Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-001709 03/01/2021

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
E. Wolf
Deputy

E S P N INC

KEITH BEAUCHAMP

v.

ARIZONA BOARD OF REGENTS

GREGG E. CLIFTON

JUDGE MIKITISH

UNDER ADVISEMENT RULING
Application for Production of Public Records

The Court has received and reviewed the Plaintiff ESPN Inc.'s (ESPN) Complaint and Application for Order to Show Cause, filed on January 29, 2021; the Defendant Arizona Board of Regents' (the Board) Memorandum in Opposition to Application for Order to Show Cause, filed February 4, 2021; and ESPN's Reply in Support of its Application for Order to Show Cause, Notice of Filing of Authorities, and attachments, filed February 5, 2021.

The Court has also received and reviewed the Board's unopposed Motion for Entry of Protective Order, filed February 11, 2021; and ESPN's Notice of No Opposition to the Board's Motion, filed February 12, 2021.

Finally, the Court has received and considered the evidence and arguments made at the Evidentiary Hearing on February 17, 2021. During the hearing, the Court granted the Motion for Entry of Protective Order upon certain conditions noted in the Minute Entry. The Court took the Application for Order to Show Cause under advisement at the end of the hearing. For the reasons set forth below, the Application is granted.

Background

ESPN is an internationally recognized media outlet focused on every level of sports. The Board is a public body responsible "for the effective governance and administration" of Arizona's three state universities, including the University of Arizona (the University). The University's men's basketball program has an impressive history of success dating back decades. The parties agree that there is a strong public interest in the men's basketball program throughout the state as well as nationally and internationally.

In September 2017, the United States Attorney for the Southern District of New York announced indictments against several individuals involved with prominent collegiate basketball programs. The indictments stemmed from a federal investigation into bribery and related offenses involving coaches, athletic shoe company representatives, and "athlete advisors." One of those arrested was one of the University's assistant basketball coaches, Emmanuel Richardson. In early 2018, the University terminated Mr. Richardson's employment. In early 2019, Mr. Richardson pled guilty to one count of conspiracy to commit bribery for taking approximately $20,000 in bribes from purported "athlete advisors" in exchange for using his position with the University to influence players to retain the services of those same advisors. In June 2019, Mr. Richardson was sentenced to three months in prison with two years of probation. One source purportedly linked the program's head coach Sean Miller to bribery. The University and Mr. Miller steadfastly have denied that assertion.

As a part of Mr. Richardson's sentencing, the University's General Counsel noted that the negative publicity associated with Mr. Richardson's arrest made the recruitment of future players substantially more challenging. He also noted that the University was facing the prospect of significant sanctions and penalties from the National Collegiate Athletic Association (NCAA), a member led organization that in part establishes and enforces the rules for intercollegiate competition.

After the announcement of the federal investigation and indictments, the NCAA began its own investigation into the basketball program. In October 2020, the University received a "notice of allegations" (NOA) from the NCAA. The NOA purportedly alleges nine separate rule violations, five of which are allegations of "Level I" violations classified as severe breaches of conduct that could lead to the imposition of serious sanctions. *See* NCAA Bylaw, 19.1.1. Several media outlets have requested to obtain copies of the NOA from the University pursuant to the Arizona Public Records Law, A.R.S. § 39-121, *et seq.*, but the University has denied the requests. ESPN requested the NOA in late October 2020, and on November 3, 2020, the University denied the request. In late January 2021, counsel for ESPN sent a demand letter for the NOA, and the

University denied the request the following day. The following week, ESPN filed this special action.

Legal standard

A person who has requested public records and been denied access may appeal the denial through a special action in the Superior Court. A.R.S. § 39-121.02.

Discussion

I. Public Records Requirements

In Arizona, "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. Arizona's public records statutes, adopted as early as 1939, are a part of its "government in the sunshine" laws designed to provide transparency in government. *See Matthews v. Pyle*, 75 Ariz. 76, 79 (1952) (referencing the Legislature's adoption of public records law in section 12-412, A.C.A. 1939). The purpose of Arizona's public records law is to "open agency action to the light of public scrutiny." *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297, 302 ¶ 21 (1998). Arizona evinces a general "open access" policy towards public records. *Phoenix Newspapers Inc. v. Purcell*, 187 Ariz. 74, 81 (App. 1996). Like its federal counterpart, Arizona's public records law allows the public "to be informed about what their government is up to." *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). Arizona's law creates a presumption that records are open to the public for inspection and establishes a "clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 490-91 (1984).

