THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

February 19, 1987

Mr. J. Scott Chafin
General Counsel
University of Houston
4600 Gulf Freeway, Suite 421
Houston, Texas 77023

Open Records Decision No. 462

Re: Whether records prepared by a law firm employed by the University of Houston to investigate the university's football program are subject to required disclosure under the Open Records Act, article 6252-17a, V.T.C.S.

Dear Mr. Chafin:

As general counsel for the University of Houston, you seek our decision under the Open Records Act, article 6252-17a, V.T.C.S. In your request letter, you advised that a reporter has asked for

> information collected and gathered by the university and by the Houston law firm of Liddell, Sapp & Zivley (the 'law firm'), which was employed by the university to conduct an investigation into allegations regarding the university's intercollegiate athletic program. . . .

Another reporter has requested copies of records maintained by the university or on its behalf consisting of documents prepared by the law firm regarding the university athletic investigation.

You stated that you have submitted as Exhibits D and E the only documents in the university's possession which meet the description in the request. The university does not contend that Exhibit D is protected from required disclosure. It does, however, contend that Exhibit E is protected by sections 3(a)(3) and 3(a)(7) of the act.

The law firm has submitted a request, in which the university joins, concerning the availability of documents in its possession which it submitted as Exhibits C, D and E-1 through E-7. The firm contests the disclosure of these Exhibits. It describes the material it prepared as follows:

> During the course of its investigation, the firm contacted over 100 current and former student-athletes, alumni supporters, coaches, administrative personnel and other persons. The

> firm conducted over 50 interviews. No one except the interviewee and the attorneys were present during any of the interviews. During the interviews, the lawyers from the firm took extensive notes. . . .
>
> The firm also prepared formal memoranda concerning many of the interviews. Such memoranda include factual statements made by the person interviewed as well as subjective impressions of the lawyer regarding the interview and thoughts on further efforts necessary to verify the witness' statements. The memoranda were circulated among the four lawyers conducting the investigation. Neither the notes nor the memoranda were disclosed to the University of Houston-University Park or to any other person. . . .
>
> The firm also created or assembled various other documents during the course of its investigation including address lists, legal memoranda, inter-office memoranda, charts, academic records, transcripts, correspondence, etc.

Both the university and the firm assert that the firm is not a "governmental body" within section 2(1) of the act, and that information in its possession is therefore not subject to required disclosure. Alternatively, each contends that sections 3(a)(1), 3(a)(3), 3(a)(7) and 3(a)(11) of the act authorize the denial of this request.

Section 2(2) of the Open Records Act defines "public records" as

> the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information.

Section 3(a) defines "public information" as

> [a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business. . . .

The threshold question is whether information collected by someone acting on behalf of a governmental body can be within these sections.

In Open Records Decision No. 437 (1986), we held that records prepared by bond underwriters and attorneys of a utility district and by the outside operator of another district contained "public

information" within section 3(a). The crux of this decision was that, in assembling the records, these individuals acted as agents of the governmental bodies. The decision stated:

> In assembling and maintaining the information at issue here, Mr. Little acted on behalf of the Aransas County Utility District for section 3(a) purposes. And even though the contractor who collected the information at issue in Mr. Brooks' request is an 'independent contractor' for some purposes, we believe he nevertheless acted on behalf of the Grant Road Public Utility District in collecting this information. See, e.g., Standard Insurance Company v. McKee, 205 S.W.2d 362 (Tex. 1947); Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. - Dallas 1964, writ ref'd n.r.e.) (one may be an independent contractor for some purposes yet may be an agent in connection with other work or activities). In collecting this information, both Mr. Little and the contractor were in effect carrying out a task which otherwise would have been left to the governmental body itself to carry out and which was delegated to them. Under these circumstances, the information at issue was 'collected, assembled, or maintained by [the] governmental bodies [themselves]' for section 3(a) purposes.

