

ORIGINAL

In the
Supreme Court of Ohio

STATE, ex rel. ESPN, INC.,

Petitioner,

v.

THE OHIO STATE UNIVERSITY,

Respondent.

Case No. 2011-1177

Original Action in Mandamus

**MOTION OF THE OHIO STATE UNIVERSITY FOR REFERRAL TO
MEDIATION AND STAY OF THE SCHEDULING ENTRY**

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FILED
SEP 28 2011
CLERK OF COURT
SUPREME COURT OF OHIO

I. Introduction

Pursuant to Supreme Court Practice Rules 17.1(A) and 14.4, The Ohio State University asks the Court to refer this public-records case to mediation and to stay the scheduling entry issued on September 21, 2011, pending the conclusion of mediation. See *Case Announcements*, 2011-Ohio-4751.

Since ESPN filed this action, the parties have been working together to resolve the requests underlying the case. These efforts have been diligent and cooperative—and most important, they have been productive and are ongoing. Mediation would allow the parties to continue these efforts and to simplify the issues before the Court (and perhaps resolve the case entirely).

This Court frequently orders mediation in public-records cases (indeed, often, as a matter of course) and it urges parties to cooperate in handling records requests. See, e.g., *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, ¶ 18. Denying mediation here would prematurely cut off the parties' efforts to narrow the issues in play and it would discourage the type of diligent communication between parties favored by this Court and Ohio's public records law.

Accordingly, Ohio State respectfully urges the Court to order mediation and to stay the scheduling order pending resolution of that process.

II. The parties have been cooperating to resolve the requests underlying this suit.

This case relates to four requests made by ESPN to Ohio State in April and May of 2011 for: (1) "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" (the "Sarniak" request); (2) "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" (the "Tressel request"); (3) "Any and all emails or documents listing people officially barred

from student-athlete pass lists (game tickets) since January 1, 2007” (the “pass-list request”); and (4) “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” (the “past-violations request”). Cmpl. ¶¶ 12, 13, and 16.

The correspondence between Ohio State and ESPN—attached here as Exhibits A-G—shows plainly that the parties have been cooperating to resolve the requests underlying this action and that those efforts are ongoing.

First, even before ESPN filed suit on July 11, 2011, Ohio State was responding to its requests and had already produced thousands of pages of documents in response to ESPN’s numerous and evolving requests concerning the football program. See Exhibit A (Letter of 7/29/11 from Ohio State’s Jim Lynch to ESPN).

Second, after the lawsuit was filed, the university’s substantial efforts to respond to ESPN continued. On July 29, 2011, Ohio State produced all non-privileged documents responsive to both the Sarniak request and the pass-list request. See Exhibit B (Letter of 7/29/11 from Ohio State counsel to ESPN’s counsel). And notwithstanding problems with the breadth and form of the two other requests—the past-violations and Tressel requests—Ohio State made clear that it was willing to work with ESPN to refine and clarify those requests and resolve them. *Id.*; see also Exhibit E (Letter of 8/24/2011 from Ohio State counsel to ESPN’s counsel).

Third, the parties’ cooperative efforts have been productive and are ongoing. ESPN recently told Ohio State that it considers the pass-list request satisfied. See Exhibit F (Letter of 9/16/2011 from ESPN’s counsel to Ohio State counsel) (“It appears that Ohio State has produced all the records it has that are responsive to ‘student-athlete’ pass lists.”). Also moving forward is

the past-violations request. Although Ohio State informed ESPN that this request was unworkably overbroad and inconsistent with the manner in which the university maintains its records, the university also proposed a fix. The university provided ESPN with a summary (an index, essentially) of all football-related violations going back to January 1, 2005, see Exhibit A at p.3, and ESPN is now identifying which records, related to which violations, it wishes to see. See Exhibits E, F, and G (Letter of 9/22/11 from Ohio State counsel to ESPN's counsel). Finally, in order to resolve the Tressel request, Ohio State is in the process of providing ESPN with information on the manner in which those records are kept, so that ESPN can refine its request. See Exhibits F and G.

In sum, the parties have been diligently communicating to resolve many of the issues underlying this action and those efforts remain active and ongoing.

