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Statutory Law: The Oklahoma Open Records Act: Are NCAA Investigation Records Accessible?

College athletics is extremely popular in the United States. This immense popularity and public interest, however, is accompanied by some problems, one of the most serious being National Collegiate Athletic Association (NCAA) rule violations by universities. Naturally, the public is also interested in this aspect of college athletics. Because of this public interest, members of the media try to gain access to information regarding NCAA investigations at schools across the country. Recently, lawsuits intended to accomplish this purpose have been filed. Members of the media have asserted that state open records laws give them the right to obtain records regarding NCAA investigations.

In the spring of 1988, members of the print and television media brought suits against the University of Oklahoma (OU) and Oklahoma State University (OSU) in both federal and state court.¹ The litigation's focus was an attempt to force the schools to disclose the contents of Letters of Official Inquiry (O.I. Letters) issued by the NCAA.² The media claimed the Oklahoma Open Records Act³ required the two state-funded universities to make public any records regarding the NCAA investigations of the two schools.⁴

The suits against OU were dropped after the University released a summary version of the allegations against its football program.⁵ The state court action against OSU was voluntarily withdrawn by the plaintiff. The federal action against OSU was dismissed because the plaintiffs had not stated a federal cause of action for which relief could be granted.⁶ The court held that the first amendment did not entitle the media access to the investigation records. Because of the dismissal, the court did not reach a decision on the merits of the applicability of the Oklahoma Open Records Act to NCAA O.I. Letters.

However, these cases remain important because they are part of an increase in litigation filed nationwide by members of the media seeking information concerning similar NCAA investigations of other major college athletic programs. Suits have been filed against the NCAA, athletic conferences, and specific universities.⁷ Almost all of this new litigation involves various state

1. *Combined Communications Corp. of Okla. v. Horton*, No. CIV-88-643-T (W.D. Okla., dismissed July 20, 1988) (federal suit against both OU and OSU); *Oklahoma Publ. Co. v. Horton*, No. C-88-1231-T (Okla. filed Apr. 28, 1988) (suit dismissed with prejudice June 22, 1988) (state court claim against OU).

2. 1988-89 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Enforcement* 3-(b) through 3-(f). NCAA Letters of Official Inquiry are sent to the universities after the NCAA completes its initial investigations into alleged infractions at the universities. The Letters contain formal allegations and invite the universities to conduct their own investigations and respond to the allegations in the Letters.

3. 51 OKLA. STAT. §§ 24A.1-24A.18 (Supp. 1987).

4. The plaintiffs in the federal action also asserted a first amendment freedom of press claim.

5. See *The Word is Out On OU*, *Daily Oklahoman*, June 17, 1988, at 17, col. 2.

6. See *Judge Bars Access to OSU Allegations*, *Daily Oklahoman*, June 23, 1988, at 23, col. 1.

7. *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988) (the NCAA

open records acts. The NCAA and its member institutions view this type of litigation as a serious threat to the confidential nature of NCAA investigations.⁸ The O.I. Letters do not signal the end of the NCAA's investigations but serve as formal notice to the school of the allegations against it.⁹ Also, the O.I. Letters are the beginning point for the schools' investigations. Therefore, the NCAA and the universities assert that disclosure of the information contained in the Letters would destroy the confidentiality of their investigative procedures and undermine the effectiveness of these procedures.

The purpose of this note is to discuss whether the Oklahoma Open Records Act entitles members of the media, or any individual, to obtain information regarding alleged NCAA violations by state-supported universities.¹⁰ It will show that the best interpretation of the Act and public policy supports exempting NCAA investigation records from disclosure. In so doing, this note will begin by outlining the provisions of the Oklahoma Open Records Act. The note will also discuss how an Oklahoma court should rule on the applicability of the Oklahoma Open Records Act to records regarding alleged NCAA infractions that are in the possession of state universities. Both sides of the issue will be presented, and the policy reasons behind any result will be discussed.

The Oklahoma Open Records Act

In 1985 the Oklahoma legislature followed the trend set by the Federal Freedom of Information Act¹¹ and several other states' open records acts and enacted an Oklahoma version.¹² As set forth in section 24A.2 of the Act, its purpose is "to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power."¹³

The Oklahoma Open Records Act achieves its stated purpose by requiring that all "records of public bodies and public officials," unless exempt under the Act, be "open to any person for inspection, copying, and/or mechanical reproduction."¹⁴ The Act contains broad definitions of "record," "public body," and "public official."¹⁵ Under the Act's definition, a record can be

and the Southwest Conference are not subject to the Texas Open Records Act); A.H. Belo Corp. v. Southern Methodist Univ., 734 S.W.2d 720 (Tex. Ct. App. 1987) (private universities are not subject to the Texas Open Records Act because they are not "public bodies").

