

**Howard E. Manning, Jr.  
Superior Court Judge  
Wake County Courthouse  
P. O. Box 351  
Raleigh, N.C. 27602  
919 792 4960  
919 792 4951(f)**

**Fax Only Memo**

**May 12, 2011**

**To: Hugh Stevens & Amanda Martin at 1-866- 593-7695  
Alexander McC. Peters & Melissa L. Trippe at 716-6763**

**Subject: The News and Observer Publishing Company, et al. versus  
Richard A. Baddour, Director of Athletics for the University of  
North Carolina, et al. 10CVS1941 Orange County Superior Court**

**Re: ORDER re: Judgment on the Pleadings**

**Ladies and Gentlemen:**

**I have carefully considered your proposed Orders and have elected to sign, file and enter plaintiffs' proposed order with a couple of pen and ink inserts only. A copy of the filed Order is attached. This fax memorandum serves as the certificate of service of the Order.**

**I note from your correspondence accompanying the proposed orders that the defendants contemplate filing a motion for a stay pending the obvious appeal that will follow. Just so you will know, I have, in some cases, stayed the operations of decisions pending appeal when all sides agreed to the stay, as in the video poker/Cherokee casino case and some others. However, it is not my general practice to stay my own decisions and in this case the stay is objected to by the plaintiffs. In such cases, I generally deny the stay and the party can go to the Court of Appeals for a writ following the entry of an order denying the stay. Just wanted all to be advised so you can proceed accordingly. Thank you for your hard work in trying to agree on the terms of the Order.**



STATE OF NORTH CAROLINA  
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
CASE NO. 10 CVS 1941

FILED

2011 MAY 12 PM 1:19

WAKE COUNTY C.S.C.

BY \_\_\_\_\_

THE NEWS AND OBSERVER )  
PUBLISHING COMPANY; DTH )  
MEDIA CORP; THE CHARLOTTE )  
OBSERVER PUBLISHING COMPANY; )  
TIME-WARNER ENTERTAINMENT- )  
ADVANCE/NEWHOUSE PARTNERSHIP; )  
WTVD TELEVISION, LLC; CAPITOL )  
BROADCASTING COMPANY, )  
INCORPORATED; THE ASSOCIATED )  
PRESS; and MEDIA GENERAL )  
OPERATIONS, INC., )

Plaintiffs

v.

RICHARD A. BADDOUR, as Director )  
of Athletics for The University of North )  
Carolina at Chapel Hill; PAUL HILTON )  
"BUTCH" DAVIS, JR., as Head Football )  
Coach at UNC-CH; JEFF B. McCRACKEN, )  
as Director of Public Safety at UNC-CH; )  
and HOLDEN THORP, as Chancellor at )  
UNC-CH, )

Defendants.

ORDER

This matter came on for hearing before the undersigned on April 15, 2011 on the plaintiffs' Motion for Judgment on the Pleadings. This matter previously was designated as a Rule 2.1 Exceptional Case and thus was permissibly heard out of term and out of county. The Plaintiffs appeared through Hugh Stevens and Amanda Martin of the law firm Stevens Martin Vaughn & Tadych, PLLC. The defendants appeared through Special Deputy Attorneys General Alexander McC. Peters and Melissa Trippe of the North Carolina Department of Justice. After

considering the pleadings and the written and oral arguments of the parties, the Court finds and concludes as follows.

This lawsuit was brought by media organizations seeking to obtain copies of records from the University of North Carolina at Chapel Hill ("UNC-CH") pursuant to the North Carolina Public Records Law, Chapter 132 of the General Statutes. The requested records that are the subject of this suit relate to the football program at UNC-CH, and allegations of improprieties in the program. The plaintiffs are eight media organizations that investigate and report on news throughout the state of North Carolina and nationally. The defendants are Richard Baddour, the Director of Athletics for the University of North Carolina at Chapel Hill ("UNC" or "the University"); Paul Hilton "Butch" Davis, Jr., the head football coach at UNC; Chief Jeff B. McCracken, the Director of Public Safety at UNC; and Holden Thorp, the Chancellor of UNC-CH. At issue are six categories of information:

- a. All documents and records of any investigation conducted by the University related to any misconduct by any UNC-CH football coach, any UNC-CH football player, any sports agent, any UNC-CH booster and/or any UNC-CH academic tutor.
- b. Names of all individuals or organizations that provided impermissible benefits to any UNC-CH football players.
- c. Unredacted phone numbers on telephone bills for mobile phones provided to and used by defendants Baddour and Davis and by former associate football coach John Blake.
- d. Parking tickets issued by UNC-CH relating to 11 players.
- e. Names, employment dates and salaries of all individuals employed as tutors/mentors for UNC-CH student athletes since January 1, 2007, including any documents mentioning former tutor Jennifer Wiley.
- f. Names of recipients of athletic scholarships.