In Open Records Decision No. 445 (1986), however, the city of Midland hired a consultant to do a management study of its police department. Under their contract, the consultant was to furnish the city with a written report of its findings and recommendations. The consultant did this, and the city released the report. The city then received a request for "information acquired in regard to the approximately 125 persons who were interviewed" by the consultant. The city advised us that it did "not have that information, [did] not know the contents of such information, and is not contractually entitled to receive same." The decision distinguished these facts from those at issue in Open Records Decision No. 437:

> There is in this instance no dispute about whether the final report submitted to the city by its consultant is subject to required disclosure. . . . This is also not a situation in which the city employed an agent to perform a task that the city itself would otherwise have been obligated to perform, or in which the consultant actually prepared the information in question at the request or under the direction of the city. Were this the case, Open Records Decision No. 437 would be on point. Finally, this is not a case involving a

> governmental entity that assembled information and then gave that information to an outside entity in order to circumvent the disclosure requirements of the act. On the contrary, you have stated that the contract between the city and its consultant called for the city to receive only a 'comprehensive written report,' that the city never possessed the requested information, that it does not know the contents of that information, and that it is 'not contractually entitled to receive the same.'
>
> Under all of these circumstances, we do not believe that the requested information can be deemed to have been 'collected, assembled, or maintained by [the city]' within the meaning of section 3(a). It is therefore not subject to required disclosure.

These decisions set out factors relevant to determining whether information held by a consultant of a university is subject to the Open Records Act. These factors are: (1) the information collected by the consultant must relate to the university's official business; (2) the consultant must have acted as an agent of the university in collecting the information; and (3) the university must have or be entitled to have access to the information. See also Open Records Decision No. 439 (1986).

The university and the law firm argue that the firm has no relationship with the university other than the attorney-client relationship created by the engagement letter. In this case, they argue, the attorney-client relationship is not an agency relationship but that of an independent contractor.

An agent is authorized by another to transact some business for him and render an accounting. Boyd v. Eikenberry, 122 S.W.2d 1045 (Tex. 1939). The principal has the right to control the means and details of the process by which the agent will accomplish his assigned task. Johnson v. Owens, 629 S.W.2d 873 (Tex. App. - Fort Worth 1982, writ ref'd n.r.e.); see also Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980); Stanford v. Dairy Queen Products of Texas, 623 S.W.2d 797 (Tex. App. - Austin 1981, writ ref'd n.r.e.). An independent contractor undertakes to do specific work for the principal using its own methods and without submitting to the principal's control with respect to all details of the work. Industrial Indemnity Exchange v. Southard, 160 S.W.2d 905 (Tex. 1942); Carruth v. Valley Ready-Mix Concrete Co., 221 S.W.2d 584 (Tex. Civ. App. - Eastland 1949, writ ref'd). By characterizing the law firm as an independent contractor, the university and the firm in effect argue that the firm conducted the investigation independently of the university's control and supervision. The university would receive

only the finished product of the investigation, which, according to media accounts, was an oral report given to the university regents in an executive session. Houston Chronicle, Aug. 1, 1986, at 1; Houston Post, Aug. 13, 1986, at 4A. The university would have no right to review materials prepared by the law firm or to record details of the investigation.

Under Texas law it is possible to be both an independent contractor and an agent in the same contractual relationship. Standard Insurance Co. v. McKee, 205 S.W.2d 362 (Tex. 1947); Carruth v. Valley Ready-Mix Concrete Co., supra. To address this open records request, however, we need not characterize the law firm as entirely an agent or an independent contractor of the university; instead, we need only examine provisions of the agreement that relate to university access to material prepared during the investigation. The letters submitted as Exhibit D of the university set out the agreement. These letters have been released to the requestor and are therefore public information.

In letter dated April 8, 1986, Dr. Richard Van Horn, University Chancellor, asked Walter Zivley to conduct an impartial investigation into possible violations of National Collegiate Athletic Association (NCAA) regulations by or on behalf of personnel associated with university athletic programs. The terms of the investigation were as follows:

> Please focus your investigation on the following:
>
> Phase I: Conduct an in-depth investigation to determine whether University Park personnel, including coaches, athletic department staff or administrative personnel, participated in or had knowledge of systematic or widespread payment of cash or similar benefits (e.g., use of credit cards, repayments of loans, retirement of debt, etc.) to student-athletes participating in the football program. . . .
>
> Possible Phase II: If, during Phase I of your investigation, you discover evidence that causes you to believe that persons not employed by the University were involved in cash payments or that student-athletes in programs other than football have received cash payments in violation of NCAA rules, please advise me of all such evidence. The evidence will be reviewed by the University to decide whether to conduct further investigations.
>
> You will be acting on behalf of the University in conducting this investigation. All employees of the University Park campus have been instructed to

