



Office of the Attorney General
State of Texas
October 2, 1991

DAN MORALES
ATTORNEY GENERAL

Mr. Mel Hazelwood
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR91-461

Dear Mr. Hazelwood:

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# 11940.

The University of Texas at El Paso [UTEP] received four written requests for information concerning an investigation of its men's intercollegiate basketball program by the National Collegiate Athletic Association [NCAA]. The requestors seek access to the following categories of information:

- (1) all documents in the university's possession relating to the NCAA investigation with regard to allegations against athletic department boosters, coaches, and other persons with the exception of students;
- (2) all documents regarding written agreements between the El Dorados, a private organization formed to support UTEP athletics, and hotels and motels in the El Paso area concerning discount rates for student athletes or prospective student athletes;
- (3) a copy of a letter sent by the NCAA to an assistant men's basketball coach informing him of allegations that he violated NCAA rules or "legislation";

(4) any information in the letter of official inquiry delivered to the university by the NCAA concerning allegations of rules violations involving a former student athlete, now deceased; and

(5) copies of correspondence between the university and the NCAA concerning the former student's traffic and parking violations.

You advise that the university voluntarily released some of the requested information prior to the submission of these requests. The information made public consists of a summary of NCAA allegations against the university, a copy of the letter sent to the president of the university by the Assistant Executive Director for Enforcement for the NCAA, and excerpts of the NCAA's letter of official inquiry directed to the president of the university. The publicized excerpts of the letter of official inquiry include information pertaining to a prospective student athlete who never enrolled at the university, allegations against university employees, and allegations concerning the deceased former student. You advise that the university does not have possession of or access to any information corresponding to the second category of information described above. A handwritten notation on the copy of the fourth request for information (exhibit 1D) indicates that the requestor has been granted access to information in the fifth category.

You have supplied for our inspection copies of the NCAA's letter of official inquiry to the president of the university and the letter from the NCAA notifying the assistant men's basketball coach of several allegations of rules violations made against him. You ask whether the information that has not yet been publicly disclosed -- *i.e.*, references to students or former students of the university, third parties who are neither students nor employees of the university, and local businesses -- may be withheld pursuant to sections 3(a)(1), 3(a)(3), 3(a)(14), or 14(e) of the Open Records Act. You also ask, in connection with your section 3(a)(3) claim, that we reconsider Open Records Decision No. 462 (1987), in which this office determined that an investigation by the NCAA that could result in sanctions against a public university was not "litigation" for purposes of section 3(a)(3).

Section 3(a)(1) of the Open Records Act protects from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." This exception incorporates constitutional and common-law

doctrines of privacy and provisions of other statutes declaring particular information confidential. Other than the federal Family Educational Rights and Privacy Act, which will be addressed below in conjunction with sections 3(a)(14) and 14(e) of the Open Records Act, you have cited no particular statute that makes the requested information confidential, but you have identified several items of information as representing third-party privacy and property interests.

A previous determination of this office, Open Records Decision No. 447 (1986), governs this aspect of your request. There it was determined that constitutional privacy does not attach to information about alleged violations of NCAA rules. The decision also found that information in the files of a state university alleging NCAA rules violations by persons who are not students of the university is not excepted by common-law privacy. *See also Kneeland v. Nat'l Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1083-84 (W.D. Tex. 1986) (public interest in violations of NCAA rules), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988) *cert. denied* 488 U.S. 1042 (1988). In our opinion, nothing in the NCAA letter of official inquiry alleges facts that would meet the common-law privacy test. Consequently, information in the letter relating to persons who are neither current nor former UTEP students may not be withheld from public disclosure on grounds of privacy.

Section 3(a)(14) of the Open Records Act excepts from public 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.

This provision must be examined in conjunction with section 14(e) of the act which provides the following:

Nothing in this Act shall be construed to require the release of information contained in the 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.

These provisions have previously been held to require a state university to withhold information relating to possible NCAA infractions involving identifiable student athletes currently enrolled at the institution and to those formerly enrolled at the institution so long as the information relates to the former student's experiences as a student at the institution. Open Records Decision Nos. 539 (1990); 469 (1987); 447 (1986). They do not protect information relating to persons who never enrolled at the institution, however. Open Records Decision No. 447 (1986). These provisions, moreover, protect only such information as is "reasonably necessary to avoid personally identifying" a student or the student's parents; they do not apply to whole documents. Open Records Decision Nos. 332 (1982); 206 (1978). Information is "personally identifiable" to a student if it makes the student's identity "easily traceable." Open Records Decision No. 165 (1977).