Subsequent to the suit being filed, the University provided documentation of category (b) (the identity of those who provided impermissible benefits to UNC players) and category (f) (names of athletic scholarship recipients). Plaintiffs conceded in open court that these two categories have been satisfied and are no longer at issue.

On March 28, 2011, plaintiffs filed a motion for judgment on the pleadings, which was heard on April 15, 2011. Neither the plaintiffs nor the defendants made arguments with regard to category (a), the plaintiffs' broad request for all documents related to the investigation. Accordingly, this Court rules only on the categories of information denoted above as (c), (d) and (e).

In describing the rationale underlying the Public Records Law, the North Carolina Supreme Court has adhered to the philosophy that "the general rule in the American political system must be that the affairs of government be subject to public scrutiny." *News and Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Accord, *Advance Publications, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 507, 281 S.E.2d 69, 71 (1981) ("Good public policy is said to require liberality in the right to examine public records."). Moreover, North Carolina's appellate courts repeatedly have admonished that the Public Records Law is to be construed liberally and the exceptions to it interpreted narrowly.

The crux of the dispute between the University and the plaintiffs involves (a) the definition of an "education record" as that term is defined in FERPA, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; and (b) whether the phone numbers of University employees that happen to appear on phone records of University-provided phones used by coaches or the athletic director are shielded from disclosure by the State Personnel Act. HEM SL-5/12/11

FERPA applies only to "education records," which are defined as "those records, files, documents, and other materials that (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The U.S. Supreme Court has held, "The word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431-33 (2002). FERPA

does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC-CH.

#### Phone Records

The plaintiffs have requested unredacted telephone bills for mobile phones provided to and used by defendants Baddour and Davis and by former associate football coach John Blake. Such records presumably include the numbers of telephones from which calls were placed to those mobile phones and the numbers to which calls were placed from those phones. Release of such telephone bills would not divulge the content of the communication, and the telephone number of a student that happens to appear on the phone bill of a coach or the athletic director is not part of the education records protected by FERPA. Nor does the appearance of the phone number of a University employee on the phone bill of a coach or athletic director constitute a personnel record. The N.C. Supreme Court has held,

In order for personnel information to be protected by section 126-22, it must meet two requirements: (1) it must have been gathered by an individual's employer (including the Office of State Personnel) or considered in an individual's application for employment; and (2) the information must relate to at least one of the enumerated activities by the employer with respect to the individual employee or applicant for employment.

*News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 476, 412 S.E.2d 7, 14 (1992).

Moreover, phone numbers are not even among the information listed in the personnel statute as employment-related or personal information to be withheld.

#### Parking Tickets

The plaintiffs have asked for access to parking tickets issued by UNC-CH relating to 11 players. The University has argued that parking tickets and associated records are education records protected by FERPA and exempt from disclosure under the Public Records Law because one potential sanction for repeated violations or refusal to pay a ticket is disciplinary action before the student honor court. However, the fact that an ultimate sanction *might* include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into

a disciplinary arm of the University. The parking tickets issued by UNC-CH public safety, if any, to 11 players are not education records protected by FERPA.

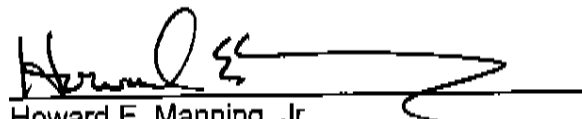
Tutor/Mentor Records

The plaintiffs have requested the names, employment dates and salaries of all individuals employed as tutors or mentors for UNC-CH student athletes since January 1, 2007. Although the athletic tutor program permits the employment of individuals who have received an undergraduate degree, the University has taken the position that undergraduate students who are employed as tutors can be so employed only by reason of their student status. "Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition." 34 C.F.R. § 99.3. Therefore active, enrolled UNC students who are employed by UNC and whose employment <sup>was or</sup> is contingent upon their being students at UNC-CH <sub>was or</sub> are education records protected by FERPA and exempt from disclosure under the Public Records Law.

Accordingly, the Court grants judgment on the pleadings for the plaintiffs with respect to the phone records and parking tickets and grants judgment on the pleadings for the defendants with respect to the tutor records. The Court holds open the issue encompassed in category (a) above, as to the remaining request for all records of the investigation.

IT IS SO ORDERED.

This the 12<sup>th</sup> day of May, 2011.

  
Howard E. Manning, Jr.  
Superior Court Judge Presiding