8. See Wong & Ensor, *The NCAA's Enforcement Procedure—Erosion of Confidentiality*, ENT. & SPORTS LAW. (Summer 1985), at 1.

9. 1988-89 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Enforcement* 3-(b) through 3-(f).

10. 51 OKLA. STAT. §§ 24A.1-24A.18 (Supp. 1987). For an extensive discussion of the Act, see White, *Open Records in Oklahoma: Where Are We Now?*, 57 OKLA. B.J. 1831 (July 26, 1986).

11. 5 U.S.C. § 552 (1982).

12. 51 OKLA. STAT. §§ 24A.10 to 24A.18 (Supp. 1987).

13. *Id.* § 24A.2.

14. *Id.* § 24A.5.

15. *Id.* § 24A.3.

in any physical form whatsoever, including paper, computer tape or disk, sound recording, and video record.¹⁶ However, to be covered by the Act a record must be created by or in the possession of public officials or public bodies and connected with the transaction of public business or the expenditure of public funds.¹⁷ Thus, a record covered by the Oklahoma Act can be of any form as long as it is controlled by a public body and is made or received in the course of performing public functions.

Like the definition of "record," the Act's definition of "public body" is very broad.¹⁸ Public bodies include, but are not limited to, entities such as departments, commissions, agencies, school districts and offices, and any of their subdivisions.¹⁹ However, to be considered a "public body" an entity must be supported in whole or in part by public funds or entrusted with the expenditure of public funds.²⁰ The definition of "public body" specifically excludes judges, justices, and the state legislature.²¹ "Public official" is defined as any official or employee of any public body.²²

The basic premise of the Oklahoma Open Records Act is that all records of public bodies and public officials should be open for public inspection.²³ However, the Act provides exemptions for some records that would otherwise be subject to disclosure. For example, section 24A.5 contains a provision that exempts records specifically required by law to be kept confidential. Records covered by this exemption include records not discoverable under state law,²⁴ records protected by a state evidentiary privilege,²⁵ and records of what transpired during meetings lawfully closed to the public pursuant to the Oklahoma Open Meetings Act.²⁶ However, if an otherwise covered record contains material that is exempt, any reasonably segregable portion of the record should be provided to the public after deletion of the exempt portions.²⁷

Several other types of records are exempt from the disclosure provisions of the Act.²⁸ Besides the confidential by law exemption in section 24A.5, two

16. *Id.* § 24A.3(1).

17. *Id.* Section 24A.3(1) states that to be covered by the Act a record must be "created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property."

18. *Id.* § 24A.3(2).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* § 24A.3(4).

23. *Id.* § 24A.2.

24. *Id.* § 24A.5(1)(a). According to section 24A.5(1)(a), records not discoverable under state law include materials prepared in anticipation of litigation or trial.

25. *Id.* § 24A.5(1)(b). Records exempt under this subsection include those protected by privileges such as the attorney-client privilege and the identity of informer privilege.

26. *Id.* § 24A.5(1)(c). The Oklahoma Open Meetings Act is codified at 25 OKLA. STAT. §§ 301-314 (1981).

27. 51 OKLA. STAT. § 24A.5(2) (Supp. 1987).

28. The following kinds of records are exempted by various sections of the Act and therefore are not subject to disclosure: law enforcement records, § 24A.8; personal notes and personally

other statutory exemptions are particularly relevant to the purposes of this note. Section 24A.7 provides that a public body may keep certain personnel records confidential, and section 24A.16 exempts some educational records and materials. These three exemptions and their applicability to the issue at hand will be analyzed extensively later in the note.

If an individual is denied access to a record of a public body or public official, section 24A.17 provides that the individual may bring a civil suit for declarative or injunctive relief. Thus, this remedy provision seems to fulfill the purpose of making government records more accessible to the public, while at the same time the exemption provisions protect certain records that the legislature has determined should be kept confidential. However, because the Act is relatively new, there is little case law offering judicial interpretation of its provisions. This note will attempt to determine the applicability of the Act to state university records pertaining to ongoing investigations of alleged NCAA infractions in the schools' athletic departments.

