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August 11, 2011

Mr. Bill Shory
News Director, WBIR-TV
1513 Hutchinson Avenue
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You have requested an opinion from this office that addresses the following issue:

> Is the Notice of Allegations to the Chancellor of the University of Tennessee, Knoxville, (hereinafter referred to as the "University") Case No. M-339, from the National Collegiate Athletic Association (hereinafter referred at as the "NCAA") dated February 21, 2011, required to be made available in its entirety, without redactions or deletions, pursuant to the Tennessee Public Records Act (hereinafter referred to as "TPRA")? Likewise, is the University's Response to the NCAA's Notice of Allegations, which was publically released by the University on July 22, 2011, required to be made available in its entirety, without redactions or deletions, pursuant to the TPRA?

I. Background

The request for an opinion contained the following statement of facts:

> On February 21, 2011, a Notice of Allegations was delivered by the NCAA to the Chancellor of the University of Tennessee, Knoxville, Case No. M-339. On February 23, 2011, this document was disclosed by the University on its website in a heavily redacted form. The document includes twenty-two (22) sections and twenty-six (26) pages with multiple redactions and deletions.
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> On February 23, 2011, Mr. Shory spoke with a representative of the University's Men's Athletics Department, Desiree Reed-Francois, who advised that the redactions and deletions were based solely on the Family Educational Right to Privacy Act ("FERPA"). Mr. Shory advised her that, under the TPRA, he was requesting a copy

> of the document without redactions or deletions. She directed him to submit the request in writing.
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> Later on February 23, 2011, Mr. Shory submitted a written request for the "Notice of Allegations to the Chancellor of the University of Tennessee, Knoxville, Case No. M-339, from the NCAA dated February 21, 2011, in its entirety and without redactions" or deletions. Mr. Shory emailed the Inspection/Duplication of Records Request Form, cover correspondence, and supporting documentation to Dr. Joseph A. DiPietro, President of the University; Chancellor Jimmy G. Cheek; and Mr. Michael E. Hamilton, Men's Athletic Director at the University. He asked that the University immediately furnish a copy of the Notice of Allegations in its entirety on the ground that the document was previously disclosed on February 23, 2011, in its heavily redacted form; the document is "promptly available" under Tenn. Code Ann. § 10-7-503; and the seven business day exception for impracticability under Tenn. Code Ann. § 10-7-503(a)(2)(B) is not applicable.
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> On March 2, 2011, the University responded to Mr. Shory's request for an unredacted copy of the Notice of Allegations. The request was denied based upon the provisions of FERPA. The letter from Vice Chancellor Nichols to Mr. Shory reads in part:
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> . . . FERPA prohibits the University from releasing student information contained in the Notice of Allegations even if the information has already been reported by the media. The Department of Education has advised educational institutions "to be sensitive to publicly available data on students and to the cumulative effect of disclosures of student data," particularly in cases involving information about "students or incidents that are well-known in the school or its community." Because of the substantial amount of media coverage of the NCAA investigation, the University was required to redact more information than what you may consider typical in order to "de-identify" students in compliance with FERPA.

However, in the same March 2, 2011 letter, the University enclosed a version of the Notice of Allegations that was still redacted, but in a modified version. Subsequently, on May 20, 2011, the University submitted its response to the Notice of Allegations to the NCAA. The redacted version of the response was publically released by the University on July 22, 2011.

II. Analysis

The Tennessee General Assembly has declared that the TPRA "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. Section 10-7-505(d). In turn, the courts in Tennessee have held that unless there is an exception for the disclosure of a record, disclosure is required "even in the face of serious contravailing considerations." *Memphis Publishing Company v. City of Memphis*, 871 S.W. 2d 681, 684 (Tenn. 1994). The courts have also held that when a record is not entirely confidential, but contains confidential information, the records custodian is required to redact the confidential information prior to making the records accessible to the public. *See Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001) and *Schneider v. City of Jackson*, 226 S.W. 3d 332 (Tenn. 2007). While the University acknowledges that the Notice of Allegations and the Response to the Notice of Allegations are public records, the position of the University is

that pursuant to the provisions of FERPA, it is required "to remove a student's personally identifiable information before producing a record to a Tennessee citizen in response to a Public Records Act request."

FERPA was adopted in 1974 in part as a means of ensuring that personal information and records related to students in schools that receive federal financial assistance remained confidential unless disclosure is authorized by a parent. 20 U.S.C.A. Section 1232g(b)(1) specifically reads:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following. . .

20 U.S.C.A.Section 1232g(a)(4)(A) reads:

> the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--
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> **(i)** contain information directly related to a student; and
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> **(ii)** are maintained by an educational agency or institution or by a person acting for such agency or institution.

Personally identifiable information is defined in 34 CFR 99.3 to include but not be limited to:

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates

When exploring the applicability of FERPA to public records request for records maintained by educational institutions, courts in various jurisdictions have acknowledged the fact that "FERPA does not prohibit the disclosure of any record. Rather, FERPA operates to deprive an educational agency or institution of funds if 'education records' are disclosed without consent." *Osborn v. Board of Regents of the University of Wisconsin System*, 647 N.W. 2d 158, 167 (Wis. 2002); *See* also *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1210 (Fla. Dist. Ct. App. Oct. 2009). However, courts generally approach the issue of whether or not FERPA creates an exception to the public records act in a manner similar to the court in *Osborn* which said:

> We do not question the importance of, and the University's interest in, receiving funding: therefore, we interpret FERPA here according to what records or information the University can disclose without jeopardizing its eligibility for funding. [12]

Id. See also *DTH Pub. Corp. v. University of North Carolina at Chapel Hill*, 496 S.E. 2d 8,12 (N.C. App. 1998) and *Bauer v. Kincaid*, 759 F. Supp. 575, 590-91(W. D. Mo. 1991).

