

# GENERAL ADVICE

## FROM GENERAL COUNSEL

*Issue: November 11, 2014*



## Court Orders and Law Enforcement Inquiries on the University Campus

NMSU units around campus regularly receive requests for information needed in legal proceedings and from various law enforcement agencies. This guidance from the Office of University General Counsel (UGC) is intended to provide NMSU employees some direction on the appropriate responses to various types of legal inquiries. While most of us are naturally inclined to want to assist, we must balance the desire to be helpful with common sense precautions to ensure that each inquiry is legitimate, and that we fulfill our legal obligations to protect individual privacy.

### Bad Guys Pretend

It is not uncommon for scam artists and criminals to present themselves as representatives of law enforcement agencies for illegitimate purposes. On occasions, we also have real law enforcement officers who act beyond the scope of their authority. A recent example illustrates: individuals claiming to be law enforcement officers conducting an undercover operation at NMSU requested (and were provided) access to certain student services. Upon investigation by our NMSU Police, we learned that these individuals were law enforcement officers – but they did not have an investigation ongoing at NMSU and had no official need for the services they requested. People are not always what they claim to be, and university personnel need to be mindful of that before turning over confidential or private information or providing university resources or access. Common sense precautions include asking for credentials (badge and identification card) and seeking support from our NMSU Police Department.

With the exception of routine employment or reference checks and inquiries to the International & Border Programs Office under the SEVIS program, we recommend that all NMSU units seek the assistance of the NMSU Police Department anytime there is a law enforcement inquiry. By contacting our own campus police regarding these inquiries, we can (1) ensure coordination of all law enforcement activity on campus, (2) correctly fulfill our campus safety and incident reporting requirements, and (3) reduce the potential for illegal or inappropriate disclosures or activities. We are fortunate to have our own law enforcement agency – NMSU Police – available to assist with such inquiries, and we need to take advantage of their services.

### Employment Reference and Background Checks

The most common inquiry received, often directly by faculty, comes from agencies conducting employment background and reference checks. In these instances, the individual making the inquiry should have not only credentials to show you, but also a consent or release signed by the person that is under investigation. If the investigator provides credentials and the signed consent/release, then unless there is something about the situation that makes you uneasy or gives you pause, there is no need to contact the NMSU Police or UGC. Our cooperation in this type of investigation benefits the student or employee and does not violate their rights since they have consented to the disclosures. You should, however, take a copy of the signed release for your records, and you should read the release before

disclosure to ensure that you understand the scope of the authorized release. For example, a consent to answer questions about the student's academic career is not a consent to release the student's medical records.

## Privacy Rights and the Criminal Investigation

Outside law enforcement agencies may seek to ask NMSU employees questions relating to an ongoing criminal investigation. The advice presented here presumes that you are not the subject of the investigation – if you are or think you may be, you will need to hire a private attorney to represent and advise you. (All criminal defense lawyers will tell you to get legal counsel before speaking to law enforcement investigators if you may be the one under investigation.) Even presuming that you are not a target of the investigation, you must still stop and consider the extent to which it is appropriate to cooperate. Remember that law enforcement investigations don't always trump privacy laws and a disclosure – even to a law enforcement agent -- may violate an individual's right to privacy and create legal liability for NMSU.

Keep in mind that personal observations are not generally protected by privacy laws and may be disclosed (for example, whether you saw a particular vehicle on campus, or witnessed a student behave in a particular manner). Compare that with information that known only from review of records or which you acquired through performance of your job duties – disclosure of this information, if protected by privacy laws, may be prohibited. The most common types of legally protected information are (1) information from student educational records, (2) information relating to employee performance and personnel matters, and (3) health care information. These types of information are subject to privacy laws which legally restrict disclosure. In such cases, disclosure of this information is prohibited regardless of whether it is conveyed verbally or in the form of a written document. So, for example, if you know a student's likely physical location because you have access and checked the student's class schedule, and you report that location to a law enforcement officer who does not have a warrant or a subpoena, then you may have committed a FERPA (Family Educational Rights and Privacy Act) violation. On the other hand, if you know a student's location only because you recently saw the student, your personal observation is not restricted and may be disclosed.