III. Mediation would considerably simplify the issues before the Court.

Mediation is warranted if it could result in either "settling the case" or "simplifying the issues." S.Ct. Prac. R. 17.1(A). One of those results is certain here.

If the current briefing schedule stands and the Court denies mediation, the Court will have before it all three unresolved requests: the Sarniak request, the Tressel request, and the past-violations request. Together, those issues will require the Court to adjudicate not only FERPA (Family Educational Rights and Privacy Act) questions, but also a score of more challenging and unwieldy issues relating to whether ESPN's requests are overbroad and whether they are consistent with the manner in which the university maintains its records, including electronically stored information and its searchability.

But there is no reason for the Court to take up such a legally and factually sprawling case just now, especially when the parties are still working to resolve some, if not all, of the remaining requests. The attached correspondence confirms that the parties' communications are

frequent and ongoing, and that they continue to be productive. As detailed above, Ohio State and ESPN have already resolved the pass-list request, and the parties are actively working to resolve at least the Tressel and past-violations requests too—and there is a strong likelihood that these will also be resolved.

As for the Sarniak records, it may be that this Court must ultimately resolve whether certain of those documents can be withheld or redacted under FERPA. Those legal questions remain mostly disputed by the parties. But even as to that issue, there remains a possibility of resolution worth exploring in mediation, since ESPN seemed to recognize early on that FERPA *does* require the protection of personally-identifiable student information. See ESPN’s Memorandum in Support of Complaint for Mandamus at p. 13 (“it is expected that student names will be redacted.”).

In short, resolution of some (if not all) of the requests remains likely. There is simply no justification for cutting off these efforts now. Indeed, resolution will only become more difficult if the parties must adhere to the existing case schedule and shift their attention away from resolving the remaining issues. The Court—and the parties—would be best served by staying the scheduling entry and referring this case to mediation so that the issues before the Court can be narrowed and simplified.

IV. Denying this request would discourage the cooperation between the parties that is favored by Ohio’s public records law and this Court.

Ohio’s public records law contemplates that the requester and a public entity will cooperate in resolving document requests. See, e.g., R.C. 149.43(B)(2) (describing cooperative method for resolving overly broad or ambiguous requests). Likewise, this Court has emphasized that “parties are encouraged to cooperate to achieve a mutually acceptable resolution of the pending

records requests.” *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, ¶ 14.

Throughout this case—and even before it was filed—Ohio State has taken seriously those mandates of cooperation and disclosure. Even before ESPN filed suit, Ohio State provided ESPN with thousands of pages of documents in response to its numerous and evolving requests concerning the football program. The university even created a public website that makes available voluminous documents relating to the football program’s recent difficulties.¹ And since the lawsuit was filed, Ohio State has continued working with ESPN to resolve its requests, including turning over many more responsive pages.

It is indisputable that these efforts have been productive and that they are not at an impasse. Of the four requests, ESPN acknowledges that the pass-list request is now resolved, and the parties’ correspondence confirms that they stand a good chance of resolving some, if not all, of the three remaining requests.

But moving forward with briefing now, and denying mediation, sends a signal that the parties’ efforts, which are ongoing, have been for naught. Where there is evidence that the parties have been diligently communicating to bring about a resolution consistent with Ohio’s tradition of open records—and that evidence exists here in spades—this Court should offer the parties its best tool for resolving or narrowing the issues and should refer the matter to mediation.

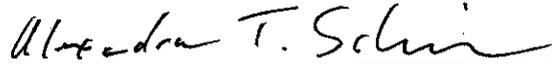
V. Conclusion

For all of the foregoing reasons, Ohio State asks the Court to refer this case to mediation and to stay the pending scheduling entry until that process is complete.

¹ See <http://www.osu.edu/news/ncaadocs/>.

Respectfully submitted,

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Ohio Attorney General



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July 29, 2011

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Via counsel

Justine Gubar
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Via counsel

Re: Public records requests in *State ex rel. ESPN, Inc. v. The Ohio State University* (Ohio S. Ct.), Case No. 11-1177

Dear Tom and Justine,

I am writing to respond more fully to the public records requests underlying ESPN's lawsuit. More specifically, I want to express Ohio State's surprise at the lawsuit and to provide additional information and responses relating to those requests.

