



**THE ATTORNEY GENERAL
OF TEXAS**

November 4, 1986

**JIM MATTOX
ATTORNEY GENERAL**

Mr. W. O. Shultz II
General Attorney and Associate
General Counsel
The University of Texas System
201 West 7th Street
Austin, Texas 78701

Open Records Decision No. 447

Re: Whether records of University of Texas athletic department investigations are excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S.

Dear Mr. Shultz:

You inform us that the University of Texas has received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for copies of documents concerning the athletic department of the university. You have supplied some of the requested information, but you believe two categories of information are excepted from public disclosure under the Texas Open Records Act. These consist of (1) materials relating to an investigation of the performance and possible wrongdoing by an employee of the athletic department, and (2) copies of any reports filed with the National Collegiate Athletic Association regarding actual or potential violations of the association's rules.

The requestor has also made a second request for the materials on the investigation of an university employee as well as some other records. We will deal with the availability of the records concerning this investigation when we address the second request. This Open Records Decision will consider only the reports filed with the National Collegiate Athletic Association (NCAA).

This category of information consists of correspondence between University of Texas personnel and the National Collegiate Athletic Association. In a typical exchange of letters, the NCAA reports that it has received a complaint that the University of Texas has violated NCAA rules, and it asks for an explanation. In answer, the university reports its findings on the matter and states what action was taken, if any. One group of letters concerns a complaint by the University of Texas that a university in another state has violated NCAA rules. The violations and alleged violations discussed in these letters for the most part concern students and employees of the University of Texas, although some concern students and employees of other

universities, prospective students, and persons without a university affiliation.

You believe that information concerning students may not be released because its disclosure is controlled by the federal Family Educational Rights and Privacy Act of 1974, known as the Buckley Amendment. See 20 U.S.C. §1232g (1974). Section 14(e) of the Open Records Act incorporates this provision of federal law by providing that

[n]othing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974 . . . codified as Title 20 U.S.C.A. Section 1232g, as amended.

V.T.C.S. art. 6252-17a, §14(e). The Buckley Amendment provides that federal funding shall be denied an educational institution which releases a student's education records without consent of the student's parents, or of the student himself if he is attending an institution of post secondary education. 20 U.S.C. §1232g(b), (d).

You also contend that an individual's privacy would be invaded by the release of information that he had been reprimanded for violating NCAA rules or has been accused of violations. You allege that such information is within the right of privacy incorporated into section 3(a)(1) of the Open Records Act, protecting from disclosure

information deemed confidential by law, either constitutional, statutory, or by judicial decision.

V.T.C.S. art 6252-17a, §3(a)(1). See also Open Records Decision No. 142 (1976).

We will first consider the application of the Buckley Amendment, as incorporated by section 14(e) of the Open Records Act, to the correspondence about students of the University of Texas. The Buckley Amendment applies to "education records," defined as follows:

1. This request for an Open Records Decision does not raise an issue as to whether the Buckley Amendment applies to copies of the letters in the possession of the National Collegiate Athletic Association. See Arkansas Gazette Company v. Southern State College, 620 S.W.2d 258 (Ark. 1981) appeal dismissed, 455 U.S. 931 (1982).

those 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). An "educational agency or institution" includes public and private institutions which receive federal funds. 20 U.S.C. §1232g(a)(3).

The letters are maintained by the athletic department of the University of Texas and some of them contain information directly related to a student. They are educational records subject to the Buckley Amendment, and neither the records nor "personally identifiable information contained therein" may be released without the student's consent. 20 U.S.C. §1232g(b), (d). We have marked the information protected from disclosure by 20 U.S.C. section 1232g as incorporated into section 14(e) of the Open Records Act.

Some of the letters include information about persons who considered attending the University of Texas at Austin but did not enroll. In addition, there are letters written by or received by University of Texas employees which include information about students enrolled in universities in other states. The University of Texas may not invoke Buckley to withhold the records of persons who are not students as defined by the following federal statute:

(6) For the purposes of this section, the term 'student' includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. (Emphasis added).

20 U.S.C. §1232g(a)(6). See also 34 C.F.R. §99.3 (1985) (defining student).

We will consider whether the right of privacy you have raised applies to information about high school students who never enrolled at the University of Texas and students of other post-secondary institutions.

You argue that a right of privacy incorporated by section 3(a)(1) of article 6252-17a, V.T.C.S., protects from public disclosure the information that an individual has been accused of violating NCAA

rules or has been reprimanded for such violations. Section 3(a)(1) incorporates a constitutional and a common law right of privacy. Open Records Decision No. 260 (1980). The constitutional right of privacy protects only information relating to marriage, procreation, contraception, family relationships, and child rearing and education. Id. None of these constitutional privacy interests are relevant to the information about violations and alleged violations of NCAA rules.

Section 3(a)(1) also incorporates a common law right of privacy, which would except information from public disclosure according to the following standard stated by the Texas Supreme Court:

[I]nformation . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. If the information meets the first test, it will be presumed that the information is not of legitimate public concern unless the requestor can show that, under the particular circumstances of the case, the public has a legitimate interest in the information notwithstanding its private nature.

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976). You assert that a common law right of privacy as applied in Open Records Decision No. 142 (1976) protects from public disclosure information that university employees have violated or have been accused of violating NCAA rules.