Knowing what information can be provided can be complicated and confusing, particularly while you are feeling some pressure to answer questions from law enforcement. **In such cases, we strongly suggest that you pick up the phone and ask for the assistance of Campus Police;** if Campus Police has any doubt about the situation presented, they will consult with our office. Using this approach, we can ensure that we fulfill our legal obligation to protect the privacy rights of our students and employees, while at the same time assisting legitimate law enforcement activities to the extent permitted by law.

## Service of Process - Summons

Due process requires that individuals and entities be given adequate notice of any lawsuit or legal proceeding that might affect the person's interests. In the case of a civil legal action, this is often accomplished through "service of process" – personal delivery of a court summons to the individual who is being sued. In some cases, service by mail is permitted. At NMSU, only the President (and UGC as his designee) is authorized to accept service of process on behalf the Board of Regents or the University. Other university personnel should not sign an acceptance of service for anyone, except for themselves (when individually named). Process servers who are seeking to serve the University should be sent to the UGC office (Hadley Hall Room 132). Anyone who receives notice of a lawsuit or legal proceeding in the mail should immediately fax or scan and email those documents to University General Counsel

(gencounsel@nmsu.edu or fax 646-3012). You will receive confirmation of receipt. Do not complete the return of service form, sign any document or take any action other than notifying General Counsel.

## Obligations under Subpoena

You or the unit where you work may occasionally be served with a subpoena – a court order directing a named person to appear and answer questions and/or allow inspection of records. Subpoenas are in a literal sense court orders, and so it is incumbent upon us to comply with subpoenas *to the extent permitted by law*. At the same time, you should recognize that lawyers, who may know little about FERPA or other privacy laws, are often empowered to issue subpoenas on behalf of the court. So, it is also necessary to consider what steps NMSU must follow before complying with the subpoena. In the case of student educational records, NMSU may be required to give the student advance notice, which in turn provides the student an opportunity to object to the anticipated disclosure in court.

The NMSU's Registrar's office routinely receives subpoenas for student records and has a well-established protocol, developed in consultation with UGC, for doing so. All other employees or units should seek assistance from UGC upon receipt of a subpoena. In some instances, a refusal to comply may be appropriate – for example, where the court issuing the subpoena does not have jurisdiction over the person or entity who was served. In other instances, the University will need to fulfill an advance notification obligation, or a duty to keep an official record regarding the subpoena and the documents produced in response. Note that *even if the subpoena indicates that you are not allowed to tell anyone about it*, you still have the right to seek the assistance from General Counsel for NMSU matters, or legal counsel, if a personal matter.

Also, be aware that unscrupulous individuals will sometimes deliver a document designed to appear to be a subpoena and containing intimidating directives such as “you must respond” by some deadline “under penalty of law” or some such nonsense. These documents have no legal force and are just like an email phishing scam – designed to get the unwary individual to inappropriately divulge information. The UGC office is happy to assist you in determining the proper response to any such request for action.

## Homeland Security and the International Student or Faculty

NMSU, through our International & Border Programs (IBP) office, participates in the SEVP (Student and Exchange Visitor Program) which allows us to obtain certain visas for our international students and exchange visitors. As participants in this program, NMSU designates IBP's staff to serve as “designated school officials” who are obligated to provide certain information to the ICE (US Immigration and Customs Enforcement) agents who monitor the visa status of our international students and some international faculty. For the most part, international students are required to waive their FERPA and other privacy rights as a condition for obtaining a student visa. Designated IBP staff are the only individuals at NMSU authorized to release student records and the information from them in response to ICE inquiries. The UGC office is working with IBP to develop guidelines for their cooperation with ICE pursuant to their participation in SEVP.

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## PRESENTATION SUMMARY:

1. Participating in centralized coordination of law enforcement activities on campus – through NMSU Police Department
2. Employment References and Background Checks – OK to respond upon verification of credentials and copy of signed release
3. Balancing Requests from Law Enforcement with FERPA and other Privacy Laws
4. Service of Summons – Don't Sign for it / Don't Respond - Refer immediately to UGC
5. Responding to Subpoenas – First Seek Advice from UGC
6. Warrants – Arrest and Search

FERPA and other privacy rights may still be applicable in the case of law enforcement inquiries and subpoenas – it is up to us to safeguard student and employee privacy rights.