ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* ESPN, INC.,	:	Case No. 2011-1177
Petitioner,	:	
v.	:	Original Action in Mandamus
THE OHIO STATE UNIVERSITY,	:	
Respondent.	:	

MERIT BRIEF OF ESPN, INC.

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I. STATEMENT OF FACTS

At a press conference on March 8, 2011, then Ohio State football coach Jim Tressel disclosed that in April, 2010, he had received e-mails alerting him that certain OSU football players had connections with Eddie Rife, owner of Fine Line Ink, a Columbus tattoo parlor. Rife was the subject of a federal law enforcement investigation. The e-mails went on to tell Tressel that federal authorities had raided Rife's house and found $70,000 in cash and "a lot of Ohio State memorabilia." The e-mails also informed Coach Tressel that players had exchanged signed memorabilia for tattoos.[1]

On April 20, 2011, Justine Gubar, an ESPN producer, made a written request ("the Request") for the following records:[2]

> *"All emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and/or Gene Smith with key word Sarniak since March 15, 2007."*

On May 27, Jim Lynch, Ohio State's Director of Media Relations, responded:[3]

> **Justine – Do[sic] to FERPA [Family Educational Rights and Privacy Act], we will not be releasing e-mails from Jim Tressel, Doug Archie or Gene Smith related to Ted Saryniak.**
>
> **Here is what our Office of Legal Affairs has told me:**
>
> **Unless specifically permitted, the University has a legal responsibility to ensure that personally identifiable information of a student is not released without the student's specific consent. The high-profile nature of certain of our students, coupled with the analysis set forth by FERPA for determining whether student information is "personally identifiable" (and thus protected from disclosure) requires the University to consider the facts and circumstances attendant to each particular request. Seemingly innocuous information that may constitute "directory" information in certain contexts may be combined with other readily available information in other settings so as to be identifiable to a particular student.**

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1 Complaint for Writ of Mandamus, Par. 5; admitted at paragraph 5 of Answer of Respondent.
2 Affidavit of Justine Gubar, Exhibit A.
3 *Id.*, at Exhibit B.

Under FERPA, the University is prohibited from releasing information that can be reasonably linked to an individual by a member of the university community with no special knowledge as well as information requested by an individual that the school reasonably knows could be individually identified because of the requester's special knowledge of the situation. FERPA refers to these types of request for information as "targeted requests." That is, the requestor has direct, personal knowledge of the subject of the case and FERPA holds that university may not release the records even in redacted form because the circumstances indicate that the requester has made a targeted request.

In short, Ohio State asserted that FERPA, a federal statute designed to protect the privacy of **student education** records, prohibits the release of records that shed light on the **non-academic** improprieties of the University's football **coach**. FERPA has no application here.

In addition to wrongfully denying ESPN's request for records pursuant to FERPA, Ohio State summarily denied related requests without reference to any legal basis at all. ESPN submitted a written request for "[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an investigation of Jim Tressel."[4] Ohio State refused to provide the requested records. The University responded simply, "[w]e will not release anything on the pending investigation."[5] The University cited no legal authority to support this denial.

Finally, Ohio State denied two of ESPN's requests as overbroad. ESPN requested "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" and "[a]ny report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."[6] Ohio State did not provide these records. The University instead responded,

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4 See Exhibit A to Affidavit of Tom Farrey.

5 *Id.*

6 See Exhibit A to Affidavit of Tom Farrey.

[w]e would deem this to be overly broad per Ohio's public records laws."[7] Despite the fact that ESPN specified the dates, parties, and subject matter of the records being sought, Ohio State labeled the requests as overbroad. Aside from a very vague reference to "Ohio's public record laws," the University cited no legal authority, reasoning or information on the maintenance of these records to support their denial.

In response to OSU's abject failure to respond to its requests for information, ESPN filed a Complaint for Writ of Mandamus ("the Complaint") on July 11, 2011. On July 29, 2011 Jim Lynch, Senior Director of Media Relations for OSU wrote a letter to Ms. Gubar and Mr. Farrey ("the July 29 letter") expressing "Ohio Sate's surprise at the lawsuit."[8] The July 29 letter also provided further explanation for OSU's actions, and enclosed copies of certain responsive records, which were redacted to comply with OSU's alleged concerns that FERPA mandated the redaction of personally identifiable student information.[9]

As to the specific requests, the July 29 letter responded as follows:

> *"All emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie, and/or Gene Smith with key word Sarniak since March 15, 2007."*
>
> **This request does not correspond to the manner in which the university's records are organized. We do not track or organize correspondence by a particular word or specific information that may be of interest to a requestor. Nor is there a specific correspondence file at the university named Sarniak. Compliance with your request would thus require us to identify and review any and all correspondence between and among multiple senior university officials. As you may know, such action is not required by the public records act.**
>
> *"All documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since January 1, 2010 related to an investigation of Jim Tressel."*

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7 *Id.*

8 See Exhibit 2 to Affidavit of Jim Lynch.

9 *Id.*

This broad request is inconsistent with the manner in which our records are organized. Further, parts of this request would require the complete duplication of a file containing multiple thousands of pages of documents.

> *"Any and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007."*

This request does not correspond to the way the university's records are organized, and hence no record responsive to this request exists. However, in an effort to provide the information you seek, we have compiled a list containing the names of individuals who are either absolutely barred from receiving student athlete passes or whose relationship to the requesting student would have to be scrutinized before passes are issued to those individuals.

> *"Any report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."*

Portions of this request improperly seek a complete duplication of the university's voluminous files on these matters. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008–Ohio–4788, ¶ 17. Further, it is inconsistent with the manner in which the university organizes its files. It is also overbroad in that it requests multiple classes of documents concerning multiple different matters.

ESPN and OSU have continued to correspond[10] and as a result, OSU has produced many of the responsive records. With respect to the request for "any and all emails or documents listing people officially barred from the student-athlete pass lists (game tickets) since January 1, 2007," it appears that OSU has now produced all responsive records.

As to the remaining three requests, OSU continues to assert an "overbreadth" objection.[11] In addition, OSU has redacted records produced pursuant to the remaining three requests on the ground that FERPA mandates the redaction of personally identifiable student information.

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[10] See Exhibits 3 through 10 of Affidavit of Jim Lynch.

[11] See Exhibits 2 and 6 of Affidavit of Jim Lynch.

Finally, OSU has withheld entire documents from production based on FERPA and/or the attorney-client privilege.[12]

II. ARGUMENT

PROPOSITION OF LAW NO. 1.

A Public Body's Failure To Comply With The Plain Terms Of Ohio Revised Code 149.43 Constitutes A Per Se Violation.

The Public Records Act, R.C. 149.43 ("PRA") proscribes and prohibits certain conduct by public bodies. The provisions contained in R.C. 149.43 are not guidelines, they are hard and fast rules. Any public body that violates those rules is subject to an action for a writ of mandamus and an order to pay the aggrieved party's attorney's fees.

