

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* ESPN, INC.,

: Case No. 2011-1177

:
: Petitioner,

:
: v.

: Original Action in Mandamus

:
: THE OHIO STATE UNIVERSITY,

: Respondent.
:

REPLY BRIEF OF ESPN, INC.

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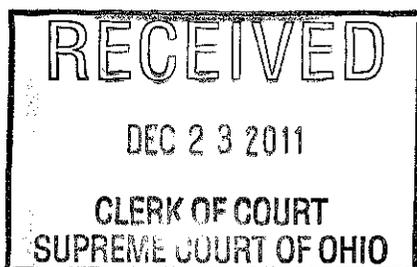


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I. INTRODUCTION

“We will not release anything on the pending investigation.”¹ The Ohio State University (“OSU”) alleges this statement and others do not mean what they say and are actually evidence of a “back and forth” negotiation between the parties. OSU’s patent refusal to provide public records or to provide supporting legal authority for the refusal is a clear violation of the Ohio Public Records Act. OSU similarly asks this Court to ignore the clear language of FERPA and supporting authority in order to find that the prohibition against adopting “a policy or practice of permitting release” really means a prohibition against the release of any records that relate in any way to a student. Both requests are unsupported by the facts or any authority and, if upheld, would pervert the meaning of two well-established statutes.

OSU next alleges, contrary to relevant authority, that emails between a coach and a third party that can only be found via a keyword search on a central server somehow qualify as “education records” that are “maintained” for purposes of FERPA.

OSU also alleges that certain documents withheld are protected by the attorney-client or work-product privilege. But OSU’s legal justifications for this argument miss the point. OSU failed to provide evidence or agreements, other than self-serving pronouncements, that would establish any privilege. Because OSU cannot justify its violations of the Ohio Public Records Act or FERPA, this Court should grant ESPN’s petition for a Writ of Mandamus and award 100% of its attorney fees.

¹ See Exhibit A to Affidavit of Tom Farrey, ESPN Merit Brief.

II. ARGUMENT

PROPOSITION OF LAW NO. 1.

OSU VIOLATED THE PUBLIC RECORDS ACT WHEN RESPONDING TO ESPN'S REQUESTS.

OSU did not comply with ESPN's records request in the manner required by the Ohio Public Records Act. OSU provides this court with a list of its efforts to "release responsive documents," contending that it "has acted appropriately every step of the way." (OSU Br. at 7). This statement is simply not supported by the evidence.

OSU can offer this court all of the misdirection in its playbook, but it cannot avoid the inconvenient truth that it violated the Public Records Act in its response to ESPN's requests. In response to the request for "[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an investigation of Jim Tressel," OSU replied, "We will not release anything on the pending investigation."²

OSU's curt reply cited to no legal authority supporting its refusal. That is not surprising, since there is none. Thus, OSU violated R. C. 149.43(B)(3) as a matter of law. Any efforts it undertook to comply **after** ESPN filed suit cannot excuse its original malfeasance.³

In response to the following request:

"[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" and "[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."

² Affidavit of Tom Farrey, Exhibit B, ESPN Merit Brief.

³ *State ex rel. Cincinnati Enquirer v. Heath* (2009), 121 Ohio St.3d 165, 2009-Ohio-590, 902 N.E.2d 976, at ¶ 11; *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 2001-Ohio-193, 750 N.E.2d 156.

OSU responded, “We would deem this to be overly broad per Ohio’s public record laws.” Despite asserting that the request was overly broad, OSU did not inform “the requester of the manner in which records are maintained by the public office.” That refusal constitutes a per se violation of R.C. 149.43(B)(2). OSU’s efforts to comply, undertaken only after ESPN filed suit, cannot excuse the violation.⁴

OSU argues that ESPN has somehow taken out of context OSU’s definitive, unyielding refusal to produce NCAA investigative records. (OSU Br. at 7). It contends, essentially, that there were numerous communications between OSU and ESPN regarding records, and if these communications were read in their entirety, it would be clear that OSU didn’t really mean it when it said “we will not release anything on the pending investigation.”

But there are no facts to support this position. The only requests at issue in this case are contained in an April 15, 2011 e-mail from Tom Farrey of ESPN, a May 11, 2011 request from Tom Farrey and an April 20, 2011 from Justine Gubar.