As you know, we have produced thousands of pages of documents in response to ESPN's numerous and evolving requests concerning the football program. As you also know, we have previously provided a number of documents regarding the requests underlying the lawsuit, including documents concerning the Sarniak e-mails (see my e-mail of May 27, 2011), past NCAA violations (see my e-mail of June 6, 2011), and the ongoing NCAA investigation (see the materials posted at <http://www.osu.edu/news/ncaadocs> on June 8, 2011 and <http://www.osu.edu/news/newsitem3199>).

Consistent with our long working relationship and many telephone conversations, we viewed the process of responding to several of those requests as ongoing. The university was unaware that ESPN thought otherwise. Indeed, we regularly interacted

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EXHIBIT A

Although the university believes that several of the requests as drafted are not consistent with the public records law, we have continued to evaluate your requests and have gathered additional documents that may be of interest to you. Those documents are copied onto the PDF file on the disc accompanying this letter, and relate to the contested requests, 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 know, such action is not required by the public records act. See *State ex rel. Zauderer v. Joseph*, 62 Ohio App. 3d 752, 756 (10th Dist. 1989). See also *State ex rel. Fant v. Tober*, No. 63737, 1993 Ohio App. LEXIS 2591 at *4 (8th Dist. Apr. 28, 1993); *aff'd* 68 Ohio St. 3d 117 (1993); *State ex rel. Thomas v. Ohio State University*, 71 Ohio St. 3d 245 (1994); *State ex rel. Dillery v. Icsman*, 92 Ohio St. 3d 312 (2001).

We have nonetheless made all reasonable efforts to respond to your request as drafted. See documents numbered as pp. 1-124 of the PDF file, which include the materials provided to you in my e-mail of May 27, 2011 as referenced above. Please note that personally identifiable information regarding our students was redacted in keeping with the Family Educational Rights and Privacy Act ("FERPA").

Notwithstanding the breadth of your request and the associated compilation difficulties resulting from it, the university believes that the attached documents constitute the complete universe of records that you apparently seek here, with the exception of documents that are being withheld because they are:

- Covered by attorney/client or work product privileges. Such documents are properly withheld under R.C. 149.43(A)(1)(v). See *Squire, Sanders & Dempsey, L.L.P. v. Givaudan*, 127 Ohio St. 3d 161, 2010-Ohio-446; *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority*, 121 Ohio St. 3d 537, 2009-Ohio-1767.
- Education records the contents of which are so directly related to individual students as to make their entire contents personally identifiable information protected under FERPA. See 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.3, "Education Records" subsection (a)(1); "Personally Identifiable Information" subsection (g).

"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"

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. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17; *State ex rel Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623; *State ex rel. Zauderer v. Joseph* (10th Dist. 1989), 62 Ohio App. 3d 752, 756.

The University posted a large number of documents responsive to this request on our website shortly before the filing of your lawsuit (<http://www.osu.edu/news/ncaadocs> and pp. 125-449 of the PDF file) and we continue to update our website at appropriate junctures on matters related to the ongoing NCAA investigation. (Please note that personally identifiable information regarding our students was redacted from the materials posted on the web in order to comply with FERPA). We suggest that you review these documents on the web and further refine or clarify your request as necessary.

"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. That list is at pp. 450-466 of the PDF file.

"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"

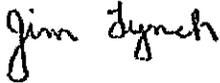
Portions of this request improperly seek a complete duplication of the university's voluminous files on these matters. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17. Further, it is inconsistent with the manner in which the university organizes its files. It is also overbroad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

Nonetheless, we want to work with ESPN to refine your request. To that end, we are enclosing the documents numbered as pp. 467-493 of the PDF file, which summarize all football related violations going back to January 1, 2005. (Please note that personally identifiable information regarding students was redacted in keeping with FERPA). Please let us know which records, related to which violations, you are interested in.

As indicated above, the university did not intend the e-mails cited in ESPN's lawsuit to be the final word on the company's requests. We were surprised that ESPN chose to proceed with litigation, and we believe that a continuation of our regular and ongoing conversations would have been fruitful in identifying any public records that you may be seeking.