*Attempts to Gain
NCAA Investigation Records from Sources Other than
State-Funded Universities*

The media has made numerous attempts to obtain information contained in NCAA O.I. Letters sent to universities. Various approaches and applications of state open records acts have been asserted in efforts to gain release of this information.

In *A.H. Belo Corp. v. Southern Methodist University*,²⁹ a newspaper sued a number of universities located in Texas in an effort to obtain from the schools information regarding NCAA investigations.³⁰ The Texas Court of Appeals affirmed the trial court's holding that private universities are not "governmental bodies" as defined in the Texas Open Records Act.³¹ According to the appeals court, private schools are not "governmental bodies" because they are not supported by public funds and do not expend public funds.³² Thus, because the Texas Open Records Act, much like the Oklahoma Act, only applies to "governmental bodies," the private universities were not required to disclose their records.³³

created material, § 24A.9; bids, if their disclosure would give an unfair advantage to competitors, § 24A.10; donations to libraries, archives, or museums, if anonymity of the donor is a condition of the donation, § 24A.11; litigation and investigatory files of the Attorney General and district and municipal attorneys, § 24A.12; federal records, § 24A.13; personal communications relating to the exercise of someone's constitutional rights, § 24A.14; and crop and livestock reports, § 24A.15.

29. 734 S.W.2d 720 (Tex. Ct. App. 1987).

30. *Id.* at 721. The plaintiffs sought disclosure of athletic department records at Southern Methodist University, Texas Christian University, Rice University, Baylor University, the University of Texas, the University of Houston, and Texas A&M University. The first four universities are private schools and the latter three are public institutions.

31. *Id.* at 723.

32. *Id.*

33. *Id.*

Another suit involving the application of the Texas Open Records Act was decided a year later. In *Kneeland v. National Collegiate Athletic Association*,³⁴ a number of broadcasters and newspapers brought suit against the NCAA and the Southwest Athletic Conference (SWC). They sought to compel disclosure of information relating to alleged NCAA and SWC violations committed by Southern Methodist University.³⁵ The plaintiffs claimed that the Texas Open Records Act³⁶ compelled the NCAA and the SWC to disclose their records relating to investigations of member universities in Texas.³⁷ The Fifth Circuit Court of Appeals held that the NCAA and the SWC were not "governmental bodies" as defined by the Texas Open Records Act and therefore were not subject to the disclosure requirements of the Act.³⁸ Thus the NCAA and the SWC were allowed to keep their records confidential.³⁹

Because the Oklahoma Open Records Act is similar to Texas' version in most respects, prospective plaintiffs in Oklahoma probably cannot obtain information regarding NCAA investigations from the NCAA itself, athletic conferences or private universities. Therefore, the only available alternative for plaintiffs under the Act is to attempt to obtain the desired information directly from state-funded universities.

Applying the Oklahoma Open Records Act to State Universities

Determining whether a record is subject to a state open records act entails a two-pronged inquiry.⁴⁰ The first prong consists of determining whether the records sought are in the possession of an entity subject to the act. The second prong involves determining whether the records sought are of the types subject to the law in question. Only if both questions are answered in the affirmative can an entity be forced to disclose the records. This two-pronged test will be used to analyze the Oklahoma Open Records Act's applicability to NCAA investigation records, specifically NCAA O.I. Letters, in the possession of state-supported universities.

Stage One: Athletic Departments as Entities Subject to the Oklahoma Open Records Act

As discussed earlier, only records created by or in the possession of public

34. 850 F.2d 224 (5th Cir. 1988).

35. *Id.* at 225.

36. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1988).

37. 850 F.2d 224, 225 (5th Cir. 1988). The suit was in federal court because the plaintiffs also asserted that the NCAA's and the SWC's refusal to disclose the records violated a constitutional right of access to public information that gave rise to a cause of action under 42 U.S.C. § 1983. The lower court dismissed this cause of action because the defendants had not acted under color of state law and therefore were not subject to section 1983. *Kneeland v. NCAA*, 650 F. Supp. 1047 (W.D. Tex. 1986). The subsequent appeal involved only the state claim under the Texas Open Records Act.

38. 850 F.2d at 230, 231.

39. *Id.*

40. Braverman & Heppler, *A Practical View of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 729 (1981).

bodies or public officials are subject to disclosure under the Oklahoma Act.⁴¹ Therefore, the question at this stage is whether the athletic departments of state universities are “public bodies” as defined by the Act.