R.C. 149.43(B) contains the following mandatory provisions:

> (2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. ... If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably indentify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.
>
> (3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. ....

OSU unquestionably violated R.C. 149.43(B) in its response to ESPN's requests. In response to the request for "All documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an

[12] See Exhibit 2 to Affidavit of Jim Lynch.

investigation of Jim Tressel," OSU replied, "We will not release anything on the pending investigation."[13]

OSU's curt reply cited to no legal authority supporting its refusal. That is not surprising, since there is none. Thus, OSU violated R. C. 149.43(B)(3) as a matter of law. Any efforts it undertook to comply **after** ESPN filed suit cannot excuse its original malfeasance.[14]

In response to the following requests:

> "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" and "[a]ny report, email or other correspondence between the NCA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."

OSU responded, "We would deem this to be overly broad per Ohio's public record laws." Despite asserting that the request was overly broad, OSU did not (and as late as October 3 had still not) inform "the requester of the manner in which records are maintained by the public office." That refusal constitutes a per se violation of R.C. 149.43(B)(2). OSU's efforts to comply, undertaken only after ESPN filed suit, cannot excuse the violation.[15]

PROPOSITION OF LAW NO. 2.

A Public Records Request That Specifies The Date, Parties and Subject Matter Of The Record Requested Is Not Overly Broad.

Ohio State wrongfully deemed ESPN's requests to be overbroad. While the University initially provided no legal authority other than "Ohio's public record laws" to support its position, in correspondence delivered after ESPN filed suit, OSU is apparently relying on this Court's most recent analysis of the PRA's "overly broad" language in *State ex rel. Glasgow v.*

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[13] Affidavit of Tom Farrey, Exhibit B.

[14] *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009–Ohio–590, 902 N.E.2d 976, at ¶ 11; *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 2001–Ohio–193, 750 N.E.2d 156.

[15] *Id.*

Jones.[16] There, a retiree concerned about the effect of proposed legislation made a records request for all emails, text messages and written correspondence sent to or received by a state representative throughout the entire time she was in office, including but not limited to that relating to the proposed bill. When the representative provided only the correspondence relating to the bill, as opposed to any and all correspondence relating to any topic whatsoever in her official capacity, the requester brought a mandamus action. This Court held that the disputed requests "impermissibly sought what approximated a 'complete duplication' of [Representative] Jones' files."[17] This Court considered its own precedent and that of lower courts to conclude that the representative had properly limited the scope of her responses to the correspondence relating to the bill which was the main concern of the requester.[18]

In contrast, ESPN's requests were specific as to dates, parties and subject matter of the records sought. The first request called for "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007."[19] This request readily identifies a discrete set of records. Unlike a request for all emails, texts or written correspondence about anything work-related, ESPN's request would not amount to a "complete duplication" of Ohio State's files.

The second challenged request sought "[a]ny report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related

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[16] 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686.

[17] *Id.* at ¶ 19.

[18] The Court cited *State ex rel. Zauderer v. Joseph* for an illustration of an overly broad request. (1989), 62 Ohio App.3d 752, 577 N.E.2d 444. In *Zauderer*, a request sought "all traffic reports" from a police chief, county sheriff and highway patrol superintendent. The court found this request to be "unreasonable in scope and, second, if granted, would interfere with the sanctity of the recordkeeping process itself." *Id.* at 756. This Court also cited *State ex rel. Dillery v. Icsman* in which a request sought "any and all records generated *** containing any reference whatsoever to Kelly Dillery." 92 Ohio St.3d 312, 2001-Ohio-193, 750 N.E.2d 156. The court found this request to be overly broad in that it failed to identify that the requester only wanted incident reports. Both of these cases, along with *Glasgow*, are readily distinguishable from the present case where ESPN sought a specific and discrete set of identifiable records.

[19] See Exhibit C to Affidavit of Tom Farrey.

to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."[20] Again, this request is specific as to the parties, dates and content of the records sought. It can aptly be compared to what this Court determined to be the appropriate scope of the request in *Glasgow* – correspondence related to the proposed bill that the requester was interested in. Here, ESPN is interested in NCAA violations within the Ohio State football program and seeks records related precisely to that topic. OSU violated the PRA by deeming this request "overly broad."

PROPOSITION OF LAW NO. 3.

A Public Body May Not Invoke The Attorney-Client Privilege Without Providing Evidence That The Privilege Applies.

OSU has the burden of proof to establish that it is entitled to assert any claimed exemptions to the PRA, including an exemption based on the attorney-client privilege.[21]

Moreover, application of a claimed privilege is not automatic.[22] A party claiming a privilege must identify the reasons for asserting it.[23] The *sine qua non* to establishing the existence of the attorney-client privilege is to show that a confidential communication was made to a lawyer within the context of an attorney-client relationship.[24] Materials do not become privileged merely because they are turned over to counsel.[25]

With these principles in mind, OSU has failed to meet its burden of proof. The sole evidence that OSU offers to support its attorney-client privilege claim is the Affidavit of Sandra

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[20] *Id.*

[21] *State ex rel. National Broadcasting Co., Inc. v. City of Cleveland* (1988), 38 Ohio St.3d 79, 82-83, 526 N.E.2d 786.

[22] *Harpster v. Advanced Elastomer Systems L.P.*, 9th Dist. No. 22684, 2005-Ohio-6919, at ¶20. citing *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. 22083, 2004–Ohio–7185, at ¶ 9, citing *McPherson v. Goodyear Tire & Rubber Co.* (2001), 146 Ohio App.3d 441, 444.

[23] *Id.*

[24] *In re Grand Jury* (June 1, 1995), 4th Dist. Nos. 93CA09, 93CA10, 93CA12, citing 44 Ohio Jurisprudence 3d (1983) 186-187 and 193, Evidence & Witnesses, Sections 828 and 833.

[25] *Harpster*, 2005-Ohio-6919, at ¶21.

J. Anderson, the Associated Vice President and Deputy General Counsel for OSU's office of Legal Affairs ("OLA").

Ms. Anderson's affidavit notes that the documents subject to the claimed privilege have been filed under seal with the court. Ms. Anderson also notes that the "affidavit provides factual background and context, including the identities of authors, senders and recipients whose names appear on these documents."[26]

The affidavit identifies three "groups" of lawyers whose names appear on the documents. The first group are the OSU lawyers – Christopher M. Culley, Julie D. Vannatta and Jan A. Neiger. Kendra Baumann, a paralegal, is also included in this group.

