

In the
Supreme Court of Ohio

STATE, ex rel. ESPN, INC.,

Case No. 2011-1177

Petitioner,

Original Action in Mandamus

vs.

THE OHIO STATE UNIVERSITY,

Respondent.

**ANSWER OF RESPONDENT THE OHIO STATE UNIVERSITY
TO PETITIONER'S COMPLAINT FOR WRIT OF MANDAMUS**

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CLERK OF COURT
SUPREME COURT OF OHIO

Respondent, The Ohio State University (“Ohio State”), in answer to the complaint of Petitioner ESPN Inc. (“ESPN”), states as follows:

FIRST DEFENSE

1. Ohio State admits the allegations in paragraph 1 of the complaint.
2. Ohio State admits the allegations in paragraph 2 of the complaint.
3. In response to paragraph 3 of the complaint, Ohio State admits that its student football program has been very successful over the years and that Ohio State promotes the program.
4. Ohio State admits the allegations in paragraph 4 of the complaint, except the allegation about the URL of the official website of Ohio State’s football program. Ohio State further responds that the URL is <http://www.ohiostatebuckeyes.com/sports/m-footbl/osu-m-footbl-body.html>.
5. Ohio State admits the allegations in paragraph 5 of the complaint.
6. Ohio State admits the allegations in paragraph 6 of the complaint.
7. In response to paragraph 7 of the complaint, Ohio State admits that it received the April 20, 2011 records request attached as Exhibit A to the affidavit of Justine Gubar. Ohio State denies that all of the requests were properly made pursuant to Ohio Rev. Code § 149.43. As to the contents of the records request, Ohio State responds that the request speaks for itself.
8. In response to paragraph 8 of the complaint, Ohio State admits that it received the records request attached as Exhibit A to the affidavit of Justine Gubar. As to the contents of the records request, Ohio State responds that the request speaks for itself.
9. In response to paragraph 9 of the complaint, Ohio State admits that, on May 27, 2011, it provided the e-mail response attached as Exhibit B to Ms. Gubar’s affidavit. Ohio State further responds that this e-mail was only an initial response and part of ongoing

communications with ESPN regarding the April 20 request and other requests from ESPN, and Ohio State believed ESPN understood this. After May 27, 2011, Ohio State continued to communicate with ESPN about its records requests and Ohio State has since issued a further response to the April 20 request. A copy of that further response is attached as Exhibit 1 to this answer.

10. In response to paragraph 10, Ohio State admits that the Federal Educational Rights and Privacy Act ("FERPA") is a federal law designed to protect the privacy of student education records, and that FERPA conditions federal funding to academic institutions on their adherence to statutory privacy standards relating to student records. Ohio State denies the allegations in paragraph 10 that FERPA does not apply to any of the records requested by ESPN.

11. In response to paragraph 11, Ohio State denies the allegations that all the records requested are public records subject to disclosure under Ohio Rev. Code § 149.43. To the extent that the remainder of paragraph 11 states legal conclusions, no response is required.

12. Ohio State denies the allegations in paragraph 12 of the complaint.

13. In response to paragraph 13 of the complaint, Ohio State admits that it received the April 15, 2011 public records request attached as Exhibit A to the affidavit of Tom Farrey and admits that Ohio State's response of June 21, 2011 is attached as Exhibit B to Mr. Farrey's affidavit. Ohio State further states that its June 21 response was only part of ongoing communications with ESPN regarding the April 15 request, and Ohio State believed ESPN understood this. After June 21, 2011, Ohio State continued to communicate with ESPN about its records request and Ohio State has since responded further to that request. A copy of that further response is attached as Exhibit 1 to this answer.

14. Paragraph 14 of the complaint states legal conclusions to which no response is required.

15. Ohio State denies the allegations in paragraph 15 of the complaint.

16. In response to paragraph 16 of the complaint, Ohio State admits that it received the May 11, 2011, records request attached as Exhibit C to the affidavit of Tom Farrey and admits that Ohio State's response of June 21, 2011 is attached as Exhibit D to Mr. Farrey's affidavit. Ohio State further states that its June 21 response was only part of ongoing communications with ESPN regarding the May 11 request and other requests from ESPN, and Ohio State believed ESPN understood this. After June 21, Ohio State continued to communicate with ESPN about its records request and Ohio State has since responded further to that request. A copy of that further response is attached as Exhibit 1 to this answer.