The NCAA letter identifies several former UTEP student athletes and their parents or relatives. Information identifying these individuals must be deleted from the letter. Open Records Decision No. 524 (1989). We are aware of at least one reference to a former student athlete regarding actions taken after he was no longer a student at the university. This information and any other references to former students concerning their conduct after they were no longer enrolled at the university cannot be excepted pursuant to either the Family Educational Rights and Privacy Act or section 3(a)(14) and must therefore be released. See Open Records Decision No. 539 (1990).

Section 3(a)(3) of the Open Records Act excepts the following from required public disclosure:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) affords a governmental body the opportunity to protect its position in litigation by forcing parties to the litigation to obtain information relating to the proceedings through the formal discovery process. Open Records Decision Nos. 551 (1990); 454 (1986); 281 (1981). Its enactment signalled the legislature's intention that parties in litigation with governmental bodies not be permitted to circumvent the discovery process by use of the Open Records Act as a means to obtain relevant information. Attorney General Opinion JM-1048 (1989); Open Records Decision No. 551 (1990).

For information to be excepted by section 3(a)(3), it must be demonstrated that litigation is pending or reasonably anticipated and that the requested information relates to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Where the attorney for the governmental body determines that the information relates to pending or anticipated litigation, this office's review will be confined to ascertaining whether that determination is reasonable in light of the facts. See Open Records Decision No. 551 (1990). Section 3(a)(3) will protect information from public disclosure only while litigation is reasonably anticipated or during the actual pendency of the litigation. *Id.* It will not shield information once the parties to the litigation have actually received it, Open Records Decision No. 511 (1988), or reviewed it pursuant to discovery, Open Records Decision No. 454 (1986).

In addition to lawsuits brought in the courts, the term "litigation" in section 3(a)(3) encompasses proceedings in quasi-judicial forums, such as contested cases brought before state administrative agencies pursuant to the Administrative Procedure and Texas Register Act, article 6252-13a, V.T.C.S. Open Records Decision Nos. 368 (1983); 301 (1982). You argue that an investigation conducted by the NCAA should be included within the term "litigation."

Open Records Decision No. 462 (1987) addressed the status of NCAA investigations under section 3(a)(3). At issue were records prepared by a law firm engaged by the University of Houston to gather information from student athletes and athletic department personnel regarding various allegations levelled against the athletic department. The records were prepared prior to an NCAA investigation, but the university and the law firm were acting pursuant to NCAA rules. Open Records Decision No. 462 (1987) at 7. In answering whether section 3(a)(3) would apply to the records prepared by the law firm, the attorney general concluded:

[You do not] 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.

Id. at 11-12.

You take issue with this determination and ask that we reconsider it. You offer three arguments in favor of finding that NCAA proceedings are litigation for purposes of section 3(a)(3). We will consider each of your arguments in turn.

First, you point out that Open Records Decision No. 462 (1987) is factually distinguishable from the instant case because here the NCAA has completed its inquiry and requested that the university further investigate the matter. You have not explained how this fact affects the status of NCAA investigations for purposes of section 3(a)(3), and we do not view this distinction as dispositive of your section 3(a)(3) claim.

You also argue that our prior determination that NCAA proceedings are not litigation for purposes of section 3(a)(3) fails to acknowledge the reality of institutional participation in intercollegiate athletics. You reason that since membership in either the NCAA or the National Association of Intercollegiate Athletics is a prerequisite to participation in intercollegiate athletics, an institution's compliance with the rules and orders of the NCAA is equivalent to an individual's voluntary submission to regulation by a licensing body with sanction powers such as

the state bar. You argue, in effect, that the NCAA's monopoly over intercollegiate athletics is equivalent to state regulation.

There is no denying the pervasive nature of intercollegiate athletics or its stature in the eyes of the general public. This fact, however, does not elevate the NCAA's operations to sovereign status. Your argument equates regulation by the NCAA with regulation by the state but does not account for its private and voluntary character. The NCAA is a private organization whose membership is composed of hundreds of public and private institutions of higher education. See *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989). Membership in the NCAA is purely voluntary, and no state institution of higher education is required to become a member. The NCAA, moreover, is not a governmental body for purposes of the Open Records Act, a conclusion which would follow naturally from your argument. *Id.*

When the NCAA investigates allegations of rules violations against one of its members, it does so as a private entity acting on behalf of its remaining members. Commenting on a lengthy and well-publicized NCAA investigation, the United States Supreme Court summarized the investigatory powers of the NCAA thus:

The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against [the university], with the ultimate sanction being expulsion of the University from membership. (Footnote omitted.)