The second group are lawyers employed by the Compliance Group, a consulting firm allegedly retained by the OLA to "assist OLA in providing legal advice and in the defense of OSU and its Department of Athletics with respect to an investigation by the NCAA."[27]

The third group is Larry H. James, an attorney with Crabbe, Brown & James, who OSU hired to represent certain athletes involved in the NCAA investigation.[28]

The affidavit provides no more context than that. It essentially alerts the court to the fact that certain names that appear on the documents either as the author or as a recipient happen to be lawyers. The affidavit contains no statement that any of the communications were made to a lawyer within the context of an attorney-client relationship.[29] There is no way to discern from the affidavit whether the documents were merely "turned over" to counsel. If so, the privilege would not attach.[30]

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26 Affidavit of Sandra J. Anderson, par. 2.
27 *Id.* at par. 4.
28 *Id.* at par. 5.
29 *In re Grand Jury* (June 1, 1995), 4th Dist. Nos. 93CA09, 93CA10, 93CA12.
30 *Harpster*, 2005-Ohio-6919, at ¶21.

In addition, it is not clear from the affidavit whether the "lawyers" were even functioning **as** lawyers in the context of the particular documents. For example, Christopher Culley and Julie Vanatta hold administrative positions. Mr. Culley is Senior Vice President and Ms. Vannatta is Senior Associate Athletic Director. Thus, the presence of their names on a document does not lead inescapably to the conclusion that they were providing legal advice.

Nothing in the affidavit indicates that the Compliance Group is a law firm or otherwise authorized to practice law. It is identified as a consulting group. There is no basis for claiming attorney-client privilege with respect to communications with a consultant. Moreover, although the affidavit claims the OLA retained the Compliance Group, OSU has produced no written agreement that would establish the Compliance Group's role in this matter, or otherwise support the notion that communications with the Compliance Group would be shielded by the attorney-client privilege.

Larry H. James did not provide legal advice to OSU. He represented several OSU athletes. OSU claims communications with Mr. James were privileged, however, because those communications "took place with the expectation of confidentiality." But OSU has provided no joint defense agreement or any other evidence to establish that Mr. James considered his communications with OSU privileged. OSU's "expectation" of confidentiality is insufficient.

OSU may assert a "common interest" with Mr. James and his clients only if it can establish that the two sides shared a common legal interest, and that the disclosures were made in the course of formulating a common legal strategy.[31] The fact that parties have a concurrent legal interest is insufficient to extend the privilege.[32]

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31 *Libbey Glass, Inc. v. Oneida, Ltd.* (N.D. Ohio 1999), 197 F.R.D. 342, 348, quoting *Bank Brussels Lambert v. Credit Lyonnais* (S.D.N.Y. 1995), 160 F.R.D. 437, 447.

32 *Id.*

ESPN is admittedly at a disadvantage when discussing this issue because it has not seen the documents. For that reason, this court must scrutinize the documents to ensure that the claim of privilege is legitimate; otherwise, a requesting party would be at the mercy of any public body that seeks to invoke the attorney-client privilege.

PROPOSITION OF LAW NO. 4.

FERPA Does Not Prohibit The Release Of The Records.

The basis for the bulk of OSU's redactions and complete failure to produce the records is its contention that R.C. 149.43(A)(1)(v) exempts the records. That provision exempts from the PRA "[r]ecords the release of which is prohibited by state or federal law." However, FERPA does not, in fact, prohibit the release of the records at issue here (nor does it even apply to the Records), so this exemption is inapplicable.

Even if FERPA applied to the Records (and it does not), it would not prohibit their release. By its express terms, FERPA does not **prohibit** the release of covered records. Rather, it merely sets conditions on the receipt of federal funds. FERPA provides in pertinent part: "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents..."[33]

Thus, Ohio State cannot assert the exemption provided by R.C. 149(A)(1)(v), which, in essence, is designed to prevent a public body from being compelled to break some other law in order to comply with its legal obligations under the PRA. By definition, this exemption simply does not apply with respect to FERPA.

[33] 20 U.S.C. 1232g(b)(1).

This court, in *State ex rel. The Miami Student v. Miami University*[34] cited with approval the case of *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*,[35] for the contention that "FERPA...does not actually prohibit the disclosure of records, but simply penalizes those educational institutions that engage in a policy or practice of disclosing such records by withdrawing that institution's federal funding."[36]

More recently, the United States District Court for the Northern District of Illinois explicitly held that the University of Illinois could not rely on FERPA to deny a records request made under the Illinois Freedom of Information Act ("FOIA").[37] The Illinois FOIA contains an exemption virtually identical to Ohio's RC 149.43(A)(1)(v). At section 7(1)(a), the Illinois FOIA prohibits the release of "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or state law." In its ruling rejecting the University's reliance on that exemption, the District Court made this common sense observation: "Section 7(1)(a) of FOIA applies only when a federal or state law 'specifically prohibit[s]' a certain disclosure. The ordinary meaning of 'prohibit' is 'to forbid by authority' or 'to prevent from doing something.' Webster's Ninth New Collegiate Dictionary 940 (1985). But FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. *Gonzaga University v. Doe*, 536 U.S. 273, 278-79, 122 S.Ct. 2268, 153 L.Ed.2d 171 (2002). Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under

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[34] 79 Ohio St.3d 168, 1997-Ohio-386, 680 N.E.2d 956.
[35] (1993), 262 Ga. 848, 427 S.E.2d 257.
[36] *Miami Student*, 79 Ohio St.3d at 171.
[37] *Chicago Tribune Co. v. University of Illinois Bd. of Trustees* (N.D. Ill.), 781 F.Supp.2d 672.

the enumerated powers in Article I. *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Illinois could choose to reject federal education money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything."[38]

The Illinois District Court noted that "[i]n *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit held that the federal government was entitled to an injunction preventing Miami University from releasing certain education records pursuant to a request under Ohio's Freedom of Information Act. The Ohio FOIA contained a[n] exemption, similar to Illinois', for information, 'the release of which is prohibited by state or federal law.' The Sixth Circuit analogized Spending Clause conditions to contracts between the states and the federal government. Under this theory, the federal government has a right to enforce the state's promise to abide by the conditions of FERPA once it has accepted federal education funds. *Id.* at 809. Even if this court were to accept the Sixth Circuit's reasoning, however, the opinion in *Miami University* included an important caveat: 'We limit this conclusion, that the FERPA imposes a binding obligation on schools that accept federal funds, **to federal government action** to enforce FERPA.' *Id.* at 809 n.11."[39] Thus, even the Sixth Circuit's reasoning would not grant Ohio State the ability to avoid its PRA obligations by virtue of FERPA.

In *State ex rel. Miami Student*, this court noted, "we are mindful that inherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it. Thus, the exceptions to disclosure are strictly construed against the custodian of public records in order to promote this public policy. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168, 169, 637 N.E.2d 911, 912. Any doubt of whether to disclosure public records is to be resolved in

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[38] *Id.* at 675.
[39] *Id.* at 675 – 676.

favor of providing access to such records. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177."[40]

Given the fact that FERPA does not prohibit disclosure, coupled with this court's obligation to construe exceptions to the PRA against the records custodian, this court should hold that FERPA does not provide adequate grounds for an exception to the PRA.

PROPOSITION OF LAW NO. 5.