The two e-mails from Tom Farrey requested a combined total of 16 categories of records. OSU’s only response to these requests was the June 21, 2011 e-mail from Jim Lynch. In that e-mail, Lynch responded to certain requests by noting “still in process;” and to others “looking into this” or “we are pulling these records.” These particular responses, to these particular requests suggest an ongoing process, but only as to those records.

With respect to the records at issue in this case, the answer was definitive and final. No fair reading of the response – “we will not release anything on the pending investigation” or “we would deem this to be overly broad” – suggests any interest in ongoing dialogue. This is especially the case when, in the same e-mail, Lynch indicated that OSU would continue its efforts to produce other categories of requested records.

⁴ *Id.*

Lynch's May 27, 2011 response to Justine Gubar's April 20 request is similarly definitive and final – "do[sic] to FERPA, we will not be releasing e-mails from Jim Tressel, Doug Archie or Gene Smith related to Ted Saryniak." That response contains no invitation for additional dialogue on the subject.

As a public records requester, ESPN is not required to take on the role of a biblical scholar and derive the hidden meaning in a plainly worded message from a public body. This court must judge whether OSU complied with the Public Records Act based on its only response. And that response violated the Public Records Act.

OSU also argues that its efforts to provide records and to narrow ESPN's requests after ESPN was forced to file this mandamus action should exonerate it from liability for its blatant violations. (OSU Br. at 7). This is not the law, nor should it be. A party that produces records after a mandamus action is filed does not render the underlying action moot.⁵ The court may reimburse the requesting party for its fees and expenses incurred to challenge the public body's initial denial, even if the public body produces records after the mandamus action is filed.⁶

There is a compelling public policy reason for this result. If OSU's position held, a public body could adopt a policy of responding to a request only if it were sued. In many cases, a requesting party would opt to avoid the expense and burden of a lawsuit, and there would be no production. And in the cases where the requesting party did file suit, the public body could then comply and avoid all consequences for its willful disregard of the law.

A "no harm no foul" policy – which requires a requesting party to sue for records – is neither fair, nor conducive to transparency. This court should reject OSU's position.

⁵ *State ex rel. Cincinnati Enquirer v. Heath* (2009), 121 Ohio St.3d at 166; *State ex. rel. Gannett Satellite Info. Network v. Shirey* (1997), 78 Ohio St.3d 400, 402, 678 N.E.2d 557.

⁶ *State ex rel. Cincinnati Enquirer v. Heath* (2009), 121 Ohio St.3d at 167-168; *State ex. rel. Gannett Satellite Info. Network v. Shirey* (1997), 78 Ohio St.3d at 402.

PROPOSITION OF LAW NO. 2.

FERPA DOES NOT EXPRESSLY PROHIBIT THE RELEASE OF “EDUCATION RECORDS.” FOR THIS REASON, THE OHIO PUBLIC RECORDS ACT COMPELS PRODUCTION OF THE RECORDS.

OSU’s heading under this proposition of law – “Ohio State has agreed not to disclose ‘education records’ as a condition of receiving federal funds” – misstates the obligation imposed by FERPA and exposes the fallacy of its argument. Nowhere does FERPA explicitly prohibit the release of student records. Rather, FERPA merely requires that schools which accept federal funds not maintain “a policy or practice of permitting the release of education records.” That provision is not a prohibition on the release of any documents.⁷

There are two statutes at issue in this case – FERPA and the Ohio Public Records Act. Both are very clear in what they proscribe. But OSU and the amici urge this court to ignore what the statutes **say** and instead apply a “this is what it **really** means” interpretation.

But this court cannot apply such an expansive interpretation. Ohio law requires that exceptions to the Public Records Act be strictly interpreted, with doubts as to the applicability of an exception being resolved in favor of disclosure.⁸

Thus, a strict construction requires that, for a record’s release to be prohibited by law, it must explicitly be prohibited. And where a legislature intends to prohibit the release of records, it must explicitly say so. For example, R.C. 3301.0711(I) explicitly states that the Ohio Department of Education “shall not release” individual standardized test scores. Similarly, R.C. 3301.0714(I) explicitly categorizes data maintained under the statewide education management information system as “not a public record” under the Ohio Public Records Act. Federal law is

⁷ *Chicago Tribune Co. v. University of Illinois Bd. of Trustees* (N.D. Ill.2007), 781 F.Supp.2d 672.