> cooperate fully. As you know, certain coaches and athletic department administrative personnel may be obligated under their respective contracts with the University or by NCAA regulations to cooperate with this institutional investigation. Student-athletes also are required by NCAA regulations to cooperate in an institutional investigation and may lose their eligibility if they refuse to do so. In the event that a University Park employee or student-athlete refuses to cooperate with you, please contact me immediately.
>
> You are authorized to interview any student-athlete attending or person employed by the University Park campus. You do not need to obtain my prior approval, or the approval of any other person or body, before conducting an interview. . . .
>
> You should report your findings of fact and applicable advice directly to me. You are to provide a full report to me at the conclusion of the investigation, and to provide interim reports on request from me.
>
> It is our agreement that all materials accumulated during the course of the investigation shall be and remain exclusively the property of Liddell, Sapp & Zivley. You have agreed, however, to disclose any such materials to me, or my designated agent, for review at the conclusion of the investigation. (Emphasis added).

The letter includes a statement of agreement signed by a member of the law firm. The university's Exhibit B also includes a letter dated May 7, 1986, in which the chancellor asked the law firm to observe the following procedures:

> 1. Please do not videotape the people you interview. The notes you take of the conversations are adequate for us.
>
> 2. Please do not talk with alumni or other members of the community unless they are directly relevant to statements or comments you have received. (Emphasis added).

These letters relate merely to a fact-finding investigation. There is no suggestion that the law firm was retained in connection with any anticipated litigation. Furthermore, the letters expressly state that the law firm acted on behalf of the university in

conducting the investigation. As a member of the NCAA, the university is answerable to that organization for violations of NCAA rules by university student athletes and personnel. See F. Remington, NCAA Enforcement Procedures Including the Role of the Committee on Infractions, 10 J. of College & University Law, 181, 183 (1983-84). The university allowed the law firm to exercise its power based on NCAA regulations to require student athletes and coaches to cooperate with university investigations. It also allowed the law firm to exercise its power under its employment contract to require athletic department personnel to cooperate with university investigations.

Most important, the letters expressly give the chancellor a right of access to information discovered and records developed during the investigation. He has a right to receive a report of the firm's fact findings, and to request and receive interim reports. At the conclusion of the investigation, the chancellor and his designated agent have a right to review any materials accumulated during the investigation. Finally, in his letter of May 7, 1986, the chancellor states that "[t]he notes you take of the conversations are adequate for us." This indicates that the law firm acted as the university's agent in assembling and maintaining information garnered during the investigation. Ownership of materials accumulated during the investigation remains in the law firm, but the university has considerable power to review those materials. The university's power to require access to the materials prepared by the firm indicates that the firm acted as the university's agent, not as an independent contractor, in developing and holding the investigative records.

We believe that the chancellor's right to examine these records causes them to be subject to the Open Records Act. The law firm prepared them on behalf of the university in connection with the transaction of official business. Although the records may be in the law firm's physical custody they are constructively in the chancellor's custody; for this reason they are, we conclude, within section 3(a) of the act.

Prior Open Records Decisions have not viewed the physical location of records as dispositive of who legally "maintains" them under the act. Open Records Decision No. 332 (1982), for example, dealt with letters about a teacher's performance written by parents and delivered to school board members at their homes. The school district contended that these letters did not constitute information subject to the act. See V.T.C.S. art. 6252-17a, §3(a). Relying on the well-established proposition that all information relevant to an individual's employment relationship is part of his personnel file, however, the decision concluded that the letters constituted part of the teacher's personnel file. Open Records Decision No. 398 (1983) considered whether the act applied to an audit report prepared at the direction of a grand jury but held by a district attorney. It stated:

> The audit report concerning the Imprest Fund is part of the testimony and evidence presented to the grand jury. It remains in the possession of the grand jury even though it physically is held by officials who serve the grand jury as custodians of grand jury files and records. As we already stated, the grand jury is not subject to the Open Records Act. The report in the possession of the grand jury is not public information.

See also Open Records Decision No. 437 (1986). In view of these authorities, we conclude that records which were developed or are maintained by the firm, but which university officials are entitled to examine, are "maintained" by the university within section 3(a) of the act.