Compliance With A Discreet Request For Records Pursuant To R.C. 149.43 Would Not Constitute "A Policy Or Practice Of Permitting The Release Of Education Records."

It is important to focus on the precise words of the FERPA statute. FERPA denies federal funding only to institutions that have a "**policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents.**"[41] This case involves a unique set of events that concern non-academic matters. Given this unique circumstance, Ohio State's production of the unredacted records would in no way constitute a "policy or practice" in violation of FERPA. Even if the records were somehow determined to be education records within the scope of FERPA, the release of records in one instance would not establish a "policy or practice," which is required for a violation of FERPA.

The court in *Ellis v. Cleveland Mun. School District* addressed this very issue.[42] There, a student filed suit concerning a substitute teacher's use of corporeal punishment. The student sought records regarding incident reports related to altercations between substitute teachers and students, student witness statements and information regarding subsequent discipline, if any,

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40 *Miami Student*, 79 Ohio St.3d at 171.
41 20 U.S.C. 1232g(b)(1).
42 (N.D. Ohio 2004), 309 F.Supp.2d 1019.

imposed on substitute teachers. The school district refused to produce the records, citing FERPA. The court concluded that the requested records were not covered by FERPA. But it also noted that "[e]ven if the records at issue in this case were 'education records' as defined by FERPA that would not necessarily end the inquiry. FERPA is not a law which absolutely prohibits the disclosure of educational records; ... while FERPA was intended to prevent schools from adopting a policy or engaging in a practice of releasing educational records, it does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure."[43]

Ohio State's compliance with the Ohio Public Records Act in this circumstance would be analogous to the Cleveland Municipal School District's compliance with the Federal Rules of Civil Procedure. Neither constitutes a "policy or practice" of disclosure confidential information. And thus, the release would not violate FERPA.

Federal courts, similarly, have noted that "FERPA's nondisclosure provisions ... speak only in terms of institutional policy and practice, not individual instances of disclosure."[44] That "policy or practice" must be of a "systematic" nature.[45]

The circumstances leading to the NCAA investigation of OSU, and ultimately to ESPN's request for the records are unique and unlikely to repeat. By complying with a unique, singular request for records, in compliance with Ohio law, OSU is not instituting a "policy or practice" of disclosing confidential information. There is no basis to claim any exemption based on FERPA.

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[43] *Id.* at 1023.

[44] *Gonzaga Univ.*, 536 U.S. at 288.

[45] *See, e.g., Daniel S. v. Bd. of Educ. of York Cmty. High Sch.* (N.D. Ill. 2001), 152 F.Supp.2d 949, 954; *Smith v. Duquesne Univ.* (W.D. Penn. 1985), 612 F.Supp. 72, 80. ("FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records.").

PROPOSITION OF LAW NO. 6.

Records That Are Not Maintained, Do Not Concern "Education," And Which Do Not Directly Concern A Student Are Not "Education Records" For Purposes Of FERPA.

Even if FERPA and R.C. 149.43(A)(1)(v) can be properly read in tandem to prohibit the release of FERPA-covered records, the records fall outside the ambit of "education records" covered by FERPA. The records responsive to the request for "all emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and/or Gene Smith with key word Sarniak since March 15, 2007" are found at pp. 1-124 of Volume II of OSU's evidence submission. A number of these records are letters and e-mails from OSU employees to Sarniak, a Pennsylvania businessman. There is no evidence to suggest that Mr. Sarniak is a parent or legal guardian of any Ohio State student (nor would such a fact necessarily convert the e-mails at issue into "education records" for purposes of FERPA). Nor has Ohio State contended that any of the records discuss grades, financial aid or the type of information to which FERPA actually applies. That the public is aware of Mr. Sarniak's ties to Terrelle Pryor is due as much as anything to information already provided by Ohio State in its efforts at damage control. In any event, the mere fact that a student's name may be discerned from a document does not automatically make that document an "education record." It is impossible to imagine that Congress had **any** interest in restricting the flow of information about shady deals at a tattoo parlor when it passed FERPA in 1974.

The remaining redacted records submitted as evidence by OSU consist largely of communications between the OSU athletic department and/or compliance division and the NCAA, a private association of member schools.[46] Those records primarily address whether coaches and administrators in the OSU football program complied with NCAA regulations.

[46] *NCAA v. Board of Regents* (1984), 468 U.S. 85, 99, 104 S. Ct. 2948, 82 L.Ed.2d 70.

These records, which concern the performance of the institution, rather than the performance of students, are not education records.

In *State ex rel. Miami Student*, this court did **not** ultimately base its decision on the inapplicability of R.C. 149.43(A)(1)(v). Rather, it found that student disciplinary records do not constitute "education records" as envisioned by FERPA. It supported its ruling with this observation: "[a]t Miami University, the University Disciplinary Board ("UDB") adjudicates cases involving infractions of student rules and regulations, such as underage drinking, but may also hear criminal matters, including physical and sexual assault offenses, which may or may not be turned over to local law enforcement agencies. Thus, the UDB proceedings are non-academic in nature. The UDB records, therefore, do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance. Consequently, we adopt the reasoning of the *Red & Black* decision, *supra*, and hold that university disciplinary records are not 'education records' as defined in FERPA."[47]

That observation applies with even more force here. The records – e-mails involving a Pennsylvania businessman without any official affiliation to either Ohio State or any student, and records concerning compliance with NCAA regulations by OSU coaches and administrators – are not records that directly involve an Ohio State student, much less grades, academic data, financial aid or scholastic performance. They are not, by any fair reading of FERPA, "education records." This court should adhere to the reasoning underlying the *State ex rel. Miami Student* case, and find that the records are not subject to FERPA by their very nature.

Other courts have adopted this court's reasoning in cases where colleges have tried to use FERPA to shield institutional misconduct. In *Kirwan v. The Diamondback*, the Maryland Court

[47] *Miami Student*, 79 Ohio St.3d at 171-172.

of Appeals, citing *State ex rel. Miami Student* rejected a FERPA defense in a case similar to this one.[48] In *Kirwan*, the University of Maryland notified the NCAA that a student-athlete accepted money from a former coach to pay the student-athlete's parking tickets. The student-athlete was suspended for three games as a result. When the school's student-run newspaper, The Diamondback, learned of the parking ticket incident, it began an in-depth investigation of other similar incidents involving the men's basketball team. The investigation was in response to allegations that certain members of the team regularly park illegally on campus and receive preferential treatment from the University with respect to the subsequent fines. On several occasions, The Diamondback requested documents from the University pursuant to the Maryland Public Information Act. The documents requested included: (1) copies of all correspondence between the University and the NCAA involving the student-athlete who was suspended and any other related correspondence during February 1996; and (2) records relating to campus parking violations committed by other members of the men's basketball team.[49]

The University of Maryland denied the request, on the ground that the documents relating to the student athletes were education records covered by FERPA. In rejecting this assertion, the Maryland Court held that "[t]he legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of the student. The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student. Nevertheless, in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in

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[48] *Kirwan v. The Diamondback* (Md. 1998), 721 A.2d 196.