The presumption of disclosure, however, is not absolute, and a public body or officer may withhold public records in certain circumstances. For example, Arizona courts have held that a public body or officer need not disclose public records under the following circumstances:

1) where public records are made confidential by statute, *see* Arizona Agency Handbook (Rev. 2018), appendix 6.1, Records Made Confidential/Non-Disclosable by Arizona Statute (documenting over 300 statutes);

2) where public records would inappropriately invade privacy, *see Scottsdale Unified School Dist.*, 191 Ariz. at 301 ("reasonable people do not expect that their privacy interest in information disappears merely because that information may be available through some public source"); and

3) where disclosure of public records would be "detrimental to the best interests of the State." *See Matthews*, 75 Ariz. at 81.

"If a document falls within the scope of the public record statute, then the presumption favoring disclosure applies and, when necessary, the Court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the State outweigh the policy in favor of disclosure." *Griffis v. Pinal County*, 215 Ariz. 1, 5 ¶ 13 (2007). The government bears the burden of overcoming the presumption of disclosure. *Scottsdale Unified School District*, 191 Ariz. 300 ¶ 9.

In order to withhold public records, a government entity must specifically demonstrate how release of particular information would violate privacy rights or confidentiality, or adversely affect the State's interests. *See Cox Arizona Publications v. Collins*, 175 Ariz. 11, 14 (1993); *Mitchell v. Superior Court*, 142 Ariz. 332, 335 (1984); *Judicial Watch Inc. v. City of Phoenix*, 228 Ariz. 393, 400 ¶ 30 (App. 2011); *Phoenix Newspapers Inc. v. Ellis*, 215 Ariz. 268, 273 (App. 2007). The government cannot rely on "global generalities" of possible harm that might result to forestall releasing public records. *Cox*, 175 Ariz. at 14; *Judicial Watch Inc.*, 282 Ariz. at 399.

II. The Board's Assertions of Specific Harm

In this case, the parties do not dispute that the NOA issued to the University is a public record. The Board has not argued that it can withhold it based on a statutory exemption or privacy interests. Rather, the Board argues that it can withhold the NOA in the best interests of the State. The Board points to several factors which, it argues, amount to specific harm that would result from the release of the NOA.

First, the Board asserts that disclosure would violate NCAA rules and subject the University to the possibility of additional allegations and harsher sanctions. The Board argues that NCAA Bylaws forbid the University for making public disclosures about a case until a "final decision" has been announced. Those Bylaws provide as follows:

> An institution and any individual subject to the NCAA Constitution and Bylaws involved in a case, including any representative or counsel, shall not make public disclosures about the case until a final decision has been announced in accordance with prescribed procedures.

NCAA Bylaw, 19.01.3 Public Disclosure.

In addition to the NCAA Bylaws, the Board notes that as a result of the FBI probe, the NCAA established the Independent Accountability Resolution Process (IARP) and Complex Case

Unit (CCU) in 2019 to address infractions issues. The Board argues that the IARP and CCU "radically transform" NCAA investigations by establishing a neutral and aggressive investigative body and new process for complex or serious violations. The IARP has Internal Operating Procedures that, like the NCAA Bylaws, address confidentiality. Those procedures provide:

> Confidential information shall not be publicly disclosed in contravention of applicable bylaws and procedures. Confidential information includes but is not limited to identifying information related to the case, investigative information, case management plan, hearing status reports, case record, institutional compliance reports, all other filings and other information submitted through the secure filing and case management system, and all other case-related information.

IARP Internal Operating Procedure 3-2-1.

In addition,

> The parties shall not disclose information about an investigation in violation of Bylaw 19.11.4.2 or contrary to instructions of the CCU. If a party improperly discloses information, the CCU may investigate the source of the leaked or disclosed information and bring appropriate allegations if the IRP [Independent Resolution Panel] could conclude from the information discovered that a party violated confidentiality expectations.

IARP Internal Operating Procedure 3-4-4.

Because the University's case was referred to the IARP, the Board argues that NCAA Bylaw 19.01.3 and IARP Internal Operating Procedure 3-2-1 bar it from publicly releasing the NOA until the Independent Resolution Panel publishes its "final public infractions decision."

The Board also argues that, "[w]hen a case is referred to the independent structure, the CCU will assess whether further investigation is needed. The CCU will conduct any additional investigation and submit the case for review by the independent resolution panel." https://iarpcc.org/. In this case, the University has confirmed the CCU's intention to conduct further investigation in the matter. The Board argues that additional investigation could result in either 1) additional violations being alleged, or 2) existing violations being withdrawn or modified.

A release of the NOA, according to the Board, would compromise the additional investigation and be detrimental to the University if it increases the chance of additional violations or reduces the chance of withdrawn or modified violations. The Board argues that disclosure of the details of the allegations contained in the NOA would tipoff individuals subject to the remaining aspects of the investigation, may result in individuals refusing to cooperate, or lead to

the destruction of or tampering with critical evidence. The Board argues that in other cases, the NCAA enforcement staff has issued new and amended NOA's containing additional allegations based on the results of additional investigation.