The law firm has submitted the following documents:

Exhibit C: representative sample of notes taken by an attorney of an interview with a student athlete;

Exhibit D: typed report of interview;

Exhibit E: E-1 records obtained from student files including grades and test scores;

E-2 personnel files of university football coaches;

E-3 correspondence among the firm, the university, and third parties;

E-4 legal memoranda prepared by firm, discussing NCAA regulations and other questions;

E-5 newspaper clippings;

E-6 miscellaneous documentation including intra-office memos of law firm and file memos on investigation, affidavits by student athletes and summaries of statements by persons interviewed;

E-7 accounting records prepared by the University of Houston.

Some of the records comprising Exhibit E are from the university's files. In a letter included in the university's Exhibit D, the law firm requested the university to assemble for its consideration the following items: a copy of NCAA rules and guidelines; any university file of newspaper clippings relating to the investigation; university files on the matters under investigation, including affidavits from former student-athletes and others; employment agreements for the coaching staff; and employment agreements relating to the matter under investigation for other persons. Some of these records appear in the law firm's Exhibits E-1, E-2, and E-5. Exhibit E-7 consists of accounting records prepared by the university. The two journalists have asked for records prepared by the law firm in regard to the investigations, and we do not understand them to be seeking copies of records prepared by the university and transferred to the law firm at the beginning of the investigation. The law firm records which we need to consider are found in Exhibits C, D, E-3, E-4, and E-6.

The request letter submitted jointly by the law firm and the university argues that these records are within sections 3(a)(7) and 3(a)(11) of the act, and are also excepted by the "informer's privilege" recognized under section 3(a)(1) of the act. See Open Records Decision No. 279 (1981). The firm and the university also invoked the attorney-client privilege aspect of section 3(a)(1). See, e.g., Open Records Decision No. 399 (1983). The letter from the university claims that the requested material is excepted by sections 3(a)(3) and 3(a)(7) of the act. In addition, some of the information regarding students and former students of the University of Houston raises section 14(e) of the act, which incorporates the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g.

The attorney-client privilege insures that a client may communicate freely with his attorney on matters involved in litigation without the fear that details of their communication will be disclosed. West v. Solito, 563 S.W.2d 240 (Tex. 1978). The classic case law definition of the privilege is found in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication is made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege

> has been (a) claimed and (b) not waived by the client.

See In re Grand Jury Proceedings, 517 F.2d 666, 670 (5th Cir. 1975) (adopting this definition); see also Tex. R. Crim. Evid., R. 503 (attorney-client privilege applies to confidential communications between client and attorney made in furtherance of the rendition of legal services and to any other fact which came to the knowledge of such attorney by reason of attorney-client relationship) (formerly codified as article 38.10 of the Code of Criminal Procedure).

Here, we are dealing not with communications of a client, but with information prepared by its attorney. Existing legal authority is to the effect that the privilege embraces an attorney's statements and advice, Dewitt and Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 693 (Tex. App. - El Paso 1985, no writ), but not every such statement. Some courts have held, for example, that an attorney's communication to his client is privileged only if its disclosure would reveal the client's communication to the attorney. See, e.g., SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 521-22 (D. Conn. 1976) (privilege applies only to advice that reveals a fact communicated in confidence by client to attorney, and not to legal opinions given by attorney). Additionally, the attorney's work product doctrine applies only when material is gathered or prepared in anticipation of litigation. See Hickman v. Taylor, 329 U.S. 495 (1947); Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977). The requestor, in this case, has demonstrated no reasonable anticipation of litigation.

With respect to the scope of the privilege under Texas law, the following discussion is relevant:

> For a communication to an attorney to be privileged, the statement must have been made to the attorney during a time when he was acting as legal adviser of the person making it, that is, while the attorney was engaged in the performance of professional services for the client. It must have been made in view of the existence of the relationship of attorney and client between the parties, in professional confidence, and in connection with the procuring of professional advice or aid in the matter to which the communication relates.
>
> The privilege does not apply, it has been held, in cases where the attorney was employed merely to draw papers, such as deeds, mortgages, or the like, nor where the attorney was acting merely as a notary; nor is it said to apply to an attorney who is employed and paid only for making an

> abstract and not with a view of obtaining any legal advice. (Emphasis added).