⁸ *State, ex rel. National Broadcasting Co. v. City of Cleveland* (1988), 38 Ohio St.3d 79, 85, 526 N.E.2d 786.

to the same effect. Thus, Federal Agencies' disclosure requirements under the Freedom of Information Act "does not apply to ... internal [agency] personnel rules and practices..."⁹

When a statute intends to prohibit the release of records, it expressly prohibits their release. A statute that at most "prohibits" the adoption of a policy or practice of "permitting" the release of records does not meet this strict standard.

OSU and the amici set forth a parade of absurd horrors that will come to pass if this court applies a strict interpretation of the law. But these hyperbolic warnings are as inaccurate as they are overstated. For example, OSU says that if this court adopts ESPN's position, schools would need to produce student medical records. (OSU Br. at 15). But that is patently false. Those records would be covered by R.C. 149.43(A)(1)(v) as well as the privacy regulations adopted under the federal HIPAA statute. Both expressly provide for the confidentiality of medical records.

There is, moreover, no supremacy clause issue here, because Ohio law does not conflict with FERPA. Ohio law provides an exception for records whose release is prohibited by state or federal law.¹⁰ But FERPA, as discussed above, does not prohibit the release of student records. Thus, there is no conflict between Ohio and federal law that would trigger the supremacy clause.

Again, OSU warns of dire consequences that await state universities if ESPN prevails here. But the solution is legislative. If the Ohio General Assembly and/or Congress intended that all records that mention a student's name be confidential, either or both legislative bodies should address that point. But there is no justification for this court, in this case, to legislate that result from the bench.

⁹ 5 U.S.C. 552(b)(2).

¹⁰ R.C. 149.43(A)(1)(v).

OSU refers to ESPN's argument that the release of records in one instance does not constitute a policy or practice as "far fetched." (OSU Br. at 19). But aside from this unsupported swipe at ESPN's argument, OSU offers no response to the authority cited by ESPN for this very point. The court in *Ellis v. Cleveland Mun. School District* held that FERPA "does not, by its **express** terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure."¹¹ The mandated release of records in that situation was not a "policy or practice" contemplated by FERPA.¹² Ohio State's compliance with the Ohio Public Records Act in this circumstance is analogous to the discovery of relevant school records required in *Ellis*. Both involve releasing records pursuant to other, well-established, legislative authority. Neither constitutes a "policy or practice" of disclosing confidential information. Thus, the release would not violate FERPA.

Moreover, OSU glosses over FERPA's actual language. FERPA threatens to withhold federal funding only if the school maintains "a policy or practice of **permitting** the release of education records." To "permit" means "to consent to" and suggests that a party makes a choice.¹³ In this case, where Ohio law **mandates** release of the records, OSU is not "consenting" to the release; rather it is obeying state law. Thus we "permit" guests to enter our home. When police enter via a search warrant, we do not permit that entry, it is compelled.

The Ohio Public Records Act **compels** production of the records here. In complying with its legal obligation to produce them, OSU is in no way permitting their release. It has no choice in the matter. Legislation in other areas recognizes a distinction between the terms "permit" and

¹¹ (N.D. Ohio 2004), 309 F.Supp.2d 1019, 1023 (emphasis added).

¹² *Id.* at 1023.

¹³ Merriam-Webster Dictionary (11th ed, 2008).

“compel.”¹⁴ A legislature is assumed “to know the meaning of words, to have used the words of a statute advisedly and have expressed legislative intent by the use of the words found in the statute.”¹⁵ And to say that compelled production constitutes permitted release distorts the English language and common sense to a shocking degree even by government standards.

OSU is hard pressed to justify its position, and so it relies on several letters from the Department of Education to various institutions for support. (OSU Br. at 21-22). But the opinion of unelected bureaucrats cannot override FERPA’s plain language. And that language, which applies only to schools that permit the release of education records, does not apply to schools which are compelled to provide the records. If this is not the intended outcome then Congress should amend the statute. But a de facto amendment is above the pay grade of the Department of Education bureaucrats or this court.

PROPOSITION OF LAW NO. 3.

THE DOCUMENTS ARE NEITHER “EDUCATION RECORDS” NOR “MAINTAINED” BY OSU.