The Board further argues that the NCAA or CCU could charge that the University has failed to cooperate with the investigation if it releases the NOA. The Board notes that, in past cases, the NCAA has charged institutions who failed to cooperate with a Level I infraction. The Board argues that if it releases the NOA, the NCAA or CCU also could charge the University with obstructing an investigation or premeditated violations, and issue a higher penalty. *See* NCAA Bylaws 19.9.3 (d), (f), (m), (o). The Board argues that these additional violations would cause specific and material harm to the State due to the negative stigma associated with additional infractions, harm to the University's reputation, and diminishment of recruitment and retention efforts for prospective athletes. The Board asserts that additional violations would result in additional costs including attorneys' fees and a harmful delay in the processing of the case.

The Board notes that the risks of disclosure in this case are heightened because this is one of the first referred to the IARP. The Board argues that the consequence of violating NCAA Bylaws and IARP Internal Operating Procedures is unknown because it is an entirely new process with no precedent. The Board argues that a court order requiring immediate release of the NOA would preclude the Board from defending the allegations contained in the NOA and limit the harm caused by unproven allegations circulating in the media.

III. Analysis

1. Violations of NCAA Bylaws and IARP Internal Operating Procedures

On their face, the NCAA Bylaws and IARP Internal Operating Procedures appear to prohibit a release of the NOA. While the NOA is not a document expressly included in the confidentiality provisions, it seems clearly included the catchall provision, "all other case-related information." *See* IARP Internal Operating Procedure, 3-2-1.

Simply because release of the NOA may violate the NCAA Bylaws and IARP Internal Operating Procedures, however, does not end the public records inquiry. The State still must overcome the presumption of disclosure by specifically demonstrating how release of particular information would harm the State's best interests. In this case, the Board must show the likelihood of a serious potential harm from revelation. *See Phoenix Newspapers Inc. v. Ellis*, 215 Ariz. 268, 273 ¶ 22 (App. 2007); *Mitchell v. Superior Court*, 142 Ariz. 332, 335 ("The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks nondisclosure rather than on the party

that seeks access."). *See also Star Publishing Company v. Pima County Attorney's Office*, 184 Ariz. 432, 434 (App. 1994).

In this case, the Board has put forth no evidence that the NCAA, CCU, or other related body has ever brought an allegation or increased penalties for a public university's release of an NOA pursuant to a public records request. While the University's Vice President and Director of the Athletic Department and its Senior Assistant Athletic Director for compliance both testified of their awareness of the NCAA adding allegations or increasing penalties based on information obtained after initial allegations were made, neither testified that the NCAA's actions in those cases were caused by the release of public records. Both testified to their awareness that other universities have released NOA's and related documents stemming from the FBI probe, yet neither were aware that the NCAA or CCU have issued any allegations or sanctions because of that disclosure. Both testified that the NCAA or CCU has not asked them not to disclose the NOA or that the University would risk additional sanctions or allegations if it does. The Senior Assistant Athletic Director for Compliance, the University's official familiar with NCAA investigations, testified that he was unaware of whether the University had conferred with the CCU about the public record request and possible disclosure.

On this record, THE COURT FINDS that the Board has not met its burden to demonstrate that release of the NOA is likely to lead to additional NCAA allegations or sanctions that would result in specific, material harm to the State.

2. Potential for Harm to Ongoing Investigation

The NCAA Bylaws and IARP Internal Operating Procedures provide that the NCAA and CCU may further investigate allegations after the issuance of an NOA. The Board presented evidence that the CCU in fact has indicated that it is undertaking additional investigation in the University's case. The existence of an additional investigation, however, does not close the public records assessment.

Several Arizona cases have dealt with public records requests for documents related to ongoing investigations. In *Cox Arizona Publications Inc. v. Collins*, 175 Ariz. 11 (1993), our Arizona Supreme Court addressed a request for release of police reports arising out of the investigation of illegal drugs and gambling by members of the Phoenix Suns basketball team. The county attorney in that case argued that police reports in an active ongoing criminal prosecution could never be subject to disclosure because of the countervailing interests of due process, confidentiality, privacy and the best interests of the State. Our Supreme Court held that such a blanket rule "contravenes the strong public policy favoring open disclosure and access." *Id.* at 14. The Court held that it was incumbent on the county attorney "to specifically demonstrate how production of the documents would violate rights of privacy or confidentiality, or would be

'detrimental to the best interests of the State.'" *Id*. The Court found that he did not meet that burden. Instead, the Court found that the county attorney argued "in global generalities of the possible harm that might result from the release of police records" which the Court found insufficient to meet his burden. *Id*.