[49] *Id.* at 204.

secret, which would be contrary to one of the policies behind the Family Educational Rights and Privacy Act. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public."[50] This court similarly should reject Ohio State's attempt to operate in the shadows of a federal statue that has no application to the facts here.

A North Carolina court similarly rejected a university's overbroad interpretation of FERPA in *The News and Observer Publishing Co. v. Baddour.*[51] There, various media organizations sought records from the University of North Carolina-Chapel Hill ("UNC-CH") relating to alleged misconduct by former head football coach Butch Davis and other school administrators pursuant to the state Public Records Law. The requested records included parking tickets issued to eleven football players. The University argued that the parking tickets were FERPA-protected education records because one potential sanction for repeated parking tickets is a disciplinary action before the school's honor court. The court, unconvinced, held that "the fact that an ultimate sanction might include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into a disciplinary arm of the University. The parking tickets issued by UNC-CH public safety, if any, to 11 players are not education records protected by FERPA."[52] Indeed, the court's view in *Baddour* was summed up when the court stated, "FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC-CH."[53]

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[50] *Id.* at 204.

[51] *The News and Observer Publishing Co., et al. v. Baddour, et.al.* (N.C. Sup. Ct., Orange County, May 12, 2011) Case No. 10 CVS 1941.

[52] *Id.*

[53] *Id.*

In *NCAA v. Associated Press*, the Florida appellate court reached the same conclusion as the Maryland and North Carolina courts.[54] In *NCAA*, Florida State University became aware of allegations that a learning specialist and an academic tutor had provided improper assistance to a number of students, including some who participated in athletic programs. The University engaged the services of a private firm to conduct an internal investigation on its behalf. On February 14, 2008, after the completion of a comprehensive self-investigation of academic misconduct, the University reported its findings to the NCAA. The Associated Press sought disclosure of documents in the NCAA disciplinary proceeding and appeal and, when the request was denied, filed suit under Chapter 119, Florida Statutes, against the NCAA, Florida State University, its President, and the GrayRobinson law firm.[55]

The defendants in the suit argued that FERPA barred the release of the records. The Florida appeals court rejected this claim because the records at issue were not "education records" under FERPA. The Florida court noted that education records are those which relate "directly" to a student.[56] But the records in the Florida case, as the court noted, "pertain to allegations of misconduct by the University Athletic Department, and only tangentially related to the students who benefitted from the misconduct."[57]

That is exactly the case with the records here. To hold that these records are covered by FERPA would allow colleges to avoid legitimate public scrutiny. This court should not allow this ploy to succeed.

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[54] *National Collegiate Athletic Association v. Associated Press* (Fla. Dist. Ct. App. 2009), 18 So.3d 1201, *cert. denied*, (Fla. 2010), 37 So.3d 848.

[55] *Id.*

[56] *Id.* at 1210.

[57] *Id.* at 1211.

Ohio courts have consistently resisted attempts by school administrators to expand FERPA's coverage beyond its intended scope.[58] In *Ellis v. Cleveland Mun. School Dist.*, the court held that information relating to allegations of physical abuse by teachers was not protected from discovery by FERPA, because the requested documents did not contain information directly relating to the student.[59] The court stated, "FERPA applies to the disclosure of student records, not teacher records. *Klein Independent Sch. Dist. v. Mattox,* 830 F.2d 576, 579 (5th Cir. 1987). While it is clear that 'Congress made no content-based judgments with regard to its 'education records' definition,' *Miami University* 294 F.3d at 812, it is equally clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students."[60]

The public's interest in the records here does not directly concern any students. Rather, the public's interest is with the activities of Ohio State administrators and the football coach. Coach Tressel's failure to pass on information concerning potential NCAA violations through the proper channels, coupled with his forwarding the e-mail to a person with no official affiliation to Ohio State, raises questions about Coach Tressel's relationship with Sarniak and what knowledge Ohio State officials had concerning that relationship. Given that Ohio State is a taxpayer-supported institution, and one of the largest public employers in the state, the public has a right to seek answers to those questions. Any student involvement is tangential and thus the records are not subject to FERPA.

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58 See also, *Baker v. Mitchell-Waters*, 160 Ohio App.3d 250, 2005-Ohio-1572, 826 N.E.2d 894, at ¶28-30.

59 (N.D. Ohio 2004), 309 F.Supp. 2d 1019, 1023-24.

60 *Id.* at 1022; the Ohio appellate court reached the same conclusion in a case involving records of alleged teacher abuse at an MRDD facility in an elementary school.

FERPA's legislative history supports the argument that the records are not "education records."[61] FERPA's legislative history reveals that "in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy."[62] "Following Watergate, lawmakers were increasingly concerned that secret governmental documents could be erroneously relied upon to the detriment of individuals, most of whom had no idea that data was being kept and no method of correcting inaccurate information;" "Senator Buckley explained that individual privacy and a citizen's right to know what information the government had collected were the motivating forces behind" the Buckley Amendment.[63]

"It appears that Senator Buckley's aim was to protect academic and academically-related records, not tangential records that might be located within the school building" and that "the initial definition was not wholly abandoned and should be referenced and evaluated" in clarifying "the scope of FERPA's protection...."[64] Congress never intended for FERPA to be used as a shield to prevent full disclosure of records that might prove embarrassing to a public body.[65]

As Senator Buckley himself recently re-emphasized, FERPA was meant to protect "education records," or those records that have some academically related function. ... Upon learning that schools were shielding themselves by refusing to disclose non-academic

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[61] *Kirwan*, 721 A.2d at 204.

[62] *Id.*

[63] Mary Margaret Penrose, *In The Name Of Watergate: Returning FERPA To Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75, 77, 82 (2011) (citing Cong. Rec. 14580 (1974)).

[64] Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 86-87.

[65] *Kirwan*, 721 A.2d at 204. *See also* Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 96. (using FERPA "to protect the school, not the student" in an "inversion [that] was never intended by Senator Buckley and is contrary to the spirit of FERPA").

information, Senator Buckley stated, "[t]hat's not what we intended. ... Institutions are putting their own meaning into the law."[66]

Finally, the Sarniak-related correspondence and e-mails are not FERPA-protected education records because they were not "maintained" as such by Ohio State. FERPA protects student records which "are maintained by an educational agency or institution."[67] In *Owasso Indep. Sch. Dist. v. Falvo*, the U.S. Supreme Court determined that, for the purposes of FERPA, "maintain" means "to keep in existence or continuance; preserve; retain."[68] With that definition in mind, the Court posited that "FERPA records will be kept in a filing cabinet...or on a permanent secure database...in the same way the registrar maintains a student's folder in a permanent file."[69]

Relying on *Owasso*, an Arizona court held that "documents scattered throughout a database, only located via a key-word search, are not 'maintained' under FERPA."[70] In *Phoenix Newspapers v. Pima Community College*, an Arizona newspaper issued a public records request for documents and email records relating to a former student of Pima Community College, Jared Lee Loughner. Loughner allegedly killed six people and wounded 13 others, including Representative Gabrielle Giffords, when he opened fire at a Tucson political gathering. The

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[66] Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 105. (quoting Riepenhoff & Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, Columbus Dispatch, May 31, 2009, at 1A). "Senator Buckley was joined in his concern about misuse of FERPA by Paul Gammill, who had recently taken over the federal education department responsible for monitoring FERPA. Echoing the senator's concerns, Gammill stated that '[i]t sounds like some institutions are using this act to hide things.'" Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 97 (quoting Riepenhoff & Jones).