36 Tex. Jur. 3d Evidence §522 (1984). This establishes that if an attorney is acting in some capacity other than as a legal adviser, communications made to him by the client — and, conversely, communications made by the attorney to the client — are not privileged. "For the privilege to exist, the lawyer must not only be functioning as an adviser, but the advice given must be predominantly legal, as opposed to business, in nature." North American Mortgage Investors v. First Wisconsin National Bank of Milwaukee, 69 F.R.D. 9, 11 (E.D. Wis. 1975). The privilege does not apply, for example, where an attorney acts merely as a technical writer or scrivener, e.g., where he prepares an application for grants or engineering specifications. See Underwater Storage, Inc. v. United States Rubber Company, 314 F. Supp. 546 (D.D.C. 1970). If an attorney acts in a ministerial or clerical capacity, moreover, the privilege does not apply. See United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969).

We conclude that the law firm clearly functioned in two different capacities when it performed its contractual duties. We further conclude that the firm's status as legal adviser was relevant in only one of these capacities, and that the attorney-client privilege applies only in this context. In giving legal advice and opinions based on its investigation, the firm undoubtedly played the role of legal adviser, and the privilege would embrace this advice and these opinions. On the other hand, in conducting the actual investigation, the firm was acting strictly as an investigator. To conclude that the privilege applies to any information collected by an attorney, regardless of whether he was actually acting as an attorney when he collected it, would be inconsistent with the concept of the privilege as discussed in the authorities cited above.

Some documents in the firm's possession are affected by this privilege. To the extent that information therein has been or may be available to the university, it may be withheld under this privilege only if it was communicated by the university or compiled by the firm when the firm was acting as a legal adviser. When it was conducting interviews and otherwise compiling raw factual data, the firm was clearly not acting as a legal adviser, and this material would not be protected by the privilege.

Section 3(a)(3) protects information relating to pending or reasonably anticipated litigation. Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). You do not raise the possibility that the university will bring suit or be sued in a judicial forum. Nor do you suggest that the university will be involved in proceedings before an administrative agency. You instead suggest that an investigation by the NCAA which could result in sanctions constitutes "litigation of a criminal

or civil nature" within section 3(a)(3), and that an NCAA investigation is likely. The NCAA, however, has no legal authority outside of the voluntary cooperation of its member schools; it conducts its own investigations and issues its own sanctions. Moreover, even if the NCAA were to launch a full-scale investigation and to threaten the imposition of sanctions -- and at this point it cannot be said that this is "reasonably anticipated" -- the proceedings would not constitute "litigation" even under the broadest interpretation of that term that can be found in previous decisions. See Open Records Decision Nos. 368 (1983); 301 (1982). Thus, since there is no pending or contemplated litigation in any forum, judicial or quasi-judicial, section 3(a)(3) is not applicable.

Section 3(a)(7) of the act protects

> matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure.

Both the law firm and the university argue that section 3(a)(7) incorporates Ethical Consideration 4-4 of the Code of Professional Responsibility. This ethical consideration states in part:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

State Bar of Texas, Ethical Considerations on Code of Professional Responsibility EC 4-4 (1972). The university argues that section 3(a)(7) is much broader than the attorney-client privilege and that it applies to

> all of the information gathered by the law firm and all communications between the law firm and the university regarding the work of the law firm in the course of the law firm's employment.

We need not determine whether Ethical Consideration 4-4 is relevant to construing section 3(a)(7). But see generally Open Records Decision No. 126 (1976). The law firm will not act inconsistently with Ethical Consideration 4-4 if the client university releases information in its constructive possession which it is required to release under the Open Records Act. Moreover, we do not

believe section 3(a)(7) allows a governmental body to make any information confidential merely by communicating it to its attorney.

This office has read section 3(a)(7) as protecting legal advice and opinion from public disclosure. Open Records Decision No. 380 (1983). Open Records Decision No. 230 (1979), for example, dealt with an investigation into employee misconduct conducted by attorneys for a school district at the behest of the school trustees. The attorneys prepared and submitted a report to the board, which declined to disclose it to the public. An Open Records Act request followed, and the board raised section 3(a)(7). The decision discussed Open Records Decision No. 210 (1978), which determined that correspondence between a school district and its attorney about alleged misconduct by a school superintendent was excepted under section 3(a)(7). Open Records Decision No. 230 distinguished the prior decision as follows:

> While the information involved [in Open Records Decision No. 210] was facially similar to that involved here, the report in that case went well beyond a purely factual report, and consisted in large part of legal advice and recommendations based upon the investigation made. Open Records Decision No. 200 (1978) also recognized the attorney-client privilege in correspondence between a school board and its attorney in which legal advice was sought and given. Here, while the investigation was conducted by attorneys and reflects their skills, the report is a purely factual investigation, and does not contain legal advice or opinion. This office held in Open Records Decision No. 80 (1975) that section 3(a)(7) did not apply to a factual investigation by an agency. See Kent Corporation v. N.L.R.B., 530 F.2d 612 (5th Cir. 1976), cert. den., 429 U.S. 920 (fact that document written by attorney does not exempt it as attorney work product under federal Freedom of Information Act); Associated Dry Goods Corp. v. N.L.R.B., 455 F. Supp. 802 (S.D. N.Y. 1978) (notes of interview not excepted merely because taken by attorney). It is our decision that the report is not excepted under section 3(a)(1) or 3(a)(7) because of an attorney-client privilege. (Emphasis added).

In conducting the investigation, the law firm acted in large part as fact finder. Section 3(a)(7) does not apply to factual information reported by the firm to the chancellor or to other university officers or employees. On the other hand, the firm also acted as legal adviser in giving the university legal advice on subjects relevant to the investigation; section 3(a)(7) would protect such advice from

disclosure. See Open Records Decision Nos. 380 (1983); 210, 200 (1978).

Section 3(a)(11) of the act applies to

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

V.T.C.S. art. 6252-17a, §3(a)(11). This exception applies to memoranda prepared by consultants of a governmental body. Open Records Decision No. 298 (1981). It permits the withholding of "advice, opinion, and recommendations" in such communications. Austin v. City of San Antonio, 630 S.W.2d 391 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 298 (1981). Factual information which can be severed from advice, opinion, and recommendation is not protected from disclosure by section 3(a)(11).

Information protected by the informer's privilege is "information deemed confidential by law" within section 3(a)(1) of the act. The informer's privilege permits governmental bodies to withhold the identities of persons who cooperate with law enforcement investigations or with administrative officials having a "duty of inspection or law enforcement within their particular spheres." Open Records Decision Nos. 285, 279 (1981). The privilege protects the identity of persons reporting possible misconduct of public employees when the alleged conduct might result in criminal prosecution. Open Records Decision No. 230 (1979).

Section 14(e) of the act provides:

> (e) Nothing 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, as enacted by Section 513 of Public Law 93-380, codified as Title 20 U.S.C.A. Section 1232g, as amended.

V.T.C.S. art. 6252-17a, §14(e). The Family Educational Rights and Privacy Act of 1974, also known as the Buckley Amendment, provides that federal funding shall be denied to an educational institution which releases a student's education records without the consent of the student's parents, or the student himself if he is attending an institution of post secondary education. 20 U.S.C. §1232g(b), (d). The Buckley Amendment applies to "education records," defined as follows:

> (4)(A) For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), 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 institutions which receive federal funds. 20 U.S.C. §1232g(a)(3). Information about University of Houston student athletes developed in the investigation is information constructively maintained by the chancellor acting for the university and physically maintained by the law firm acting for the university.

In Open Records Decision No. 447 (1986), we determined that a state university's correspondence regarding actual or possible violations of NCAA rules by its students were education records. We believe that the law firm's notes and reports of interviews with student athletes about their knowledge of or participation in NCAA rules violations constitute education records maintained by a person acting on behalf of an educational agency. Neither the records nor "personally identifiable information contained therein" may be released without the student's consent. The Buckley amendment applies to students presently or formerly enrolled at the university. See 20 U.S.C. §1232g(a), (b); Open Records Decision Nos. 157, 151 (1977).

We now turn to an examination of the records designated exhibits C, D, and E-3, E-4 and E-6 to determine which documents in the constructive custody of the university are excepted by sections 3(a)(1), 3(a)(7), 3(a)(11) or 14(e) of the act. Some documents are not germane to the investigation or are internal documents of the law firm that do not appear to be within the chancellor's right to review records of the investigation. Such documents are not within the act and are, for that reason, not subject to required disclosure.

Exhibit C consists of handwritten notes of interviews with a student at the University of Houston. Exhibit D contains memoranda summarizing an interview with a former student. The notes and the typed memorandum contain information about the student who gave the interview and report his answers to questions about possible NCAA violations by students and employers of the university. Other students are mentioned by name or are described so that they could be identified. The notes and memo contain information directly related to a student and are therefore education records, protected from public disclosure by section 14(e) of the act. Exhibits C and D were

submitted as representative samples of notes and reports on interviews. Section 14(e) applies to similar notes and memoranda reporting interviews with other students and former students of the university.