17. Paragraph 17 of the complaint sets out legal conclusions to which no response is required.

18. Ohio State denies the allegations in paragraph 18 of the complaint.

19. Paragraph 19 of the complaint sets out legal conclusions to which no response is required.

20. Ohio State further denies all allegations alleged in the complaint that have not been expressly addressed in paragraphs 1 through 19 of this answer.

SECOND DEFENSE

21. ESPN fails to state a claim upon which relief can be granted.

THIRD DEFENSE

22. The claims in ESPN's complaint are moot.

FOURTH DEFENSE

23. The claims in ESPN's complaint are not yet ripe.

FIFTH DEFENSE

24. Ohio State has no clear legal duty to produce records in response to the records requests underlying this case beyond those it has already produced.

SIXTH DEFENSE

25. ESPN has no clear legal right to obtain records in response to the records requests underlying this case beyond those that Ohio State has already produced.

SEVENTH DEFENSE

26. Ohio State is not liable for attorneys' fees because it has acted reasonably in response to the records requests underlying this case.

EIGHTH DEFENSE

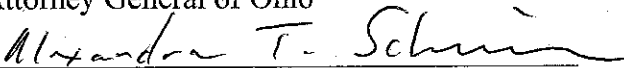
27. This case presents questions of federal law.

NINTH DEFENSE

28. Ohio State reserves the right to assert additional defenses upon prior notice to the Court and ESPN.

Respectfully Submitted,

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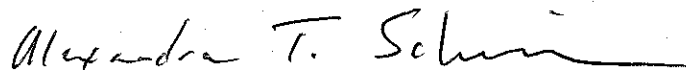
The Ohio State University

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Respondent The Ohio State University to Petitioner's Complaint for Writ of Mandamus was served by U.S. mail this 2nd day of August, 2011 upon the following counsel:

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July 29, 2011

Tom Farrey
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Bristol Connecticut 06013
Tom.Farrey@espn.com

Via counsel

Justine Gubar
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Justine.Grubar@espn.com

Via counsel

Re: Public records requests in *State ex rel. ESPN, Inc. v. The Ohio State University* (Ohio S. Ct.), Case No. 11-1177

Dear Tom and Justine,

I am writing to respond more fully to the public records requests underlying ESPN's lawsuit. More specifically, I want to express Ohio State's surprise at the lawsuit and to provide additional information and responses relating to those requests.

As you know, we have produced thousands of pages of documents in response to ESPN's numerous and evolving requests concerning the football program. As you also know, we have previously provided a number of documents regarding the requests underlying the lawsuit, including documents concerning the Sarniak e-mails (see my e-mail of May 27, 2011), past NCAA violations (see my e-mail of June 6, 2011), and the ongoing NCAA investigation (see the materials posted at <http://www.osu.edu/news/ncaadocs> on June 8, 2011 and <http://www.osu.edu/news/newsitem3199>).

Consistent with our long working relationship and many telephone conversations, we viewed the process of responding to several of those requests as ongoing. The university was unaware that ESPN thought otherwise. Indeed, we regularly interacted

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EXHIBIT 1

Although the university believes that several of the requests as drafted are not consistent with the public records law, we have continued to evaluate your requests and have gathered additional documents that may be of interest to you. Those documents are copied onto the PDF file on the disc accompanying this letter, and relate to the contested requests, as follows:

"All emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie, and/or Gene Smith with key word Sarniak since March 15, 2007"