We look forward to continuing to work with ESPN and would be happy to discuss these matters further if you would like to refine or modify your requests after reviewing the documents attached.

Best Regards,

A handwritten signature in cursive script that reads "Jim Lynch".

Jim Lynch
Senior Director of Media Relations



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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July 29, 2011

VIA E-MAIL

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RE: *State ex rel. ESPN, Inc. v. The Ohio State University* (Ohio S. Ct.), Case No. 11-1177

Dear Jack,

I am writing to follow up on our telephone conversation of Thursday, July 21, and to forward additional materials from OSU that might resolve the case.

As we discussed, I and several of my colleagues at the Attorney General's Office will be representing OSU. It is our Office's policy to avoid needless disputes and focus on the practical interests and legal issues in a case. Consequently, please do not hesitate to contact me about any ideas or concerns you may have.

As we also discussed, this case came in the midst of OSU's continuing efforts to respond to ESPN's public records requests and hence took OSU by surprise. The university's process of responding to ESPN's requests was still ongoing, and OSU thought ESPN understood that.

OSU nonetheless has continued to gather documents responsive to ESPN's requests. It has collected additional documents and explained the University's position in a letter to the reporters who made the requests. Because litigation has commenced, we are giving that letter to you to forward to the reporters. We ask that you and your client review the enclosed materials to see if they resolve ESPN's outstanding requests, and hence this case.

Best regards,

MIKE DEWINE
Ohio Attorney General

Todd R. Marti
Principal Assistant Attorney General

Enclosures

EXHIBIT B

GRAYDON HEAD

LEGAL COUNSEL | SINCE 1871

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August 4, 2011

Todd R. Marti, Esq.
Principal Assistant Attorney General
MIKE DEWINE OHIO ATTORNEY GENERAL
Education Section
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Columbus, OH 43215

Re: State ex rel. ESPN, Inc. v. The Ohio State University
Case No. 11-1177

Dear Todd:

I am writing in response both to your July 29, 2011 letter and the letter addressed to Tom Farrey and Justine Gubar on the same date. ESPN maintains its position that: (1) its record requests were proper in both wording and scope; and (2) FERPA does not apply to the records it has requested. While we appreciate the ongoing nature of responding to public records requests, the volume of documents which Ohio State has provided to ESPN in the past, and those additional documents attached to your letter, Ohio State continues to withhold documents and information on the basis of FERPA and overly broad or improperly drafted requests. This information is the very subject of the current lawsuit.

As described both in ESPN's Complaint and the supporting Memorandum, FERPA does not apply to the requested records. They are not "education records." Therefore, Ohio State's redaction of information based on FERPA is improper. ESPN is entitled to unredacted documents responsive to its requests. Likewise, Ohio State cannot rely on FERPA to withhold entire documents.

Furthermore, ESPN's requests comport with the Public Records Act. They are specific as to the dates and subject matter of the records sought. They are simply not overly broad. Ohio State's reliance on *State ex rel. Glasgow v. Jones* is misplaced. In *Glasgow*, the requestor sought all emails, text messages and written correspondence sent to and received by a state representative regarding any issue at any time she was in office. Here, ESPN seeks specific information from a defined time frame regarding limited topics. Ohio State's use of the "overly broad" exception to curtail or shape its responses to ESPN's properly drafted requests is therefore improper.

Finally, Ohio State contends that many of ESPN's requests are inconsistent with the manner in which it organizes its records. However, the requests used precisely the types of "key word" identifiers as Ohio State Senior Director of Media Relations, Jim Lynch, suggested. Mr. Lynch communicated this requirement to both Tom Farrey and Justine Gubar. Therefore, the requests not only complied with the Public Records Act, they were drafted in the specific manner that Ohio State requested.