Clearly the Act is intended to cover public universities in general. State-funded universities such as OU and OSU are obviously entities that are “supported in whole or in part by public funds” and therefore are subject to the Act.⁴² Furthermore, section 24A.16 of the Act refers specifically to records kept by “public educational institutions.”⁴³ Thus, the legislature definitely intended Oklahoma’s state-supported universities to be subject to the Act. Because the universities as a whole are public bodies, the athletic departments of the universities are subject to the Act unless it can be shown that the athletic departments should be analyzed separately.

The argument that university athletic departments should not be subject to the disclosure provisions of the Act does have support. The Act’s definition of “public body” closely parallels the definition of “public body” in the Oklahoma Open Meeting Act.⁴⁴ In addition, the policies behind both the Open Records Act and the Open Meeting Act are the same—to provide public access to government matters. Thus the scope and coverage of the two acts should be, and in fact are, very similar.

This similarity of scope and purpose is significant because the Open Meeting Act’s definition of “public body” specifically excludes “athletic staff meetings of institutions of higher education.”⁴⁵ Thus, when drafting the Open Meeting Act, the state legislature determined that most governmental meetings should be open to the public, but that the public should not be entitled to attend university athletic department meetings.⁴⁶ Therefore, an argument that athletic department records should be kept from the public as well is feasible. This argument would be based on the assertion that both acts should be interpreted and applied in the same manner. Arguably, because university athletic departments are not bound by the Open Meeting Act, they should not be bound by the Open Records Act.

This reasoning has one major flaw. The Open Records Act’s definition of “public body” does not itself exclude university athletic departments as does the Open Meeting Act’s definition. Because the definition in the Open Records Act closely parallels the Open Meeting Act’s definition in all other aspects, presumably the legislature intentionally omitted the athletic department exclusion from the Open Records Act. Therefore, even though athletic department meetings are excluded from the Open Meeting Act, athletic department records are not necessarily excluded from the Open Records Act.⁴⁷

41. 51 OKLA. STAT. § 24A.3(2) (Supp. 1987).

42. *Id.* See discussion of the definitions used in the Oklahoma Act, *supra* at text accompanying notes 11-28.

43. 51 OKLA. STAT. § 24A.16 (Supp. 1987).

44. 25 OKLA. STAT. § 301-314 (1981).

45. *Id.* § 304(1).

46. *Id.* § 304(1).

47. See also Tex. Att’y Gen. Ops. 0-1662 (1940), V7115 (1948), and H-456 (1974) (funds generated by the athletic departments of state universities are “public funds” of the state).

Athletic departments at state-supported universities in Oklahoma are apparently subject to the Open Records Act. First, OSU and OU are definitely entities that are subject to the Act. Second, athletic departments at OU and OSU cannot reasonably be treated separately from the universities as a whole. Thus, stage one of the two-pronged test is answered affirmatively. The analysis should then proceed to the second inquiry: whether the records sought are of a type subject to the Act. If this question is also answered in the affirmative, the media should be allowed access to NCAA O.I. Letters and other related records in the possession of state-supported universities.

Stage Two: NCAA Investigation Records as Records Subject to the Oklahoma Open Records Act

Even though public universities and their athletic departments are subject to the Open Records Act and could undoubtedly be forced to disclose certain types of records, some records may be exempt from the Act.⁴⁸ Three exemptions in the Act are relevant to the records involved in athletic department investigations. Section 24A.5 exempts records that are required by law to be kept confidential.⁴⁹ Section 24A.16 deals with records kept at public educational institutions and provides that while statistical and directory information shall be open for inspection, other student records are to be kept confidential.⁵⁰ Section 24A.7 permits public bodies to keep confidential those records that “relate to internal personnel investigations” and those personnel records whose disclosure would constitute a “clearly unwarranted invasion of personal privacy.”⁵¹

Confidential By Law Exemption

As discussed earlier,⁵² the main thrust of the Open Records Act appears in section 24A.5, which provides that records of public bodies shall be open for inspection. However, section 24A.5 also provides the first exemption of the Act.⁵³ According to section 24A.5(1), the Act does not apply to records specifically required by law to be kept confidential. The Oklahoma Supreme Court explained this exemption in *Tulsa Tribune v. Oklahoma Horse Racing Commission*.⁵⁴

In *Tulsa Tribune*, a newspaper asserted that the Oklahoma Act entitled it to obtain personal financial statements in the possession of the Oklahoma Horse Racing Commission. The financial statements were submitted to the Commission by individuals seeking to secure a pari-mutuel racing permit. Pursuant to a request from the individuals, a district court ordered the Commission not to disclose the records. The Oklahoma Supreme Court, however,

48. See *supra* text accompanying notes 28-35.

49. 51 OKLA. STAT. § 24A.5(1) (Supp. 1987).

