduly restrictive in this regard.

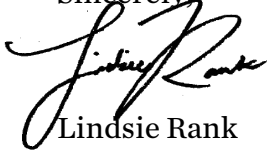
⁹ At least one federal court has held that individuals have no reasonable expectation of privacy in the presence of known reporters. *Deteresa v. ABC*, 121 F.3d 460, 465 (9th Cir. 1997) (where a journalist identified himself and did not promise to keep a conversation in confidence, a source had no reasonable expectation of privacy to not be recorded). Additionally, the conversation at issue took place in the *lobby* of the station, not in a private office, further diminishing any reasonable expectation of privacy.

university should apply it in light of similar statutes in all-party consent states, as well as consistently with its strong free press commitments. It is our opinion, therefore, that you did not violate Loyola's recording policy—which proscribes recordings only “when the person or persons being recorded have a reasonable expectation of privacy.”¹⁰

III. Conclusion

Punishing a student journalist for normal newsgathering activity not only violates the expressive freedoms of that individual journalist, but casts a chilling effect upon the entire student media enterprise at Loyola. Loyola's decision to charge you with misuse of university documents for simply *receiving* documents from an official source—regardless of the ultimate outcome of that charge—casts into question Loyola's commitment to press freedom. This concern is only exacerbated by the university punishing you for recording a consensual interview during a situation in which those present had no reasonable expectation of privacy.

Sincerely,

A handwritten signature in black ink, appearing to read "Lindsie Rank". The signature is fluid and cursive, with the first name "Lindsie" being more prominent than the last name "Rank".

Lindsie Rank
Student Press Counsel

¹⁰ Further, while determination of reasonable expectation of privacy isn't always clearcut, when there is a question as to whether a policy was violated, the rule of lenity counsels resolution of the question in favor of the accused. Especially at a university that purports to support freedom of speech and of the press, it should resolve the question of whether you violated the recording policy in favor of allowing more, not less, newsgathering.