Open Records Decision No. 142 (1976) considered whether the University of Texas must disclose minutes of a meeting of the Southwest Athletic Conference at which two individuals were privately reprimanded or censured for violating Southwest Conference regulations. This office found that disclosure of this information would invade the privacy of the two individuals, one of whom was a private individual and the other an employee of an institution not supported by tax funds of Texas. Relying on the doctrine of common law privacy as stated in Industrial Foundation of the South v. Texas Industrial Accident Board, Open Records Decision No. 142 surmised that an individual who had been censured or reprimanded would find that fact highly embarrassing and would reasonably object to the publication of the information. The Open Records Decision then concluded that the requestor did not overcome the presumption that the information was not of legitimate public concern.

Open Records Decision No. 142 was issued soon after the Texas Supreme Court ruled on Industrial Foundation of the South v. Texas Industrial Accident Board; the Supreme Court issued its opinion on July 21, 1976, while Open Records Decision No. 142 was issued on September 13, 1976. Since that time, this office has issued additional rulings which apply the test for common law privacy differently from Open Records Decision No. 142. Moreover, another Texas court has discussed privacy rights under the Open Records Act, in Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

Hubert v. Harte-Hanks considered whether the names and qualifications of candidates for the office of president of a state university were exempt from disclosure under the Texas Open Records Act as information in "personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ." V.T.C.S. art. 6252-17a, §3(a)(2). The court determined that the Industrial Foundation test for information deemed confidential by law under section 3(a)(1) of the Open Records Act also applied to personnel information protected by a privacy right under section 3(a)(2). The court stated that

the information sought is plainly not of the intimate or embarrassing nature which the Supreme Court discussed in Industrial Foundation. The records sought in that case were claims injured workers filed with the Industrial Accident Board for worker's compensation benefits. The sensitive information the Supreme Court detailed as being exempt from disclosure involved claims by victims of sexual assaults, victims of mental or physical abuse in the workplace, illegitimate children, psychiatric patients, persons who attempted suicide, or persons suffering injuries to sexual organs.

652 S.W.2d at 551. The court also stated that the public is legitimately concerned with the names and qualifications of candidates for the presidencies of state universities financed by public funds. It finally noted in dicta that

a liberal construction of the Open Records Act seems to compel disclosure of information, even when disclosure might cause inconvenience or embarrassment for some persons.

652 S.W.2d at 552.

The language of Hubert v. Harte-Hanks indicates that the court would require a higher level of embarrassment than did Open Records Decision No. 142 to consider the information protected by common law privacy. Open Records Decisions issued by this office also find that the subject matter covered by common law privacy is more strictly limited than Open Records Decision No. 142 would suggest. Open Records Decision No. 408 (1984) determined that the name of a person arrested for a felony offense could not be withheld as information protected by a common law right of privacy, even though charges were later dismissed. Another Open Records Decision concluded that allegations, later proven to be unfounded, of a public employee's illegal job-related activities were not private information. Open Records Decision No. 400 (1983).

This office has also held that a common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. Open Records Decision No. 438 (1986) determined that a complaint alleging sexual harassment by a city supervisor is not excepted from disclosure by a right of privacy. Open Records Decision No. 219 (1978) determined that a common law right of privacy did not protect an audit report raising questions about the conduct of identifiable employees "which might be embarrassing to them. . . ." Open Records Decision No. 219 (1978). The decision concluded that

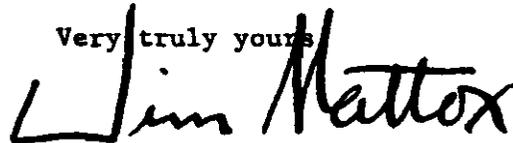
[t]he information is not excepted by section 3(a)(1) on the basis of a privacy interest in avoiding embarrassment which might arise by implication from the way in which government business is conducted.

Open Records Decision No. 219 at 2. See also Open Records Decision No. 230 (1979).

Open Records Decision No. 269 (1981) determined that information concerning the resignation of an employee of the University of Texas Health Science Center must be disclosed. The information included a written agreement between the individual and the Dallas Center, a promissory note executed by the individual, and a report of an investigation and audit of university funds in a division of the Dallas Center. The decision held that this information was not protected by a common law right of privacy. It also pointed out that the public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law-abiding manner, particularly in matters involving the handling of public funds. Open Records Decision No. 269 (1981). See also Open Records Decision Nos. 350, 315 (1982); 208 (1978) (right of privacy does not protect citizen complaints against police officers and the disposition of complaints).

The correspondence you have submitted includes charges that identified individuals have violated NCAA rules and facts that support or refute the charges. The charges relate to University of Texas employees, employees and students of out-of-state universities, and prospective students of the University of Texas who ultimately did not enroll. On the basis of authorities issued since Open Records Decision No. 142, we do not believe these letters contain "highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. . . ." (Emphasis added). We conclude that facts about an individual's participation in a university athletic program or in recruiting for enrollment in such a program are not exempt from public disclosure by a common law right of privacy; nor does this right exempt charges that his participation has violated NCAA rules and regulations. The charges of NCAA rule violations are not protected from disclosure by the "false light" privacy test. This doctrine applies only to scurrilous information, see Open Records Decision No. 400 (1983), and none of this information could be characterized as scurrilous. Accordingly, the information not excepted from public disclosure by the Buckley Amendment as incorporated into section 14(e) of the Open Records Act must be disclosed to the requestor.

Very truly yours



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