OSU next argues that the disputed records here at issue are “education records” for purposes of FERPA. (OSU Br. at 22). OSU’s argument is unconvincing and contrary to FERPA authority. E-mails between OSU and third parties, which indirectly relate to a student, are not “education records” contemplated by FERPA. And these same e-mails, accessible only by key word search, are not “maintained” by OSU.

¹⁴ See 42 U.S.C.A. 247d-6d(e)(6)(B) (the court in an action...shall permit discovery...and the court shall compel a response); R.C. 169.17(C) (the director may compel ... production of any book.... If a person fails to ... permit photocopying ... the director [,] shall compel obedience...).

¹⁵ *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 236-237, 78 N.E.2d 370.

A. Documents That Detail Interactions Between Ohio State And Third Parties That Only Indirectly Relate To Students Are Not “Education Records.”

OSU urges this court to reverse its ruling in *State ex rel. The Miami Student v. Miami University*¹⁶ – that the term “education records” does not include every scrap of paper that happens to contain a student’s name – and adopt the overly expansive interpretation favored by the Department of Education. (OSU Br. at 28-31). OSU contends that the Sixth Circuit’s ruling in *United States v. Miami University*¹⁷ compels that result. But just as OSU reads too much into the FERPA statute, it reads too much into the Sixth Circuit decision.

The records at issue in the *Miami University* case were university disciplinary records. They detailed the interaction between the student and the university. In that respect, they could be characterized as education records.

But the records here are distinct from the disciplinary records in the *Miami University* case. They reflect interactions not between student and school, but rather reflect interactions between the school and third parties that only indirectly relate to the students.

Despite its reach and power, the NCAA is a private organization. The rules it promulgates and the discipline it imposes are not the actions of the university. Records generated in the course of OSU’s efforts to remain in the good graces of an independent, private governing body are not education records. To find otherwise would stretch the FERPA statute to lengths never envisioned by Congress. Similarly, correspondence from the OSU athletic department to a private citizen in Pennsylvania are in no way analogous to the disciplinary records at issue in *Miami Student*.

In responding to ESPN’s argument, OSU ignores much of the authority ESPN cites and mischaracterizes the rest. Thus OSU does not respond to ESPN’s reliance on *The News and*

¹⁶ 79 Ohio St.3d 168, 1997-Ohio-386, 680 N.E.2d 956.

¹⁷ (6th Cir. 2002), 294 F.3d 797.

Observer Publishing Co., et al. v. Baddour, et al. and *Kirwin v. The Diamondback*, where the courts recognized that records related to parking infractions of student athletes are not “education records.”¹⁸ The silence is deafening as OSU fails to respond to the *News and Observer* court’s findings that “FERPA does not provide a student with an invisible cloak so that the student can remain hidden from view while enrolled at UNC-CH.”¹⁹ Nor does OSU counter the observation in *Kirwin*, that Congress never intended FERPA to be used as a shield to prevent full disclosure of records that might prove embarrassing to a public body.²⁰

To the extent OSU actually does respond to ESPN’s authority, it mischaracterizes it. In *National Collegiate Athletic Association v. Associated Press*, the Florida Appellate Court expressly affirmed a trial court ruling finding that records related to an NCAA investigation of Florida State were not education records covered by FERPA.²¹ That court held that “these records pertain to allegations of misconduct by the University Athletic Department, and only tangentially relate to the students who benefitted from that misconduct.”²²

OSU seeks to distinguish this on point ruling by noting that the records in that case had been redacted to eliminate student names before the court got involved. (OSU Br. at 30). OSU argues that, by implication, the court would have ruled differently had the records not been redacted. But that is not the case. The holding notes that, because the only records before it had been redacted, it was not in a position to address whether unredacted records would be subject to its ruling.²³ But given the basis for its holding – that the records, by their nature, were not

¹⁸ *The News and Observer Publishing Co., et al. v. Baddour, et. Al.* (N.C. Sup. Ct., Orange County, May 12, 2011) Case No. 10 CVS 1941; *Kirwan v. The Diamondback* (Md. 1998), 721 A.2d 196, 204.

¹⁹ *The News and Observer Publishing Co.*, Case No. 10 CVS 1941.

²⁰ *Kirwan*, 721 A.2d at 204.

²¹ *National Collegiate Athletic Association v. Associated Press* (Fla. Dist. Ct. App. 2009), 18 So.3d 1201, *cert. denied*, (Fla. 2010), 37 So.3d848.