The firm contacted alumni supporters and university personnel, but it is not clear whether these contacts resulted in interviews. Notes and memos reporting interviews with persons other than students of the University of Houston are not excepted by section 14(e). Whether such records could be withheld in whole or in part under other exceptions cited would require examination of those records. Exhibit D includes information that could be excepted by the informer's privilege in that it deals with misconduct of university personnel. See Open Records Decision Nos. 285 (1981); 230 (1979). Exhibit D consists largely of a narrative account of the interviewee's remarks, but it also includes the attorney's evaluation of the interviewee's demeanor and credibility, which would be excepted by section 3(a)(11). Open Records Decision Nos. 345, 334 (1982); 168 (1977). Records of interviews with non-students might, therefore, be protected in part by the informer's privilege or by section 3(a)(11), if Exhibit D is typical of those records.

Exhibit E-3 consists of correspondence between the law firm and the university and between the firm and third parties. It includes letters from the firm to the university requesting copies of information in the university's files and the university's responses. It also includes copies of form letters sent to university students and employees regarding their availability for interviews and letters to newspapers requesting access to their sources for articles on NCAA violations at the university. Cover letters forwarding fee bills are also found in the Exhibit E-3. In addition, there is some material which probably falls outside of the law firm's agency relationship with the university, such as letters from investigators offering their services in connection with the investigation.

Some of the letters identify students whom the law firm wishes to interview. This identifying information is excepted by section 14(e) of the act. A letter from Walter Zivley to the Chairman of the Board of Regents is excepted in part by section 3(a)(11). One anonymous letter fits the standard for false light privacy set out in Open Records Decision Nos. 372 (1983); 308 (1982). We have marked the portions of Exhibit E-3 which need not be disclosed.

Exhibit E-4 consists of three legal research memoranda which are closed in their entirety by sections 3(a)(7) and 3(a)(11) of the act.

Exhibit E-6 includes materials from university files, including the job description for a particular coaching job and copies of university policies applicable to the athletic department. These materials are open. Other materials concern the law firm's proposed procedures for carrying out the investigation and memoranda on legal

questions raised by the investigation. These items do not contain "public information" within section 3(a) of the act. If the legal research memoranda have been or may be communicated to the university, they are protected by the attorney- client privilege.

Exhibit E-6 also includes drafts of press releases and a letter prepared for the university's consideration but never adopted. These may be withheld under section 3(a)(11). See Open Records Decision No. 196 (1978). It also includes lists of people to be interviewed and allegations to be investigated and a list of individuals who gave interviews with a summary of their comments germane to the allegations. The lists of students' names and information provided by students is excepted by section 14(e) of the act. The remaining lists are available to the public. Copies of affidavits of students regarding NCAA violations are excepted by section 14(e).

A one page summary of a billing to the university is available to the public. A handwritten outline of an interim report on the investigation is also open. Handwritten notes of telephone calls with university personnel and other persons are "public information" within the act to the extent that they contain the kind of investigative information the university contracted to obtain. Portions that may be excepted from public disclosure by any of the applicable exceptions are marked.

A memo of an interview with a university employee is information within the scope of the act. Some portions are excepted by sections 3(a)(1), 3(a)(11), or 14(e) of the act.

Records available to the requestor are marked "open" and must be disclosed to him. Other records are marked to indicate that they do not contain "public information" within section 3(a) of the act or that they are excepted from public disclosure by particular Open Records Act provisions.

We finally consider the university's "Exhibit E," consisting of correspondence between the law firm and the university. A letter from the firm requests information from the university's files which it needs to begin its investigation. This letter is a duplicate of one found in the law firm's Exhibit E-3. One portion of the letter requests names and other information about the students who will be contacted in the investigation. This part of the letter is "directly related to a student" within the Buckley amendment and is therefore excepted by section 14(e) of the act. The rest of the letter is open to the public. Other correspondence identifies students who will be contacted in the investigation and is excepted by section 14(e).

There is also a copy of a letter from the law firm to a university regent. A copy of this letter is also found in Exhibit E-3 of the law firm. It is excepted in part by section 3(a)(11) of the act. The remainder is available to the requestor.

The final items in the university's Exhibit E are two letters consisting of legal advice from the law firm. These letters are excepted by sections 3(a)(7) and 3(a)(11) of the act.

Very truly yours,

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