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DOUGLAS J. PETERSON
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July 21, 2022

Via email at [REDACTED]
John Caroff

RE: *File No. 22-R-135; University of Nebraska; John Caroff, Petitioner*

Dear Mr. Caroff:

This letter is in response to your petition received by this office on July 6, 2022, in which you requested that we review the denial by the University of Nebraska (“University”) of your public records request submitted on June 24, 2022. In accordance with our normal procedures, we requested a response from the University after we received your petition, and we subsequently received a response from Jaclyn L. Klintoe, Director University Records/Associate General Counsel. We have considered your petition and the University’s response in accordance with the provisions of the Nebraska Public Records Statutes (“NPRS”), Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2020, Supp. 2021), amended 2022 Neb. Laws LBs 876 and 1246. Our findings in this matter are set forth below.

FACTS

On June 24, 2022, you emailed the following request to Ms. Klintoe:

I am requesting access to examine the following public record:

The November 6, 2021, All-22 video of the college football game between Ohio State University and the University of Nebraska. I believe the University of Nebraska includes participation in officially recognized activities and sports as public directory information.

On June 29, you supplemented your request with the following information:

All-22 video, which is sometimes referred to as All-22 film, is an edited compilation of digital video recordings of the game. The All-22 video includes recordings from two cameras. One camera is located at the 50-yard line and captures a wide-angle sideline shot. At the beginning of each offensive/defensive play and kickoff, the sideline camera is focused to include all 22 players on the field within the frame. The second camera is located behind the center of the endzone. The endzone camera is not focused to include all 22 players on the field, except on kickoffs. Rather, the width of the endzone shot is more narrowly focused on the line formation for the beginning of each given play.

Shortly after a game is completed, the All-22 video is uploaded to an online video exchange service. Catapult Group International Limited, via a press release on August 3, 2020 announced it had been awarded a contract to provide this exchange service to all FBS teams. Prior to 2020, a company called Dragonfly provided the service.¹

Ms. Klintoe timely responded to your request on July 1. She indicated that the University is required to comply with the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, and while the University considers participation in organized sports to be “directory information” under FERPA, the “designation does not extend to all aspects of participation in those college sports.” She informed you that the requested video was an “education record” under FERPA and would be withheld on that basis and Neb. Rev. Stat. § 84-712.05(1). Ms. Klintoe further informed you that the University considered the All 22 video to be proprietary.

You state in your petition that FERPA defines “directory information” to include

the 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 agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). You further state that the University has made “participation in officially recognized activities and sports” part of its public directory information. Citing

¹ In addition, on July 1, you emailed Ms. Klintoe the reason for your request (i.e., generally, providing an opportunity for women to study game film). However, “[t]he public records statutes apply ‘equally to all persons without regard to the purpose for which the information is sought.’ As a general rule, citizens are not required to explain why they seek public information.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 801, 943 N.W.2d 231, 247 (2020) [*BH Media Group*] (quoting *State ex rel. Sileven v. Spire*, 243 Neb. 451, 457, 500 N.W.2d 179, 183 (1993)). Accordingly, this office does not consider the reason or purpose for a records request when making our determination under § 84-712.03(1)(b).

canons of statutory construction set out in *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018), you assert that “[a]ll aspects of participation are included within the plain and ordinary meaning of 20 U.S.C. § 1232g(a)(5)(A), Neb. Rev. Stat. 84-712.05(1) and the University of Nebraska – Office of the University Registrar web page’s definition of public directory information.” You argue that the University’s position “creates limitations, which is reading a meaning into the statutory language.”

The University asserts that the exception to disclosure in Neb. Rev. Stat. § 84-712.05(1) provides a statutory basis to withhold the video. This exception pertains to

[p]ersonal information in records regarding a student, prospective student, or former student of any educational institution or exempt school that has effectuated an election not to meet state approval or accreditation requirements pursuant to section 79-1601 when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on February 1, 2013, and regulations adopted thereunder

According to the University, this exception allows it “to withhold any personal information in records regarding its students, other than the information it has designated as ‘routine directory information’ in compliance with [FERPA].” (Emphasis in original.)