[67] 20 U.S.C. 1232g(a)(4)(A).

[68] *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.E.2d 896 (2002), citing Random House Dictionary.

[69] *Id.* at 433.

[70] (AZ Sup. Ct., Pima County, May 17, 2011) Case No. C20111954.

requested records were locatable by executing a database search using the keyword "Loughner."[71] The college denied the request, citing FERPA.

The court held that "[d]ocuments are not 'maintained' by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records...'FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar,' not individual assignments or emails."[72] The court ultimately ordered the school to disclose the records pursuant to the newspaper's request, holding that "[a] keyword search that returns an unknown quantity and quality of documents, does not comport by the idea of records kept by a central custodian or records kept in a central location or database, and does not conform to the idea of records kept in a filing cabinet in the records room."[73]

As in *Phoenix Newspapers*, ESPN's request for "all emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and /or Gene Smith with key word Sarniak since March 15, 2007" does not seek institutionally-maintained education records. The request articulates a keyword search nearly identical to that in *Phoenix Newspapers*, the results of which were ordered to be disclosed. The records requested by ESPN are not of the kind kept in the permanent files of Ohio State students or stored in the filing cabinets of the school's registrar as contemplated by FERPA. Instead, they are "scattered throughout a database" and only peripherally related to the students' academic life. Therefore, the Sarniak records were not "maintained" as education records for the purposes of FERPA.

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[71] *Id.*
[72] *Id.* citing *Owasso Indep. Sch. Dist, supra* at fn. 27.
[73] *Id.*

PROPOSITION OF LAW NO. 7.

Where A Public Body Commits A Per Se Violation Of The Public Records Act, And Fails To Adequately Justify Claimed Exemptions, The Requesting Party Is Entitled To Attorney Fees.

R.C. 149.43(c)(1) permits this Court to award ESPN statutory damages, attorney's fees and costs associated with bringing this action. As an aggrieved party, ESPN is entitled to this relief.

This Court may reduce an award of statutory damages, attorney fees and costs only if it determines that: "(a) Based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section; and (b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct."[74]

Ohio State's unsupported denials of ESPN's requests and erroneous designation of other requests as overbroad clearly violated the PRA. OSU's failure to provide guidance to ESPN on how it maintains its records is also a per se violation of the PRA. In light of the specific requirements that the PRA imposes on public offices to respond to records requests and the clear

[74] R.C. 149.43(c)(1).

failure of the University to adhere to those requirements, a well informed custodian could have no reasonable belief that the responses provided complied with the law.

Moreover, given this court's previous ruling in *State ex rel. Miami Student*, coupled with the *Kirwan* case and the *NCAA v. Associate Press* case – where the courts made it clear that records related to institutional wrongdoing are not covered by FERPA – there is no way that a well informed records custodian would reasonably believe that FERPA covered the Records.

Shrouding the Records in secrecy allegedly provided by a statute that has no application in no way advances the public policy underlying the PRA. Nor is that policy advanced by allowing a public office to flout its obligation to respond to requests. ESPN is absolutely entitled to an award of every penny of its attorney fees here.

III. CONCLUSION

This court should join with courts from around the country in sending an unmistakable message to collegiate athletic departments – you cannot hide your misdeeds behind FERPA and you must honor your obligations under the PRA. And the court should do so by granting ESPN's petition for a Writ of Mandamus, and awarding 100% of its attorney fees.

Respectfully submitted,

John C. Greiner /JKM

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Merit Brief of ESPN, Inc.*** was served by regular U.S. Mail, postage prepaid, this 21st day of October, 2011, upon the following:

Michael Dewine, Esq.
Alexandra T. Schimmer, Esq.
Damian W. Sikora, Esq.
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FILED
PATRICIA NOLAND
CLERK, SUPERIOR COURT
5/18/2011 8:28:04 AM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. STEPHEN C. VILLARREAL
JUDGE

CASE NO. C20111954

DATE: May 17, 2011

PHOENIX NEWSPAPERS INC.,
Plaintiff,

VS.

PIMA COMMUNITY COLLEGE,
Defendant.

RULING

IN CHAMBERS UNDER ADVISEMENT RULING RE: PLAINTIFF'S APPLICATION FOR ORDER TO SHOW CAUSE ON SPECIAL ACTION.

Procedural Background

Plaintiff, Phoenix Newspapers Inc., ("PNI" or "Plaintiff") pursuant to A.R.S. § 39-121.02(A) and Ariz. R. P. Spec. Act. 4, applied for an Order directing Defendant, Pima Community College, ("PCC" or "Defendant") to show cause why Plaintiff should not be promptly granted the relief sought in its Complaint for Statutory Special Action under A.R.S. § 39-121 et seq. (the "Arizona Public Records Law"). This matter arises out of the alleged shooting of a number of persons by Jared Lee Loughner in Tucson, Arizona on January 8, 2011. Loughner had been a student at PCC until approximately October of 2010. Plaintiff, PNI, publisher of the Arizona Republic, filed the within Complaint seeking certain documents from PCC. Specifically, by Special Action, PNI seeks access to the following documents:

a. Any and all written communications, including but not limited to email records, between or among PCC officials, staff or employees regarding Loughner, from January 1, 2009 to October 10, 2010;
b. Any and all written communications, including but not limited to email records, between or among PCC officials, staff or employees and any outside agency, public or private (e.g., law enforcement or mental health organizations) regarding Loughner, from January 1, 2009 to October 10, 2010; and
c. Documents sent or received by PCC or its employees relating to Loughner or his parents on or after September 29, 2010 to October 10, 2010 (including, without limitation, correspondence with Loughner or his parents regarding Loughner's suspension and terms upon which he could return).

Victoria Robertson
Law Clerk

[Comp. ¶ 7(a-c)].

PCC asserted the email documents are student records under the Family Education and Rights Protection Act ("FERPA") and, therefore, refused to disclose them. PNI argued that the emails are not FERPA records and should be disclosed pursuant to this Special Action.