50. *Id.* § 24A.16.

51. *Id.* § 24A.7.

52. See *supra* the section “The Oklahoma Open Records Act.”

53. 51 OKLA. STAT. § 24A.5 (Supp. 1987).

54. 735 P.2d 548 (Okla. 1986).

issued a writ of prohibition holding that the district judge exceeded his authority by ordering the nondisclosure.⁵⁵ According to the Oklahoma Supreme Court, the public body in possession of the records should make the initial determination as to what matters are exempt under the Act.⁵⁶ If the public body decides not to disclose the requested records, a suit may then be brought in district court.⁵⁷

In so holding, the court set out some guidelines for interpreting the Act and in particular section 24A.5. The court stated that unlike the other specific exemptions in the Act, section 24A.5(1) is a "general grant of confidentiality."⁵⁸ However, according to the court, section 24A.5(1) does have the same purpose as the other statutory exemptions—to provide an exemption "where the release of information possessed by a public body may be damaging to an individual."⁵⁹ The court held that there should be a balance between the privacy rights of those furnishing information and the rights of those seeking its disclosure.⁶⁰

The court further stated that because subsection (a) of section 24A.5(1) specifically exempts records not discoverable under state law,⁶¹ the protective guidelines in section 3203(C) of the Oklahoma Discovery Code⁶² may be considered when determining what materials will be exempt from the Act.⁶³ Section 3203(C) of the Discovery Code provides that a judge may issue a protective order with respect to discovery to protect a person from "annoyance, embarrassment, oppression, or undue burden of expense."⁶⁴ According to *Tulsa Tribune*, the same factors should be used when deciding whether section 24A.5(1)(a) exempts a particular record from the Act.⁶⁵

The above factors found in the Discovery Code, along with the privacy rights of any individual involved, should be weighed against the media's (or the public's) right to the records when deciding whether the media is entitled to have access to NCAA O.I. Letters in the possession of state universities. There are strong interests on each side of this balancing equation. On one hand, the public has a strong interest in being informed about alleged wrongdoing at a public university.⁶⁶ On the other hand, any individual named in

55. *Id.* at 551.

56. *Id.* at 552.

57. *Id.* at 555.

58. 735 P.2d 548, 553 (Okla. 1986).

59. *Id.* at 554.

60. *Id.*

61. 51 OKLA. STAT. § 24A.5(1)(a) (Supp. 1987).

62. 12 OKLA. STAT. § 3203(C) (Supp. 1987).

63. 735 P.2d 548, 554 (Okla. 1986).

64. 12 OKLA. STAT. § 3203(C) (Supp. 1987).

65. 735 P.2d 548, 554 (Okla. 1986).

66. Section 24A.2 of the Act states as follows:

As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.

an NCAA O.I. Letter has a strong privacy interest at stake.⁶⁷ Letters of Inquiry are followed by additional investigations that might prove alleged violations false. If the information was released to the public before completion of the investigations, irreparable harm already would have been done to the named individual. If these privacy interests outweigh the public's interest in the alleged wrongdoing, the records will be exempt from disclosure under section 24A.5(1).

The Texas Court of Appeals recently determined the applicability of the Texas Open Records Act⁶⁸ to the same type of investigative records and in so doing discussed the scope of the confidential by law exemption. In *Vandiver v. Star Telegram*,⁶⁹ the court ordered Texas A&M University to disclose an NCAA O.I. Letter and other documents relating to alleged NCAA infractions committed by Texas A&M.⁷⁰ One of the university's defenses was that the Texas Open Records Act⁷¹ exempted the records sought by the newspaper

51 OKLA. STAT. § 24A.2 (Supp. 1987).

The public interest in favor of disclosure is also evident in the first amendment to the U.S. Constitution. The first amendment, which is applicable to the states through the fourteenth amendment due process clause, guarantees the freedom of speech and press. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967) ("a broadly defined freedom of press assures the maintenance of our political system and an open society"). The first amendment does not carry with it an unrestrained right to gather information, *Pell v. Procunier*, 417 U.S. 817 (1974) (regulation prohibiting media interviews with specific individual prison inmates held not to violate the Constitution), however it does provide a strong policy interest in favor of disclosure.

