



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 18, 1989

Mr. James B. Bond
Deputy Chancellor for Legal & External Affairs
The Texas A&M University System
College Station, Texas 77843-1230

Dear Mr. Bond:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6213; this decision is OR89-217.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

Texas A&M University, a public state university, received a request from a journalist asking the university to release various documents, including correspondence, notes, memoranda, and reports possessed by the university that relate to any investigation(s) by the NCAA on the subject of alleged football recruiting violations, specifically concerning a former assistant football coach and the ACT test score of a student athlete who attends or attended the university. The university seeks to withhold disclosure of the requested information on the basis that the information constitutes student records excepted from disclosure under sections 3(a)(14) and 14(e) of the act. The university considers that the requested information is similar, if not identical to, information held to be

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excepted from disclosure in Open Records Decision No. 447 (1986).

Section 3(a)(14) specifically excepts from disclosure

student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, that student's parent, legal guardian, or spouse or a person conducting a child abuse investigation required by Section 34.05, Family Code.

Section 14(e) states that

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.

You have submitted seven items relevant to the request for information the requestor believes to be held by the university.

In Open Records Decision No. 447 (1986), we concluded that section 14(e) of the Act applied to information about identifiable student athletes found in correspondence records from a state university to the NCAA, as such personally identifiable information constituted "education records" within the federal act, and thus could not be released without the student's consent.

In Open Records Decision No. 462 (1987), it was determined that a state university's correspondence regarding actual or possible violations of NCAA rules by its students constituted student records, and that neither the records nor "personally identifiable" information contained therein could be released.

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These prior decisions except from disclosure only the names or other identifying characteristics of students involved in the investigation of alleged recruiting violations, but do not except from disclosure the substance of the correspondence after the students' names and other identifying information have been deleted. Taking each document that you sent to this office in turn, only the names of students in the letter dated February 7, 1989, from Charles Smrt to Robert Smith, are excepted from disclosure. Likewise, only the names of students in the letter of January 5, 1989, from Robert Smith to Charles Smrt, are excepted. In the letter dated August 19, 1988, from Theresa Semel to Billy G. Lay, the name of the student is excepted from disclosure, as would be the names of students mentioned in Billy G. Lay's letter of August 10, 1988, Robert Smith's letter of November 10, 1988, and Charles Smrt's letter of September 2, 1988.

You indicate in your letter that you cannot comply with the requestor's request for "any and all interim reports prepared by investigators or Robert Smith concerning the allegations contained in the NCAA letter of September 2, 1988," because the report, which you acknowledge was prepared by the university, is in the hands of the NCAA and that no copy was retained by the university. A government agency is not required to obtain information not in its possession. Open Records Decision Nos. 445 (1986); 317 (1982). However, prior Open Records Act decisions have not viewed the physical location of records as dispositive of who legally maintains them under the act. see Open Records Decision Nos. 398 (1983), 332 (1982). In prior decisions, records that were developed or maintained by a third party for the agency were held to be "maintained" by a university within the meaning of section 3(a) of the act. In Open Records Decision No. 462 (1987), we also determined that a law firm's notes and reports of interviews with student athletes about their knowledge of recruiting violations constituted educational records maintained by a person acting on behalf of an education agency.

Therefore, the mere fact that the university has not retained a copy of the reports it prepared for, or sent to, the NCAA is irrelevant: it is nonetheless information covered by the Act, and subject to the same tests regarding student records as noted above in relation to the correspondence requested. Because the report at issue is within

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the constructive possession of the university, the university has a duty to attempt to obtain a copy.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-217.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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DAN/bc

Ref.: ID#6213

cc: Mr. Doug Bedele
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Enclosures