Cincinnati at Fountain Square

Northern Kentucky at the Chamber Center

Butler/Warren at University Pointe

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EXHIBIT C

ESPN's position on each of the disputed requests in light of the July 29th letters is outlined below:

1. *"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"*

Ohio State now contends that the request does not correspond to the manner in which its records are organized. Ohio State claims, "we do not track or organize correspondence by a particular word or specific information that may be of interest to a requestor." However, as noted above, "key word" requests are not only acceptable, but requested by Jim Lynch. Ohio State has denied prior records requests because they *did not* contain key words. Ohio State's response is therefore inconsistent with its own directives to requestors.

While Ohio State provided additional documents responsive to this request (pages 1-124 of the attachment to your letter), it has redacted any personally identifiable information regarding students, citing FERPA. Ohio State also withheld whole documents because they are "education records the contents of which are so directly related to individual students as to make their entire contents personally identifiable information protected under FERPA." Again, the disputed records are not education records, so FERPA does not apply to them. Any redaction is therefore improper. Similarly, Ohio State has no basis to withhold entire documents on the basis of FERPA.

Ohio State also noted that it has withheld documents "covered by attorney-client or work product privileges." To the extent that requested documents are actually privileged, ESPN requests a "privilege log" of those documents, identifying the parties, date, and subject of the interaction.

2. *"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."*

Ohio State contends that this request is inconsistent with the manner in which its records are organized. There is no explanation of this assertion in Jim Lynch's letter. Ohio State also claims the request is overly broad. As discussed above, however, this request is specific in date and subject matter and sufficiently targeted to constitute a proper request. Given ESPN's interest in "the NCAA investigation of Jim Tressel" it is difficult to conjure a more targeted or narrower request to obtain the information ESPN seeks. Even if a proper response to this request amounted to a "complete duplication of a file," that file would represent a finite set of documents related to (and presumably kept as) "the NCAA investigation of Jim Tressel."

The suggestion that ESPN review documents that Ohio State has posted on its website, a "large number" of which are responsive to this request is inconsistent with Ohio State's obligation under the Public Records Act. ESPN made a proper records request and Ohio State must provide all documents responsive to that request.

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

ESPN is still awaiting background documents and details relating to this request. For example, ESPN seeks information regarding Dennis Talbott, who appears on the list produced. Jim Lynch has orally promised to provide this information and has yet to do so.

4. *"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."*

Ohio State again contends that this request is overly broad and inconsistent with the manner in which the records are organized. While Ohio State has provided a summary of football-related violations going back to January 1, 2005, it has redacted student names, citing FERPA. First, this request is sufficiently narrow and targeted. To the extent that the request asks for "multiple classes of documents concerning multiple different matters," ESPN requests "all documents" responsive to the request, regardless of class. Similarly, in response to Ohio State's request that ESPN specify "which records, relating to which violations" it is interested in, ESPN requests "all records" relating to "all violations." Second, the records are not FERPA-protected education records so ESPN is entitled to unredacted copies of these records.

While ESPN appreciates its ongoing relationship with Ohio State, the wrongful assertion of exceptions to the Ohio Public Records Act allows Ohio State to simply pick and choose which information it wants to release and which it wants to conceal. This is inconsistent with the letter and the purpose of the PRA. As such, ESPN seeks the full disclosure of all documents responsive to its requests, as stated in the Complaint. This includes but is not limited to, all documents or information withheld on the basis of FERPA, all documents or information withheld due to allegedly overbroad requests, all documents or information withheld because requests are purportedly inconsistent with the manner in which the information is organized and a summary log of any documents withheld due to attorney client or work product privileges.

Very Truly Yours,

GRAYDON HEAD & RITCHEY LLP


John C. Greiner

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August 15, 2011

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Principal Assistant Attorney General
MIKE DEWINE OHIO ATTORNEY GENERAL
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Re: State ex rel. ESPN, Inc. v. The Ohio State University
Case No. 11-1177

Dear Todd:

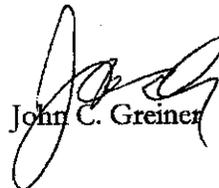
I am writing to follow up on my August 4, 2011 letter as I have not received a response from you.

I assume from your failure to respond that Ohio State does not intend to alter its position, as expressed in its July 29, 2011 letter, on the four outstanding records requests.

