

Court Rules in UNC Football Public Records Dispute

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North Carolina Superior Court Judge Howard Manning recently ruled on the scope of protection for documents related to the highly-publicized investigation of irregularities in the University of North Carolina football program. The Court held that the majority of communications among attorneys are protected from disclosure, but that other categories of investigative documents must be disclosed as public records of a public agency. The Court also ruled that portions of former UNC football coach Butch Davis' personal cell phone records must be disclosed. The Court's rulings are available below, and a discussion of a subsequent order entered by the Court is linked [here](#).

Background

As a general matter, the University must disclose its records as a state agency under North Carolina's public records laws. The dispute in this case hinged on the applicability of certain exemptions from the public records laws for attorney-client privilege or protection arising from the federal law. For example, North Carolina law exempts attorney-client privileged communications and trial preparation materials from disclosure as public records. And as a matter of federal law, the Family Educational Rights and Privacy Act (FERPA) protects most student records from disclosure as public records. In this case, the parties disputed what documents related to the UNC football investigation would fall within these exemptions.

Here, the plaintiffs (media outlets including newspapers and broadcasters) sought disclosure of several categories of documents from the University in connection with the NCAA investigation into irregularities within the UNC football program. The categories included personal and business phone records, investigative documents, and information about mentors and tutors to the athletes. Ultimately, the Court allowed the production of many of these documents as public records, with a few important exceptions.

At earlier stages of the case, the Court determined that many documents are not protected by FERPA and are subject to disclosure under the public records laws. For example, the Court ruled that unredacted phone numbers on telephone bills for coaches' cell phones provided by UNC—including phone numbers of UNC students—are not protected by FERPA and are a public record. The Court also ruled that parking tickets issued to 11 UNC football players are not education records and are not protected by FERPA. The University was required to produce those

documents.

The Court's earlier rulings also distinguished records (e.g., names, employment dates, and salaries) of tutors and mentors for UNC athletes based on whether the tutors and mentors were students themselves. Non-student tutors were treated by the Court as University personnel, and those records are not protected by FERPA. In contrast, active UNC students and graduate students that were employed as tutors or mentors for athletes are protected by FERPA. The University was not required to disclose the requested information about UNC student tutors and mentors.

Disclosure of Personal Phone Records

In perhaps the most anticipated portion of the case, the Court ruled that former UNC football coach Butch Davis was a public official and ordered him to disclose portions of his personal cell phone records. On August 22, 2012, Judge Manning signed an order requiring Davis to produce his personal cell phone records within 30 days. The order permits personal calls to be redacted from the records, but he ruled that information regarding University-related calls is a public record.

Judge Manning took care in his ruling to limit the protection for personal cell phones belonging to public officials. He observed that public officials "may not avoid public scrutiny. . . by using personal cell phones to conduct public business."

Disclosure of NCAA Materials

In a separate decision, Judge Manning determined the scope of protection for investigative and legal documents regarding the NCAA investigation into misconduct by UNC football coaches, players, agents, boosters, and tutors. The two primary categories of documents were (1) communications between UNC and its attorneys that may be privileged, and (2) documents submitted to NCAA in connection with its investigation.

Protected Communications and Preparation

In the first category of investigative documents, the Court ruled that certain broad categories of communications were protected from disclosure by attorney-client privilege, and that materials prepared in connection with the investigation were also protected from disclosure.

Under North Carolina public records law, written communications to a state agency are exempted from mandatory disclosure if they are:

made within the scope of the attorney-client relationship by any attorney-at-law serving such governmental body, concerning any claim against or on behalf of the governmental body or governmental entity for which the body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected.

N.C. Gen. Stat. § 132-1.1(a). The law also exempts from disclosure “trial preparation material” that meets the following definition:

Any record, wherever located and in whatever form, that is trial preparation material within the meaning of [the North Carolina Rules of Civil Procedure], any comparable material prepared for any other legal proceeding, and any comparable material exchanged pursuant to a joint defense, joint prosecution, or joint interest agreement in connection with any pending or anticipated legal proceeding.

N.C. Gen. Stat. § 132.9.9(h)(2).

Here the Court concluded that the NCAA investigation was an administrative proceeding within the meaning of the North Carolina statutes, so attorney-client communications and trial preparation materials related to the investigation would be protected. Thus, communications from in-house UNC counsel, corporate counsel, or an outside law firm to the University are not public records and are exempt from disclosure. Similarly, communications from in-house UNC counsel to outside counsel are privileged and are exempt from disclosure. Communications prepared by UNC staff at the direction of in-house or outside counsel for submission to in-house or outside counsel in connection with the investigation are “trial preparation” materials and also exempt from disclosure. As a result of the Court’s findings, copies of recordings of interviews prepared in connection with the investigation will not be required to be disclosed.

Disclosure of Documents Submitted To The NCAA

Next, the Court considered whether documents submitted by the University to the NCAA in response to its investigation were protected from disclosure. The parties agreed that student-athlete information relating to academics are protected by FERPA and would not be disclosed. The parties disputed disclosure of information relating to the NCAA investigation into impermissible benefits to student athletes such as plane tickets, jewelry, clothing, shoes, automobiles, payments to cover parking tickets, monetary gifts, free meals, and so on.

The Court determined that such benefits are not academic and fall outside the scope of FERPA. Thus, the Court ruled that documents relating to investigations into impermissible benefits only (and not academic conduct) must be disclosed. This category of documents includes statements of fact submitted by UNC to the NCAA in the course of an investigation, reinstatement requests on behalf of a particular athlete submitted by UNC to the NCAA, and similar documents relating to a player subjected to penalties or sanctions by the NCAA for non-academic misconduct.

Importantly, the University does not have to disclose the materials unless the investigation resulted in penalties or sanctions. Documents relating to an investigation that did not result in the player being declared ineligible or subjected to other sanctions by the NCAA for an impermissible benefits rules violation are not required to be disclosed.

Judge Manning was careful to emphasize that “information relating to truly academic issues pertaining to student-athlete academic misbehavior. . . is protected from disclosure by FERPA.” So, documents relating to investigations on the basis of academic performance issues such as low GPA, academic courses, etc., are protected by FERPA as academic records and are not required to be disclosed.

On a related issue, the Court also determined the scope of protection for the University’s formal response to the NCAA (a large document dated September 29, 2011, with exhibits). The University previously released a heavily redacted version of the response. Judge Manning ruled that redactions in the public version of the document were appropriate to protect employees and academic student records. However, portions of the response relating to impermissible benefit violations resulting in sanctions and ineligibility are not protected and must be disclosed in unredacted form. In the Court’s words, “the cloak of secrecy must be lifted and the sun let in for all to see.”