The Court has received and reviewed Plaintiff's Complaint, Plaintiff's Application for Order to Show Cause and Memorandum in Support, Defendant's Answer to Plaintiff's Complaint, Defendant's Response to Plaintiff's Application for Order to Show Cause, and Plaintiff's Reply in Support of Application for Order to Show Cause. The Court heard arguments on this issue on April 29, 2011. Additionally, the Court received Defendant's Notice of Submission of Documents for *In Camera* Review, Plaintiff's Response to Defendant's Notice of Submission of Documents for *In Camera* Review, and Defendant's Reply to Plaintiff's Response to Notice of Submission of Documents for *In Camera* Review. Finally, the Court reviewed all of the documents submitted for *in camera* review.

The documents submitted to the Court were divided into three groups. "Group A" documents are the result of a search of PCC's employee email database for documents containing the word "Loughner" between the dates of January 1, 2009 and October 10, 2010. "Group N" documents are redacted law enforcement reports regarding Loughner which PCC previously released to the media. "Group N" documents are not at issue in this litigation. "Group L" documents are a compilation of documents, including email and other communications between PCC employees, which PCC provided to the United States Department of Justice in response to a grand jury subpoena. These items were also provided to Loughner's criminal defense attorney.

Analysis

FERPA was enacted to protect the privacy rights of parents and students through preventing the disclosure of students' education records. Under FERPA "education records" are "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A). FERPA's range is broad, including "records, files, documents, and other materials". If records are not protected by FERPA, and not subject to any other privilege, then they must be disclosed under the Arizona Public Records Law which creates a broad presumptive right of access to the records of government institutions.

Victoria Robertson
Law Clerk

"The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'" *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002) (citing Random House Dictionary). FERPA records "will be kept in a filing cabinet ... or on a permanent secure database .... in the same way the registrar maintains a student's folder in a permanent file." *Id.* at 433. Documents in an employee's or another individual's possession, such as email in an individual email account, but never seen or preserved by the educational institution are not maintained under FERPA and therefore not education records. *S.A. v. Tulare County Office of Educ.*, No. CV F 08-1215, 2009 WL 3126322, at *7 (E.D. Cal. Sept. 24, 2009). Emails, like assignments, are fleeting and pass through many hands and are maintained once they are placed in the student's permanent file. *Id.*

Documents are not "maintained" by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records. *Id.* If emails can be removed from the database in question simply by the account holder deleting the email from their inbox then emails that happen to remain on the server by no action of the educational institution are not maintained by the school. *Id.*; *See Owasso*, 534 U.S. at 433. "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar," not individual assignments or emails. *Owasso*, 534 U.S. at 435.

In this case, to locate the documents in question, at least regarding Group A, PCC searched all electronic files for the word "Loughner". This search returned several duplicate documents and documents which were purely personal or subject to other exemptions. The fact that PCC conducted a system wide database search for a word or name indicates these documents were not saved in a central location on a permanent database which could be easily accessed after a request. Instead these documents were in individual inboxes or other locations and were simply stored on the database as a necessary component of providing email, which does not generate FERPA protection. *See Tulare*, 2009 WL 3126322 at *7 (finding the argument that educational institution "maintains" emails in inboxes and institution's server fails). A key-word search that returns an unknown quantity and quality of documents, does not comport with the idea of records kept by a central custodian or records kept in a central location or database, and does not conform to the idea of records kept in a filing cabinet in the records room. *See Owasso*, 534 U.S. at 433, 435.

Accordingly, this Court finds that documents scattered throughout a database, only located via a key-word search, are not "maintained" under FERPA. The Court concludes, therefore, that the emails contained in Group A and the emails contained in Group L are not FERPA protected records. This Court further finds that

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Law Clerk

the **GROUP N** documents are not at issue in these proceedings. The Court declines to address these documents as they are outside the purview of this litigation.

Conclusion

IT IS ORDERED that PNI's Complaint for Special Action Relief is hereby **GRANTED.**

IT IS FURTHER ORDERED that PCC must disclose to PNI all documents submitted for *in camera* review as **GROUP A.**

IT IS FURTHER ORDERED that, as to the documents submitted for *in camera* review as **GROUP L,** PCC must only disclose email documents to PNI at this time.

IT IS FURTHER ORDERED that PCC provide this Court further clarification regarding whether the **non-email** documents submitted for *in camera review* as **GROUP L** are privileged under FERPA. PCC is directed to resubmit only Group L non-email documents together with a privilege log providing clarification as to the classification and origin of the documents, how the documents were stored, and specifically what, if any, privilege PCC is asserting to the documents. PCC should remove transcripts, grades, and other conventionally protected personal information from Group L documents prior to resubmission to the Court, as PNI expressly exempted such documents from this litigation. Additionally, any documents created after Loughner was no longer a student at PCC, after October 10, 2010, should be removed from Group L as those documents are also outside the scope of this litigation.

IT IS FURTHER ORDERED that PCC shall file the above pleading and resubmit Group L non-email documents for further *in camera* review no later than ten [10] business days from the date of this ruling. PNI shall file their response to PCC's pleading within ten [10] business days. PCC may reply to PNI's response no later than five [5] business days thereafter. Parties are directed to email or fax their pleadings to opposing counsel to ensure their timely receipt. The Court will review the requested pleadings and documents and, if possible, rule upon the privilege or confidentiality issues without a hearing. The Court may, however, set the matter for a hearing thereafter if the Court deems it necessary.

HON. STEPHEN C. VILLARREAL

(ID: d87f1db3-7ae7-43ab-8dba-60033f2a216a)

Victoria Robertson
Law Clerk

cc: David J. Bodney, Esq.
John C. Richardson, Esq.
Peter S. Kozinets, Esq.
Sesaly Ona Stamps, Esq.
Clerk of Court - Under Advisement Clerk

Victoria Robertson
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Fax Only Memo

May 12, 2011

To: Hugh Stevens & Amanda Martin at 1-866- 593-7695
Alexander McC. Peters & Melissa L. Trippe at 716-6763

Subject: The News and Observer Publishing Company, et al. versus Richard A. Baddour, Director of Athletics for the University of North Carolina, et al. 10CVS1941 Orange County Superior Court

Re: ORDER re: Judgment on the Pleadings

Ladies and Gentlemen:

I have carefully considered your proposed Orders and have elected to sign, file and enter plaintiffs' proposed order with a couple of pen and ink inserts only. A copy of the filed Order is attached. This fax memorandum serves as the certificate of service of the Order.

I note from your correspondence accompanying the proposed orders that the defendants contemplate filing a motion for a stay pending the obvious appeal that will follow. Just so you will know, I have, in some cases, stayed the operations of decisions pending appeal when all sides agreed to the stay, as in the video poker/Cherokee casino case and some others. However, it is not my general practice to stay my own decisions and in this case the stay is objected to by the plaintiffs. In such cases, I generally deny the stay and the party can go to the Court of Appeals for a writ following the entry of an order denying the stay. Just wanted all to be advised so you can proceed accordingly. Thank you for your hard work in trying to agree on the terms of the Order.