67. Oklahoma recognizes a cause of action for tortious invasion of privacy. *McCormack v. Oklahoma Publ. Co.*, 613 P.2d 737 (Okla. 1980). In *McCormick*, the court adopted the four distinct categories of invasion of privacy contained in the *Restatement (Second) of Torts* § 652A. The four categories are: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public. *McCormack*, 613 P.2d at 739.

Clearly, the first two categories are not applicable to the issue of this note. However, categories (3) and (4) might apply to the publication of NCAA investigation records. Closer scrutiny reveals, however, that category (3), unreasonable publicity given to private life, would not be actionable in this situation because one of the elements is that the matter not be of public concern. *Id.* at 740. NCAA investigations of state-supported universities are of legitimate public concern. Therefore, category (3) would not apply to these records.

The elements of category (4) are: first, the person must have been placed in a highly offensive false light; and second, the actor must have acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed. *Id.* Disclosure of allegations before the investigations are complete could place some individuals named in the records in a false light. The case would probably turn on whether the publisher acted with reckless disregard.

Whether an individual would have an action for invasion of privacy would depend on the facts of each case. However, the factors involved in the different types of invasion of privacy actions could be helpful when balancing the individuals' right to privacy against the public's right to access of the information.

68. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1988).

69. 756 S.W.2d 103 (Tex. Civ. App. 1988).

70. *Id.* at 106.

71. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1988) provides that "information deemed confidential by law, either Constitutional, statutory, or by judicial decision" is exempt from the disclosure.

as records deemed confidential by law.⁷² The court held, however, that the Act only exempts records that (1) contain highly intimate or embarrassing facts which, if publicized, would be highly objectionable to a reasonable person; and, (2) are not of legitimate concern to the public.⁷³ Because the court found that the records in question were of concern to the public, the confidential by law exemption did not apply and the records were subject to disclosure.⁷⁴

While the *Vandiver* ruling may be a correct application of the confidential by law exemption of the Texas Open Records Act, it is of limited use for interpreting Oklahoma's parallel provision. *Tulsa Tribune*, which is the only extensive judicial authority dealing with the confidential by law exemption in the Oklahoma Open Records Act,⁷⁵ makes no mention of the two factors the Texas court applied. Furthermore, if a record is not of a legitimate concern to the public, the Oklahoma Act, or any open records act, should not be applicable in any event. Thus, *Vandiver* lends no support to the argument that the confidential bylaw exemption in section 24A.5(1) of the Act is not applicable to the investigative records in question. The balancing of interests procedure proscribed by the Oklahoma Supreme Court in *Tulsa Tribune* remains the only applicable test to determine whether records are exempted by section 24A.5(1).

Exemption for Confidential Educational Records

In addition to the possible confidential bylaw exemption of section 24A.5(1), the Act exempts certain information concerning students at state schools. Section 24A.16 provides that public educational institutions should make available to the public "statistical information not identified with a particular student," as well as directory information.⁷⁶ Directory information is defined as "a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational institution attended by the student."⁷⁷

According to an Oklahoma Attorney General Opinion, the disclosure requirement of section 24A.16 covers only this kind of directory information.⁷⁸ Other kinds of student records are not subject to the Act, and disclosure of records other than statistical records could be a violation of the federal Family Educational Rights and Privacy Act.⁷⁹ Furthermore, according to section

72. 756 S.W. 2d 103, 105 (Tex. Civ. App. 1988).

73. *Id.*

74. *Id.*

75. 51 OKLA. STAT. § 24A.5(1) (Supp. 1987).

76. *Id.* § 24A.16.

77. *Id.* § 24A.16(B).

78. Op. Okla. Att'y Gen. 152 (1987).

79. 20 U.S.C. § 1232g (1982). Section 1232g(b)(1) of the Family Educational Rights and Privacy Act provides that no federal funds shall be made available to any educational institution that has a policy or practice of permitting the release of student records other than directory information.