Regardless of this position, please advise if Ohio State intends to provide a privilege log. If Ohio State fails to provide a privilege log by week's end, ESPN will make a formal discovery request.

Very Truly Yours,

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John C. Greiner

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EXHIBIT D



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August 24, 2011

VIA E-MAIL

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RE: *State ex rel. ESPN, Inc. v. The Ohio State University* (Ohio S. Ct.), Case No. 11-1177

Dear Jack,

I am writing in response to your letters of August 4 and 14, 2011. As you know, Ohio State has already provided voluminous records in response to ESPN's requests. Notwithstanding the improper breadth and form of many of these requests, the university has made substantial efforts to provide ESPN the documents it appears to seek.

Several of the requests as drafted, and several of your follow-up requests, remain inconsistent with Ohio public records law and with FERPA. The university, however, remains willing to work with ESPN to refine or modify certain requests so that any additional documents of interest, if there are any, can be identified.

Notwithstanding the improper form of the first request – for “[a]ll 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” – the university made substantial efforts to comply with this request, as drafted, and believes that the previously disclosed documents constitute the complete universe of records that ESPN seeks. Your letter of August 4 objects to the redaction of personally identifiable student information in certain documents, but these redactions are required by FERPA. While ESPN's interest in these documents may relate only tangentially to students, that does nothing to change the fact that the *documents themselves* relate directly to students and therefore, the students' personally identifiable information must be redacted under FERPA. You have also requested a privilege log for documents that were not disclosed because they are covered by attorney-client or work-product privileges. Although the university is not required to provide a privilege log under Ohio public records law, *State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St.3d 379, 383, it has nonetheless prepared one relating to this request and an electronic version of the log is attached to the email here.

ESPN's second request seeks “[a]ll 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.” This broad request remains inconsistent with the manner in which the university's records are organized, and parts of the request would require the complete duplication of a file containing many thousands of pages of documents. As the university therefore

EXHIBIT E

John C. Greiner, Esq.
August 24, 2011
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explained in its July 29 letter, this is an improper request. Nevertheless, the university has already provided many responsive documents. Many additional documents that might fall within this broad request contain personally identifiable student information that would have to be redacted before they are produced to third parties, and 34 C.F.R. § 99.3, "Personally Identifiable Information" subsection (g), would require that certain documents be withheld. The process of reviewing the voluminous body of documents for those considerations would take months. The university therefore reiterates its suggestion that ESPN refine this request if it is interested in additional documents, and the university remains willing to discuss this request further with ESPN to aid in that process.

As to ESPN's third request – for "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" – the records provided on July 29, 2011, are the only responsive documents. In your letter of August 4, you state that ESPN is still awaiting certain "details" and "information." But Ohio's public records law covers documents, not information. *State ex rel. Morgan v. City of New Lexington* (2006), 112 Ohio St. 3d 33, ¶¶ 30, 33; *Nat'l Fed'n of the Blind of Ohio v. Ohio Rehab. Serv. Comm'n.* (10th Dist.), 2010-Ohio-3384, ¶ 35. While the university has no objection to ESPN's reporters communicating directly with Jim Lynch to clarify if there is additional information they seek, the university has already provided the only documents responsive to this records request.

Finally, ESPN's last request is for "[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." As previously explained, this request is overbroad, and portions of the request improperly seek a complete duplication of voluminous files and are inconsistent with the manner in which the university organizes its files. Nevertheless, the university remains willing to respond to this request. However, responding to the request in its present form will take a significant period of time because there are a large number of documents to be reviewed for FERPA protections and other privileges. The university has already started this review process and includes here the full body of responsive documents for resolved violations for 2009 and 2010. See documents 404 through 640 provided today.

This process can be expedited considerably, though, if ESPN is willing to refine and clarify this request. As explained in our previous letter, the university has provided ESPN a summary of all football-related violations going back to January 1, 2005. We are confident this summary can help ESPN refine its request and that this would enable the university to provide responsive documents sooner. In sum, notwithstanding the improper overbreadth and other deficiencies with this request, the university remains willing to work with ESPN to provide the documents it seeks. So please let us know which records, related to which violations, ESPN is interested in.