²² *Id.* at 1211.

²³ *Id.* at 1211.

education records covered by FERPA – there is no reason to believe its holding would not apply to unredacted records.

Similarly, OSU points to the fact that in *Ellis v. Cleveland Mun. School District* and *Baker v. Mitchell-Waters* the courts directed that the names of minor students be redacted from records, despite the holdings in both cases that FERPA did not cover the records.²⁴ (OSU Br. at 30). OSU argues, apparently, that this fact somehow supports the notion that FERPA compels OSU to redact the records here. But that conclusion is erroneous. The redactions in those cases were not mandated by FERPA. Indeed, given the rulings in both cases that FERPA did not cover the records, that result would have been impossible. Rather, the redactions were ordered in the nature of a protective order, pursuant to the courts' inherent power to make such an order related to records before it.²⁵ In no way does that fact limit the scope of these holdings or justify OSU's actions.

B. The Sarniak Records Are Not "Maintained."

In response to ESPN's contention that the e-mails and correspondence to Ted Sarniak are not "maintained," OSU points to technical details relating to its computer system. (OSU Br. at 32). But OSU misses the larger point. Unlike records purposefully maintained in a manner similar to a "student's folder in a permanent file," e-mails to third parties are fleeting.²⁶ The fact that they may exist on a central server for some period of time does not mean that they are "maintained."²⁷ Records that are readily accessible from a dedicated file are maintained. But the Sarniak e-mails, which were accessible only via a key word search, are not.

²⁴ *Ellis v. Cleveland Mun. School District* (N.D. Ohio 2004), 209 F.Supp.2d 1019; *Baker v. Mitchell-Waters* (2005), 160 Ohio App.3d 250, 2005-Ohio-1572, 826 N.E.2d 894.

²⁵ Fed. R. Civ. P. Rule 26.

²⁶ *Owasso Indep. Sch. Dist. v. Falvo*, (2002), 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.E.2d 896.

²⁷ *See Phoenix Newspapers v. Pima Community College* (AZ Sup. Ct., Pima County, May 17, 2011) Case No. C20111954, citing *S.A. v. Tulare County Office of Education*.

PROPOSITION OF LAW NO. 4.

OSU PROVIDED NO CREDIBLE EVIDENCE ESTABLISHING THE RECORDS WERE PROTECTED BY THE ATTORNEY-CLIENT OR WORK-PRODUCT PRIVILEGE.

OSU provides this court with a litany of legal justifications for its assertion of the attorney-client privilege, but it misses the point that its assertion of that privilege is frustrated not on legal grounds, but by a lack of evidence to support the legal principles. OSU's supporting affidavits do not identify whether or which communications were made to a lawyer within the context of an attorney-client relationship.

OSU argues that it retained the Compliance Group to provide legal advice in the defense of OSU and its Department of Athletics and to serve as an agent of OSU's attorneys. (OSU Br. at 38). But OSU has not produced any agreement with the Compliance Group that definitively establishes its role in this matter. Moreover, while Sandra Anderson's affidavit notes that "the retainer agreement between OLA and the Compliance Group includes a provision for sharing and protecting confidential information" there is no indication in the record that there was any explicit agreement that OSU's communications with the Compliance Group would be shielded by the attorney-client privilege.

Similarly, OSU failed to produce a joint defense agreement with attorney Larry James or any other evidence that he considered his communications with OSU shielded by privilege.

OSU's support for asserting attorney-client privilege here consists largely of self-serving, unilateral pronouncements by OSU. Actual evidence or agreements that would conclusively establish that privilege are lacking.

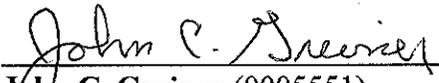
III. CONCLUSION

This court should join with courts from around the country in sending an unmistakable message to collegiate athletic departments – you cannot hide your misdeeds behind FERPA and you must honor your obligations under the PRA. And the court should do so by granting ESPN’s petition for a Writ of Mandamus, and awarding 100% of its attorney fees.

Respectfully submitted,

Of Counsel:

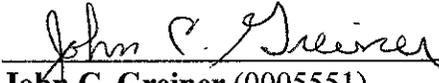
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The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief of ESPN, Inc.* was served by regular U.S. Mail, postage prepaid, this 22nd day of December, 2011, upon the following:

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