In *Carlson*, our Supreme Court addressed a public records request for a county sheriff's offense report implicating an inmate of the county jail in an alleged assault on another inmate. The Court held that there was a presumption in favor of releasing the report unless the State was able to show specifically that the best interests of the State would prevent inspection. *Carlson*, 141 Ariz. at 491. Likewise, in *Star Publishing Company v. Pima County Attorney's Office*, 181 Ariz. 432 (App. 1994), our Court of Appeals addressed a public records request for production of a county attorney's office's computer backup tapes. The county attorney argued that, among other concerns, some of the material might impede a pending criminal investigation. The Court held that "while these concerns might on occasion permit secrecy, no showing has been made on this record why they should preclude revelation. All that is offered is speculation." *Id* at 434.

In this case, the public body at issue is not the investigative body. Rather, it is the subject of the investigation. Nevertheless, the same rule regarding ongoing investigations must apply. The Board may not withhold documents relating to an investigation without an express showing by specific evidence that the release would be detrimental to the State.

The Board argues that disclosure of the NOA would specifically and materially harm the Board, the University and the State "by undermining the integrity of the investigation going forward." The Board argues that disclosure would improperly forewarn individuals regarding future aspects of the investigation and cause individuals to refuse to cooperate or destroy evidence. The Board, however, offered no evidence as to how the integrity of the investigation would be undermined by release of the NOA. It also offered no evidence that disclosure would improperly forewarn any individuals or cause them to refuse to cooperate. ESPN noted that there has been numerous court proceedings, plea agreements, and public trials in addition to numerous media reports related to the allegations in this case. If there is any potential of improperly impeding the investigation, it was incumbent upon the Board, specifically and materially, to show how. Because the Board has not made such a showing, THE COURT FINDS that the Board has not met its burden to demonstrate that release of the NOA would impede any ongoing investigation in such a way as to be detrimental to the State's best interests.

3. Harm to the IARP Process

The IARP was established in 2019 and therefore its precise modes of operation are uncertain. Naturally, participating institutions like the University are cautious. No rational individual or institution wishes to be the example of how to do things improperly. Nevertheless,

the recent establishment of the process cannot shield the Board from producing public records in compliance with our state laws. In this case, the University's officials testified that they have not spoken with either the NCAA or CCU about the public records request to release the NOA nor how the release would affect the resolution process.

If release of the NOA would compromise this new process, it was incumbent on the Board to show how. Because the Board has not done so, THE COURT FINDS that the Board has not met its burden to show that release of the NOA would harm the IARP or be detrimental to the best interest of the State. While the Board has expressed its desire to limit the harm caused by "unproven allegations circulating in the media," the best interests of the State exception does not exist to save an officer or public body from inconvenience or embarrassment. *Dunwell v. University of Arizona*, 134 Ariz. 504, 508 (App. 1982).

4. Timing of Production

Arizona law requires that a custodian of records must "promptly furnish" copies of public records when requested. A.R.S. §39-121.01 (D). The Board argues that it should be allowed to turn over the NOA at the completion of the investigative portion of the IARP in order to prevent the potential harm to any further investigation. The Board argues that it anticipates that this investigative phase will be completed within three to six months and that this timing would be reasonable under the public records law. The University's athletic department officials, however, testified that they did not know the exact timing of the investigation. Even assuming the Board's conclusions to be correct, THE COURT FINDS that furnishing the NOA in three to six months is not consistent with the statutory requirement to provide the records promptly.

5. Attorneys' Fees

"The Court may award attorneys' fees and other legal costs that are reasonably incurred in any action under this [public records] article if the person seeking public records has substantially prevailed." A.R.S. §39-121.02 (B). Both the determination that the petitioner substantially prevailed and the award of attorneys' fees are at the discretion of the trial court. *See Hodai v. City of Tucson*, 239 Ariz. 34, 46 ¶ 41 (App. 2016), *citing Democratic Party of Pima County v. Ford*, 228 Ariz. 545, 547-48 ¶ ¶ 8-10 (App. 2012).

In this case, THE COURT FINDS that the Board denied the public records request relying in part on NCAA Bylaws and IARP Internal Operating Procedures that on their face compel confidentiality with the threat of additional allegations or sanctions. THE COURT ALSO FINDS that the Board was grappling with the newness of the IARP procedures that caused it to place extra caution on release of information that might compromise, or be seen to compromise, an ongoing investigation. While these reasons are insufficient to protect the release of the public records, THE

COURT FINDS that they are sufficient to forestall an award of attorneys' fees. Therefore, THE COURT FINDS that although ESPN substantially prevailed in this action, no award of attorneys' fees is appropriate.

Conclusion

Based on the foregoing,

IT IS ORDERED **granting** the Application for Order to Show Cause and ordering the Board to disclose the NOA promptly in response to the public records request.

IT IS FURTHER ORDERED **denying** the request for attorneys' fees.