24A.16, even directory information regarding a student may not be disclosed if the student's parent or the student himself, if he is eighteen years of age or older, objects to such disclosure.⁸⁰ Any information regarding specific student-athletes that would be contained in an O.I. Letter or similar materials, would be more than "directory information." Furthermore, a parent or student-athlete could, and presumably would, object to the disclosure of such information. Therefore, section 24A.16 exempts any portion of O.I. Letters and other similar records that pertains to specific student-athletes. Those portions of the records not pertaining to students, such as portions regarding coaches and/or alumni, however, are not exempted by section 24A.16. These portions of the records would be subject to disclosure after deletion of the exempt student information.⁸¹

Personnel Records Exemption

One other exemption in the Oklahoma Open Records Act is relevant. Section 24A.7 of the Act states in part as follows:

- A. A public body may keep personnel records confidential:
1. Which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or
 2. Where disclosure would constitute a clearly unwarranted invasion of personal privacy such as employee evaluations, payroll deductions, or employment applications submitted by persons not hired by the public body.⁸²

Records created by a university in its own investigation of alleged infractions could be viewed as relating to a personnel investigation involving demotion or discipline. This is particularly true with respect to those portions of any record that deal with the involvement of a coach in alleged rule violations. Coaches are personnel of the university; therefore, a university investigation involving possible discipline of a coach would be exempt from the Act due to section 24A.7.

A more difficult issue is whether O.I. Letters are personnel records that relate to internal personnel investigations of the universities. In answering this question, it should be remembered that the Act's definition of "record" includes not only material created by the public body but material received by the public body.⁸³ NCAA O.I. Letters would obviously be records received by the university. Furthermore, the Letters relate to the internal investigations the universities conduct upon receipt of the Letter from the NCAA. Therefore, not only would the universities' own investigations be exempt under section 24A.7, but the NCAA O.I. Letters would also be exempt under that

80. 51 OKLA. STAT. § 24A.16(B) (Supp. 1987).

81. *Id.* § 24A.5(2).

82. *Id.* § 24A.7.

83. *Id.* § 24A.3.

section. Of course, the exemption in section 24A.7 would apply only to those portions of the records that mention university employees.

Three statutory exemptions in the Act work to exempt portions of the records in question. First, section 24A.5 contains an exemption for any records required by law to be kept confidential. Application of this provision involves the balancing procedure outlined in *Tulsa Tribune*.⁸⁴ Second, section 24A.16 exempts all records regarding specific students except "directory information." Third, section 24A.7 exempts records relating to internal personnel investigations.

The Act provides that any reasonably segregable portion of a record should be disclosed after deletion of the exempt material.⁸⁵ However, after all the information withheld by these exemptions is deleted from the records, little information would remain. These exemptions may prevent the public from gaining access to a substantial portion of the information contained in the O.I. Letters or similar records in the possession of state-funded universities. The question remains, however, whether this result furthers the policy concerns underlying the Act.

Supporting the Policy Concerns of the Oklahoma Open Records Act

Three categories of parties are affected by lawsuits such as *Oklahoma Publishing Company v. Horton*⁸⁶ and *Vandiver v. Star-Telegram*.⁸⁷ The media and the public whose rights the media represents are one category affected; the university represents a second affected category; and within the third category are all those persons named in the records sought.

The media and the public certainly have a well-founded interest in what goes on at state-supported universities. Furthermore, the *Vandiver* court correctly recognized that the public is legitimately concerned with alleged violations of NCAA rules committed by these state-supported universities. This strong public interest in the availability of records in the possession of public bodies should, however, be weighed against the privacy rights of any person mentioned in the records and the universities' interest in conducting effective investigations into alleged NCAA rule violations.⁸⁸ The public interest in favor of disclosure is somewhat weakened by the fact that NCAA rules provide for the publication of the outcome of the investigations after the investigations are completed.⁸⁹ Thus, the media and the public will be kept informed, although at a later date.

In addition, *Tulsa Tribune v. Oklahoma Horse Racing Commission* emphasized the rights of any individual who furnishes information to a public

84. 735 P.2d 548 (Okla. 1987).

85. 51 OKLA. STAT. § 24A.5(2) (Supp. 1987).

86. No. C-88-1231-T (Dist. Ct. of Cleveland Co., Okla., filed Apr. 28, 1988) (suit dismissed with prejudice June 22, 1988).

87. 756 S.W.2d 103 (Tex. Civ. App. 1988).

88. See discussion of balancing interests involved in the confidential by law exception to the Act, *supra*, "Confidential By Law Exemption."

89. 1988-89 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Enforcement* 12-(d)-(4) and 12-(f).

body or is mentioned in a record that is potentially subject to disclosure under the Act.⁹⁰ The court went so far as to hold that an individual whose interests are adversely affected by disclosure would have standing to challenge the public body's decision to release the information.⁹¹ Individuals named in investigations and individuals who supply information to the investigators would be adversely affected by disclosure. They would therefore have standing to challenge a university's decision to make the materials available to the public.