The University considers your argument that “[a]ll aspects of participation” may be construed from the plain and ordinary meaning of the directory information definition at issue here as overly broad. “Directory information is static data—it allows the University to create a descriptive listing of students that includes certain informational details about their education and background.” Its inclusion allows the University to create items like team rosters and game programs. However, “[i]t is not a blanket designation that allows carte blanche permission to disseminate student-athlete records containing their information and likenesses.” The University indicates that its standard practice is to have each student athlete sign a waiver before disseminating their image or likeness, and that “the University itself does not rely on the ‘routine directory information’ exception for distributing student-athlete information. Therefore, All-22 video of an entire collegiate football game should not be considered ‘directory information’ as included in the University’s public definition.”

The University asserts that it properly withheld the video under § 84-712.05(1) “even if FERPA waivers were obtained for each depicted athlete and/or FERPA” did not otherwise apply. The exception gives the University the discretion to withhold all non-directory student records even in those instances where FERPA permits disclosure. Thus, since the video constitutes student personal information and does not fall under the “routine directory information” exception, the University represents that its reliance on § 84-712.05(1) as a basis to withhold the video was appropriate.

DISCUSSION

The basic rule for access to public records is set out in § 84-712(1). This provision generally states that “[e]xcept as otherwise expressly provided by statute,” all Nebraska citizens and other interested persons have the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Neb. Rev. Stat. § 84-712(1) (2014) (emphasis added). “Public records” are defined as follows:

Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Neb. Rev. Stat. § 84-712.01(1) (2014) (emphasis added). Thus, in those instances where the Legislature has provided that a particular record shall be confidential or may be withheld at the discretion of the records custodian under § 84-712.05, there is no right of access. The NPRS “place[s] the burden of proof upon the public body to justify nondisclosure.” *BH Media Group*, 305 Neb. at 792, 943 N.W.2d at 242.

Under FERPA, an institution making directory information public “shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent [or student] to inform the institution or agency that any or all of the information designated should not be released without the parent's [or student's] prior consent.” 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37. Accordingly, the University has designated the following items “directory information”:

- Student name
- Year at the University (Freshman, Sophomore, Junior, Senior, etc.)
- Dates of attendance
- Academic college and major field of study
- Enrollment status, (e.g., undergraduate or graduate; full-time or part-time)
- Participation in officially recognized activities and sports
- Degrees
- Honors and awards received
- Most recent educational agency or institution attended

- Hometown
- University email address

The University's policy states that “[d]irectory information will be available to the public upon request and may be included in student directories published electronically. However, students have the right to have directory information withheld from the public, if they so desire.”²

We have considered your argument that the plain and ordinary meaning of the FERPA definition of directory information in 20 U.S.C. § 1232g(a)(5)(A), the state law exception to disclosure for student records in § 84-712.05(1), and the University’s definition of directory information as encompassing “all aspects of participation,” allows you to access the requested video. We disagree. There is nothing in those provisions that would expand students’ “participation in officially recognized activities and sports” to include video footage of a particular football game. The requested video is not “directory information” as contemplated under FERPA.

In the present case, the University is relying on the state law exception to disclosure which allows a public body to lawfully withhold personal information in records regarding a student, former student, or prospective student, except for those items listed in its published directory information. Since we have concluded that the requested video does not fall under the University’s directory information, its reliance on § 84-712.05(1) to deny you access to the video was appropriate.

Finally, we note for the record that the University also argues that the video may be withheld under the exception in § 84-712.05(3) (“proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose”). However, since we have concluded that § 84-712.05(1) provides a statutory basis to withhold the requested video, it is unnecessary for us to determine the applicability of § 84-712.05(3).

CONCLUSION

Based on the foregoing, we conclude that the All 22 video of the Ohio State v. Nebraska football game held on November 6, 2021, is not directory information as defined in FERPA, and as designated by the University. Consequently, the University’s reliance on § 84-712.05(1) to withhold the video was appropriate. Since no further action by this office is necessary, we are closing this file. If you disagree with the conclusion reached

² Accessible at <https://registrar.unl.edu/academic-standards/policies/directory-information/>.

John Caroff
July 21, 2022
Page 6

above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the NPRS.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Jaclyn L. Klintoe (via email only)

49-2987-30