Nat'l Collegiate Athletic Ass'n v. Tarkanian, 109 S.Ct. 454, 464-465 (1988). These characteristics fundamentally distinguish NCAA investigations from "litigation" as that term has been applied by the courts and by this office in decisions under the Open Records Act.

As previously noted, the litigation exception has been applied by this office outside the judicial branch of government to include only quasi-judicial proceedings of administrative agencies in the executive branch of government. See Open Records Decision Nos. 556 (1990); 474 (1987); 436 (1986); 368 (1983); 301 (1982). Section 3(a)(3) has never been applied to the disciplinary proceedings of a purely

private organization such as the NCAA. Although there have been limited efforts to bring intercollegiate athletics under the sanction of the state, see Civ. Prac. & Rem. Code ch. 131 and V.T.C.S. art. 8871, we are aware of no other Texas law that purports to regulate the affairs of the NCAA in any way. Unlike lawsuits in the courts and contested cases before administrative agencies, the state has no legislative power to control the conduct of the NCAA proceedings other than the collective influence that may be exerted on the NCAA by public universities of this state that are members.¹

In other contexts the courts will sometimes apply the term "litigation" more narrowly than this office has under the Open Records Act. In *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989), the court held that proceedings before Industrial Accident Board were not "litigation" for purposes of Rule 166b, subdivision 3, paragraph d of the rules of civil procedure. The court rejected the expansive definition of "litigation" adopted by the court of appeals, a definition quoted with approval in Open Records Decision No. 301 (1982), which held that adversary proceedings before administrative agencies were litigation for purposes of section 3(a)(3). The courts have not extended application of the term to matters outside the the judicial or executive branches of government. See *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989); *Davis v. First Nat. Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1942). See also Garner, *A Dictionary of Modern Legal Usage* 344 (1987) ("litigation" properly refers to the *process* of carrying on a suit in law or equity, rather than the proceeding itself). The cases and decisions also suggest that "litigation" encompasses proceedings for which some form of judicial relief, either by appeal or trial de novo, is provided by statute. See *Flores, supra* (proceedings in which reviewing tribunal is not bound by lower tribunal's fact findings is not litigation); Open Records Decision Nos. 474 (1987); 301 (1982). No such relief is statutorily offered to public universities that are disciplined by the NCAA.

Finally, you observe that, its voluntary character aside, the NCAA can impose severe sanctions on an institution, its employees, and student athletes. These sanctions include the remittance of all monies received by UTEP from its basketball team's participation in NCAA post-season tournaments, curtailment of recruiting activity, a reduction in the number of athletic scholarships the university

¹This influence, moreover, can only be exerted in concert with public and private institutions from all other states that are members of the NCAA.

may award, the withdrawal of scholarships to particular student athletes, and the banning of student athletes and university employees from further participation in NCAA activities.

These contingencies do not convert an NCAA inquiry to litigation for purposes of section 3(a)(3). At most, the inquiry threatens sanctions which, if imposed, might form a basis for concluding that litigation in the courts is reasonably anticipated. See Open Records Decision Nos. 336, 326 (1982); 281, 270, 266 (1981) (EEOC complaints are not "litigation" for purposes of 3(a)(1), but are evidence of reasonable probability of litigation).² Consequently, we are not persuaded that Open Records Decision No. 462 (1987) was incorrect in its assessment of NCAA investigations under section 3(a)(3) of the Open Records Act, and we decline to overrule it at this time.

To summarize, we conclude that the identities of current and former student athletes at the University of Texas at El Paso, their parents, and their relatives may be deleted from the NCAA letter of official inquiry pursuant to section 3(a)(14) of the Open Records Act. However, information relating to former student athletes regarding actions taken after they were no longer enrolled at the university may not be withheld from public disclosure. Information relating to third parties who are neither students nor relatives of students, and information relating to local businesses may not be withheld pursuant to section 3(a)(1) of the Open Records Act. An NCAA investigation of a state university's intercollegiate basketball program is not litigation for purposes of section 3(a)(3) of the Open Records Act.

²A similar argument was addressed in the Tarkanian case. In arguing that the NCAA was a "state actor" for purposes of the Due Process Clause of the 14th Amendment, Coach Tarkanian complained that because of the NCAA's overbearing control over intercollegiate athletics, the University of Nevada at Las Vegas had no alternative but to comply with its demands. To this the Court responded that the

University's desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA would obviously thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

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 OR91-461.

Yours very truly,



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Opinion Committee

SA/mc

Ref.: ID#s 11940, 12039, 12161, 12223, 12270

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