The legitimate concern for the privacy rights of individuals named in the records becomes even stronger when the records sought are only *allegations* of rule violations, as was the case in *Oklahoma Publishing Co. v. Horton*. An O.I. Letter contains only allegations of rule infractions based on information obtained by NCAA investigators. The Letter is sent to the university to inform it of the allegations and invite the university to conduct its own investigation. A hearing is conducted to determine whether any of the alleged infractions occurred.⁹² If universities are forced to disclose the records *before* the investigations are complete, damage could occur to the reputations of individuals named in the allegations even though the individuals were later proven innocent of any wrongdoing. Therefore, the individuals who are involved or named in the investigations have a strong right to privacy that lends support to the argument that records such as NCAA O.I. Letters should not be made public information, especially before the investigations are completed.

The universities and the NCAA would also be adversely affected by the forced disclosure of such information. Both the NCAA and the universities charged with rule violations seek to find the truth with respect to the allegations. The investigative process could be adversely affected if the investigation records were disclosed prior to completion of the investigations. In *Athens Newspaper, Inc. v. Board of Regents*,⁹³ a Georgia trial court recognized this danger in its holding that the plaintiff newspaper was not entitled to records regarding ongoing investigations by the University of Georgia into alleged NCAA infractions committed by its athletic department. The court's own findings of fact best explain the adverse effect disclosure would have on the effectiveness of investigations:

The Court finds that the ongoing investigation by the University of the alleged charges with respect to the men's basketball program would be impeded if statements of witnesses became available to the public before the investigation was completed in that (a) some witnesses asked to make statements by the officials of the University would be reluctant to furnish information if they were aware that their identity and the substance of the information they furnished would immediately become "hot news"; (b) some such witnesses would be unwilling to furnish information if they were

90. 735 P.2d 548, 554 (Okla. 1987).

91. *Id.* at 555.

92. The six steps in the NCAA enforcement program are as follows: (A) preliminary investigation; (B) official inquiry; (C) committee on infractions hearing; (D) findings; (E) penalties; (F) appeal (optional). Wong & Ensor, *supra* note 8, at n. 18.

93. No. 42,871 (Sup. Ct. Ga., Jan. 25, 1985).

aware that they might be immediately subject to contact by the news media with requests for interviews as participants in “hot news”; and (c) some such witnesses would be unwilling to furnish information to the University officials if they were aware that it would be immediately made public and their truthfulness called into such question by other witnesses and by the news media.⁹⁴

In summary, strong policy reasons support the exemptions of NCAA Letters of Official Inquiry and other records pertaining to ongoing investigations from the disclosure requirements of the Act. Although the public has a strong interest in having access to the records of public bodies, the public interest is outweighed by three factors. First, the public interest in favor of disclosure of investigative records is not as strong in this situation as in others because the NCAA provides for disclosure at a later date. The public’s access to the information is not barred, merely delayed. Second, disclosure would violate the privacy of the individuals named in the records. Third, the investigations by the schools and the NCAA would be adversely affected by premature disclosure. For these reasons, a finding that the records in question are exempt from the Oklahoma Open Records Act is not only the correct application of the Act, it also best meets public policy concerns.

Conclusion

The Oklahoma Open Records Act provides that records of public bodies should be accessible by the public, subject to certain exemption provisions of the Act. Athletic departments at state-supported universities are “public bodies” within the Act’s definition; therefore, NCAA investigation records in the possession of the schools are subject to disclosure unless exempt under the Act.

Three exemption provisions in the Act could apply to this kind of material. First, records required by law to be kept confidential are exempt. This exemption requires balancing the public’s right of access with the individual’s right to privacy. This balancing test would depend on the facts of each case, but because of the strong privacy interest much of the material could be exempt. Second, all student records except “directory information” are exempt from disclosure. Therefore, most portions of the investigation records relating to students would be exempt. Third, records that relate to internal personnel investigations are exempt. This provision could exempt any portion of a record that relates to coaches. Together, these provisions could exempt most of the information contained in NCAA investigation records.

The policy concerns involved are best served by the decision that the investigation records are exempt from disclosure. Confidentiality better enables the universities to conduct effective investigations and protects individuals from damage due to premature release of allegations.

Sound policy reasons and a careful interpretation of the Act lead to the conclusion that NCAA Letters of Official Inquiry and other investigation records

94. *Id.*