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 10 CVS 1941

FILED
2011 MAY 12 PM 1:19
WAKE COUNTY, C.S.C.
BY_____

THE NEWS AND OBSERVER PUBLISHING COMPANY; DTH MEDIA CORP; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; TIME-WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP; WTVD TELEVISION, LLC; CAPITOL BROADCASTING COMPANY, INCORPORATED; THE ASSOCIATED PRESS; and MEDIA GENERAL OPERATIONS, INC.,

Plaintiffs

v.

RICHARD A. BADDOUR, as Director of Athletics for The University of North Carolina at Chapel Hill; PAUL HILTON "BUTCH" DAVIS, JR., as Head Football Coach at UNC-CH; JEFF B. McCRACKEN, as Director of Public Safety at UNC-CH; and HOLDEN THORP, as Chancellor at UNC-CH,

Defendants.

ORDER

This matter came on for hearing before the undersigned on April 15, 2011 on the plaintiffs' Motion for Judgment on the Pleadings. This matter previously was designated as a Rule 2.1 Exceptional Case and thus was permissibly heard out of term and out of county. The Plaintiffs appeared through Hugh Stevens and Amanda Martin of the law firm Stevens Martin Vaughn & Tadych, PLLC. The defendants appeared through Special Deputy Attorneys General Alexander McC. Peters and Melissa Trippe of the North Carolina Department of Justice. After

considering the pleadings and the written and oral arguments of the parties, the Court finds and concludes as follows.

This lawsuit was brought by media organizations seeking to obtain copies of records from the University of North Carolina at Chapel Hill ("UNC-CH") pursuant to the North Carolina Public Records Law, Chapter 132 of the General Statutes. The requested records that are the subject of this suit relate to the football program at UNC-CH. and allegations of improprieties in the program. The plaintiffs are eight media organizations that investigate and report on news throughout the state of North Carolina and nationally. The defendants are Richard Baddour, the Director of Athletics for the University of North Carolina at Chapel Hill ("UNC" or "the University"); Paul Hilton "Butch" Davis, Jr., the head football coach at UNC; Chief Jeff B. McCracken, the Director of Public Safety at UNC; and Holden Thorp, the Chancellor of UNC-CH. At issue are six categories of information:

a. All documents and records of any investigation conducted by the University related to any misconduct by any UNC-CH football coach, any UNC-CH football player, any sports agent, any UNC-CH booster and/or any UNC-CH academic tutor.
b. Names of all individuals or organizations that provided impermissible benefits to any UNC-CH football players.
c. Unredacted phone numbers on telephone bills for mobile phones provided to and used by defendants Baddour and Davis and by former associate football coach John Blake.
d. Parking tickets issued by UNC-CH relating to 11 players.
e. Names, employment dates and salaries of all individuals employed as tutors/mentors for UNC-CH student athletes since January 1, 2007, including any documents mentioning former tutor Jennifer Wiley.
f. Names of recipients of athletic scholarships.

Subsequent to the suit being filed, the University provided documentation of category (b) (the identity of those who provided impermissible benefits to UNC players) and category (f) (names of athletic scholarship recipients). Plaintiffs conceded in open court that these two categories have been satisfied and are no longer at issue.

On March 28, 2011, plaintiffs filed a motion for judgment on the pleadings, which was heard on April 15, 2011. Neither the plaintiffs nor the defendants made arguments with regard to category (a), the plaintiffs' broad request for all documents related to the investigation. Accordingly, this Court rules only on the categories of information denoted above as (c), (d) and (e).

In describing the rationale underlying the Public Records Law, the North Carolina Supreme Court has adhered to the philosophy that "the general rule in the American political system must be that the affairs of government be subject to public scrutiny." *News and Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Accord, *Advance Publications, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 507, 281 S.E.2d 69, 71 (1981) ("Good public policy is said to require liberality in the right to examine public records."). Moreover, North Carolina's appellate courts repeatedly have admonished that the Public Records Law is to be construed liberally and the exceptions to it interpreted narrowly.

The crux of the dispute between the University and the plaintiffs involves (a) the definition of an "education record" as that term is defined in FERPA, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; and (b) whether the phone numbers of University employees that happen to appear on phone records of University-provided phones used by coaches or the athletic director are shielded from disclosure by the State Personnel Act.

FERPA applies only to "education records," which are defined as "those records, files, documents, and other materials that (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The U.S. Supreme Court has held, "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431-33 (2002). FERPA

does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC-CH.

Phone Records

The plaintiffs have requested unredacted telephone bills for mobile phones provided to and used by defendants Baddour and Davis and by former associate football coach John Blake. Such records presumably include the numbers of telephones from which calls were placed to those mobile phones and the numbers to which calls were placed from those phones. Release of such telephone bills would not divulge the content of the communication, and the telephone number of a student that happens to appear on the phone bill of a coach or the athletic director is not part of the education records protected by FERPA. Nor does the appearance of the phone number of a University employee on the phone bill of a coach or athletic director constitute a personnel record. The N.C. Supreme Court has held,

> In order for personnel information to be protected by section 126-22, it must meet two requirements: (1) it must have been gathered by an individual's employer (including the Office of State Personnel) or considered in an individual's application for employment; and (2) the information must relate to at least one of the enumerated activities by the employer with respect to the individual employee or applicant for employment.

News & Observer Pub. Co., Inc. v. Poole, 330 N.C. 465, 476, 412 S.E.2d 7, 14 (1992). Moreover, phone numbers are not even among the information listed in the personnel statute as employment-related or personal information to be withheld.

Parking Tickets

The plaintiffs have asked for access to parking tickets issued by UNC-CH relating to 11 players. The University has argued that parking tickets and associated records are education records protected by FERPA and exempt from disclosure under the Public Records Law because one potential sanction for repeated violations or refusal to pay a ticket is disciplinary action before the student honor court. However, the fact that an ultimate sanction ***might*** include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into

a disciplinary arm of the University. The parking tickets issued by UNC-CH public safety, if any, to 11 players are not education records protected by FERPA.

Tutor/Mentor Records

The plaintiffs have requested the names, employment dates and salaries of all individuals employed as tutors or mentors for UNC-CH student athletes since January 1, 2007. Although the athletic tutor program permits the employment of individuals who have received an undergraduate degree, the University has taken the position that undergraduate students who are employed as tutors can be so employed only by reason of their student status. "Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition." 34 C.F.R. § 99.3. Therefore active, enrolled UNC students who are employed by UNC and whose employment is contingent upon their being students at UNC-CH are education records protected by FERPA and exempt from disclosure under the Public Records Law.

Accordingly, the Court grants judgment on the pleadings for the plaintiffs with respect to the phone records and parking tickets and grants judgment on the pleadings for the defendants with respect to the tutor records. The Court holds open the issue encompassed in category (a) above, as to the remaining request for all records of the investigation.

IT IS SO ORDERED.

This the 12th day of May, 2011.

Howard E. Manning, Jr.
Superior Court Judge Presiding