In *National Collegiate*, the court examined whether or not copies of transcripts from an NCAA disciplinary proceeding and the responses to the proceedings that were submitted to the NCAA by Florida State University were "education records" as defined by FERPA which would be protected from disclosure pursuant to a state statute that made "education records" confidential. *National Collegiate*, 18 So. 3d 1201, 1210 (Fla. Dist. Ct. App. Oct. 2009). Because Florida had a statutory provision that made "education records" confidential, the court looked at the issue presented from the perspective of whether or not the records were education records that were protected pursuant to state statute as opposed to FERPA. *Id*. at 1207. The court held that the records were not "education records" because they did not directly relate to a student, but rather pertained "to allegations of misconduct by the University Athletic Department and only tangentially relate to the students who benefitted from that misconduct." *Id*. at 1211. Additionally, the court held that because the all of the identifying information or information directly related to the students had been redacted from the transcripts and the responses, the records did not constitute "education records" and therefore were not protected from disclosure by state statute. *Id*. the court concluded its analysis of this issue by stating:

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[1] The United States District Court for the Eastern District of Illinois recently held in *Chicago Tribune v. University of Illinois*, 2011 WL 982531(N.D. Ill. March 7, 2011) that because FERPA does not prohibit the release of education records, the University was required to release admission records requested pursuant to a FOIA request. An appeal of the lower court's decision has been filed.

[2] It is also important to note that the Family Policy Compliance Office within the Department of Education, which is the entity that administers the FERPA provisions, issued an opinion letter on February 12, 2002 which states that to the extent reports submitted by a University to the NCAA for purposes of self-reporting violations contain "specific information such as the name of the student and his high school-and because the documents are maintained by the University, and are institutional in nature (they relate to the school's responsibility to self-report violations to the NCAA)" the records are "education records" that cannot be disclosed without the consent of the student in unredacted form and depending upon how easy it is to trace the identity of the student after the redactions are made, there could be some situations where even redacted record could not be disclosed without the student's consent.

> We emphasize that our decision is limited to the disclosure of the redacted versions of the transcript and response. Like the trial court, we have reviewed only the redacted versions of these documents. We are therefore not in a position to decide whether the plaintiffs or other members of the public are entitled to examine the unredacted versions.

Id.

In *Kirwan v. The Diamondback*, the court also examined whether or not certain correspondence between the NCAA and a university was protected from public disclosure. Unlike the court in *National Collegiate* that held that transcripts and responses generated as a result of an NCAA proceeding were not confidential pursuant to a state statute that referenced FERPA, the court in *Kirwan* looked specifically at whether or not correspondence between the NCAA and the University of Maryland, College Park was protected from public disclosure by FERPA. *Kirwan v. The Diamond Back*, 721 A.2d 196, 203 (Md. 1998). In *Kirwan*, a request was made by the campus newspaper to the University for all correspondence between the University and the NCAA relative to student-athletes receiving preferential treatment related to parking tickets and former coaches paying a student-athlete's parking tickets. *Id*. at 198. FERPA was one of several legal basis cited the request when the University denied the request. *Id*. at 199. The court began its analysis of this issue by reviewing FERPA's legislative history. *Id*. at 204. According to the court:

> The legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of a student. The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student.

Id. The court then looked at a number of cases from various jurisdictions where records that were maintained by educational institutions and contained identifying information related to students were determined not to be "education records" because the records were not related to a student's education or academics. *Id*. at 205. After considering both the legislative history and the cases from other jurisdictions, the court held that "education records" as defined by FERPA "do not include . . . correspondence between the NCAA and the University regarding a student-athlete accepting a loan to pay parking tickets. *Id.* at 206. However, when determining whether or not the requestor should have been awarded attorney's fees for denying the request, the court said:

> the University's withholding of the information was not entirely unjustified. The definition of the term "education records" in the federal Family Educational Rights and Privacy Act is broad and, literally, could be construed to encompass the records here involved. There have been no prior reported Maryland cases dealing with the particular issues here. Moreover, there is not very much case-law elsewhere concerning the meaning of "education records" in the federal statute and the issue of public access to records of the type here.

Id.

The definition of "education records" is considerably broad and based upon all of the information provided to this office, attorneys within the University's legal department have reviewed unredacted copies of the records and have construed the provision to include the records at issue. Based upon the breath of the definition of "education record", the lack of any case within this jurisdiction that directly addresses the issue presented, and the fact that this office does not have the ability to review an unredacted copy of both the Notice of Allegations and the Response to the Notice of Allegations to determine whether or not the records constitute education records and the information contained within the records is in fact personally identifiable information, this office is unable to say for certain whether or not the records are required to be provided to the public in their entirety without redactions or deletions pursuant to the TPRA. However, it is the opinion of this office that to the extent that the records are going to be kept by the University and are not temporary in nature, relate directly and not just tangentially to students of the University, and contain information that identifies or when linked with other information would identify a student of the University, such information is required to be redacted pursuant to FERPA prior to the records being made accessible to the public.

Please feel free to call me at (615) 401-7892 if you have questions or concerns.

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