This request does not correspond to the manner in which the university's records are organized. We do not track or organize correspondence by a particular word or specific information that may be of interest to a requestor. Nor is there a specific correspondence file at the university named Sarniak. Compliance with your request would thus require us to identify and review any and all correspondence between and among multiple senior university officials. As you know, such action is not required by the public records act. See *State ex rel. Zauderer v. Joseph*, 62 Ohio App. 3d 752, 756 (10th Dist. 1989). See also *State ex rel. Fant v. Tober*, No. 63737, 1993 Ohio App. LEXIS 2591 at *4 (8th Dist. Apr. 28, 1993); *aff'd* 68 Ohio St. 3d 117 (1993); *State ex rel. Thomas v. Ohio State University*, 71 Ohio St. 3d 245 (1994); *State ex rel. Dillery v. Icsman*, 92 Ohio St. 3d 312 (2001).

We have nonetheless made all reasonable efforts to respond to your request as drafted. See documents numbered as pp. 1-124 of the PDF file, which include the materials provided to you in my e-mail of May 27, 2011 as referenced above. Please note that personally identifiable information regarding our students was redacted in keeping with the Family Educational Rights and Privacy Act ("FERPA").

Notwithstanding the breadth of your request and the associated compilation difficulties resulting from it, the university believes that the attached documents constitute the complete universe of records that you apparently seek here, with the exception of documents that are being withheld because they are:

- Covered by attorney/client or work product privileges. Such documents are properly withheld under R.C. 149.43(A)(1)(v). See *Squire, Sanders & Dempsey, L.L.P. v. Givaudan*, 127 Ohio St. 3d 161, 2010-Ohio-446; *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority*, 121 Ohio St. 3d 537, 2009-Ohio-1767.
- Education records the contents of which are so directly related to individual students as to make their entire contents personally identifiable information protected under FERPA. See 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.3, "Education Records" subsection (a)(1); "Personally Identifiable Information" subsection (g).

"All documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since January 1, 2010 related to an investigation of Jim Tressel"

This broad request is inconsistent with the manner in which our records are organized. Further, parts of this request would require the complete duplication of a file containing multiple thousands of pages of documents. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17; *State ex rel Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623; *State ex rel. Zauderer v. Joseph* (10th Dist. 1989), 62 Ohio App. 3d 752, 756.

The University posted a large number of documents responsive to this request on our website shortly before the filing of your lawsuit (<http://www.osu.edu/news/ncaadocs> and pp. 125-449 of the PDF file) and we continue to update our website at appropriate junctures on matters related to the ongoing NCAA investigation. (Please note that personally identifiable information regarding our students was redacted from the materials posted on the web in order to comply with FERPA). We suggest that you review these documents on the web and further refine or clarify your request as necessary.

"Any and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007"

This request does not correspond to the way the University's records are organized, and hence no record responsive to this request exists. However, in an effort to provide the information you seek, we have compiled a list containing the names of individuals who are either absolutely barred from receiving student athlete passes or whose relationship to the requesting student would have to be scrutinized before passes are issued to those individuals. That list is at pp. 450-466 of the PDF file.

"Any report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005"

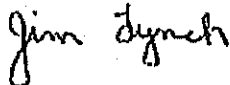
Portions of this request improperly seek a complete duplication of the university's voluminous files on these matters. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17. Further, it is inconsistent with the manner in which the university organizes its files. It is also overbroad in that it requests multiple classes of documents concerning multiple different matters.

Nonetheless, we want to work with ESPN to refine your request. To that end, we are enclosing the documents numbered as pp. 467-493 of the PDF file, which summarize all football related violations going back to January 1, 2005. (Please note that personally identifiable information regarding students was redacted in keeping with FERPA). Please let us know which records, related to which violations, you are interested in.

As indicated above, the university did not intend the e-mails cited in ESPN's lawsuit to be the final word on the company's requests. We were surprised that ESPN chose to proceed with litigation, and we believe that a continuation of our regular and ongoing conversations would have been fruitful in identifying any public records that you may be seeking.

We look forward to continuing to work with ESPN and would be happy to discuss these matters further if you would like to refine or modify your requests after reviewing the documents attached.

Best Regards,

A handwritten signature in cursive script that reads "Jim Lynch".

Jim Lynch
Senior Director of Media Relations