John C. Greiner, Esq.
August 24, 2011
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Best regards,

MIKE DEWINE
Ohio Attorney General



Todd R. Marti
Principal Assistant Attorney General

GRAYDON HEAD

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September 16, 2011

Todd R. Marti, Esq.
Principal Assistant Attorney General
MIKE DEWINE OHIO ATTORNEY GENERAL
Education Section
30 East Broad Street, 16th Floor
Columbus, OH 43215

Re: State ex rel. ESPN, Inc. v. The Ohio State University
Case No. 11-1177

Dear Todd:

Sorry for this slow reply to your August 24, 2011 letter. I have had a chance to speak with my client and we have the following response.

With respect to the FERPA defense, we simply disagree, and I believe we will need to have the Supreme Court sort this out.

You've requested that ESPN "refine" its request relating "[a]ll 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." I am not sure how to refine it exactly. R.C. 149.(B)(2) provides:

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 identify 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.

Would you please inform me the manner in which Ohio State maintains its records so I can consider "refining" the request in an appropriate manner?

It appears that Ohio State has produced all the records it has that are responsive to "student-athlete" pass lists.

Cincinnati at Fountain Square Northern Kentucky at the Chamber Center Butler/Warren at University Pointe

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EXHIBIT F

Todd R. Marti, Esq.
September 16, 2011
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You've also asked ESPN to refine its request for "[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." You pointed me to some previously produced records to use as a guide. It appears from those records that each "case" is assigned a number. That number appears in the far left column.

Based on this information, please provide the information requested above as it relates to case numbers 443, 447 and 458. In addition, please produce the information requested above for any case initiated since November 1, 2010.

Finally, Rob Hamburg from my office sent you this e-mail on August 24 asking that you add a column to your privilege log showing the "subject of the interaction" covered in the document. We have not gotten a response to you on this. We would appreciate a response. I look forward to your reply. Thank you.

Very Truly Yours,

GRAYDON HEAD & RITCHEY LLP


John C. Greiner

JCG|pl

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MIKE DEWINE

— ★ OHIO ATTORNEY GENERAL ★ —

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September 22, 2011

John C. Greiner, Esq.
Graydon Head & Richey, LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157

RE: *State ex rel. ESPN, Inc. v. The Ohio State University* (Ohio S. Ct.), Case No. 11-1177

Dear Jack,

Thank you for your letter of September 16. We are happy to continue working with you and ESPN to refine ESPN's requests and to identify any responsive documents.

As to the athletic infractions request, your letter requests copies of the files on NCAA cases 443, 447, and 458. Those files are enclosed here (they are documents 890-990). Personally identifiable student information has been redacted pursuant to FERPA. Your letter also asked the University to produce infractions case files "for any case initiated since November 1, 2010." If you could kindly clarify whether you are seeking only football related cases, or case files relating to all athletic infractions during that period, we will respond accordingly.

You also asked for a revised privilege log showing the "subject of the interaction" covered in the log. As we previously noted, and continue to maintain, the University is not required to produce a privilege log under Ohio public records law, *State ex rel. Nix v. City of Cleveland* (1998) 83 Ohio St.3d 383. Nonetheless, in the interests of moving forward toward a resolution of these matters, we previously provided a privilege log, and in that same spirit, we enclose here a revised log reflecting the general nature of the privileged records.

Finally, with regard to ESPN's request for documents relating to the NCAA's investigation of Jim Tressel, your September 16 letter asks for information regarding the manner in which the University maintains its records. The University will address that request and is currently preparing a description of its recordkeeping on this issue. I expect to have that to you next week.

Best regards,

MIKE DEWINE
Ohio Attorney General

Todd R. Marti
Principal Assistant Attorney General

EXHIBIT G

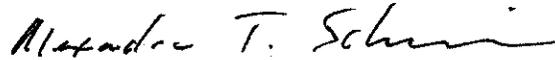
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of The Ohio State University for Referral to Mediation and a Stay of the Scheduling Entry was served by email and U.S. mail this

28 day of September, 2011 upon the following counsel:

John C. Greiner
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157

Counsel for Petitioner,
ESPN, Inc.



Alexandra T. Schimmer
Solicitor General