

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE UNITED STATES DEPARTMENT)
OF EDUCATION,)
)
Petitioner,)
)
vs.)
)
THE NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION, an unincorporated)
association,)
)
Respondent.)

1:06-cv-1333-JDT-TAB

**ENTRY ON MOTION BY UNITED STATES DEPARTMENT OF EDUCATION TO
COMPEL SUBPOENA ENFORCEMENT (Doc. No. 1.20) AND MOTION BY THE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION TO QUASH OR, IN THE
ALTERNATIVE, FOR A PROTECTIVE ORDER (Doc. No. 1.1)**

This matter concerns a documents production dispute between the National Collegiate Athletic Association (“NCAA”), a well-known private organization charged with enforcing the amateur traditions of its college sports members, and the United States Department of Education Office of Inspector General (“OIG”), a federal agency responsible for ensuring that public tax dollars for education are spent lawfully and for their intended purpose. About two years ago, the University of the District of Columbia (“UDC”) abruptly cancelled its basketball season, and the NCAA and the OIG each say they are still investigating the reasons that led to this cancellation. The NCAA says it is

looking into possible NCAA rule violations. The OIG says it wants to determine if federal student financial aid funds were misused.

This court is involved because the OIG issued a subpoena on May 1, 2006, for all of NCAA's records pertaining to its investigation, and the NCAA, seeking to preserve the confidentiality of certain documents, subsequently filed a motion to quash. Alternatively, if the records must be produced, the NCAA would like a protective order requiring OIG to notify the NCAA before showing these records to anyone else, including other law enforcement agencies. The NCAA contends that unrestricted disclosure will harm its ability to regulate college sports. The OIG responds that either of the NCAA's proposed solutions will impair its ability to carry out its mission.

On August 11, 2006, noticing that the OIG had not yet filed a motion to compel enforcement of its subpoena, the court ordered the parties to show cause why the matter should not be dismissed for lack of subject matter jurisdiction. The OIG responded by filing a motion to compel on August 18, 2006, to which the NCAA has filed its response. As noted in a separate order, the roles of the parties have now been reversed and realigned, and a district court cause number has been assigned.

The matter is now fully briefed, oral arguments have been heard, and subject matter jurisdiction has been established. The court rules as follows.

I. BACKGROUND

The NCAA is a voluntary association of colleges, universities, and conferences, and its headquarters are located in Indianapolis, Indiana. (Aff. of David Price (“Price Aff.”) ¶¶ 3-4.) Its purpose is to promote amateur athletics in higher education, and one of the ways that it accomplishes this goal is by establishing and enforcing rules regarding the recruitment of athletes.¹ (*Id.*) At some point, the NCAA began investigating the basketball programs at UDC, an NCAA member institution located in Washington, D.C. (*Id.* ¶ 5.) During the 2004-2005 basketball season, “in the wake of an NCAA investigation” of alleged rule violations, UDC officials cancelled the men’s and women’s basketball programs. (*Id.*)

The OIG learned in late 2004 that UDC had cancelled its programs because of alleged violations of “recruitment, academic eligibility and financial aid violations.” (Decl. of Ronald Wormsley (“Wormsley Decl.”) ¶ 5.) The OIG opened an investigation into whether any federal student financial aid funds had been misappropriated. (*Id.* ¶ 6.) On March 25, 2005, UDC’s Financial Aid Director Henry Anderson told OIG that some funds had been “‘accidentally’ over-awarded.” (*Id.*) The OIG learned on January 25, 2006, that the discovery of overpayments to twelve student athletes had prompted the cancellation of the 2004-2005 basketball season. (*Id.*) UDC outside counsel Robert Clayton told OIG that the university had reported its preliminary investigation to the NCAA and that it would give the OIG a copy of the NCAA’s findings after the NCAA completed its investigation. (*Id.*)

¹ Allegations of misconduct are brought before the NCAA Committee on Infractions, composed of representatives of member institutions and of the public. (Price Aff. ¶ 4.)

The OIG issued an administrative subpoena on May 1, 2006, to the NCAA for “any and all documents” related to its UDC investigation. (*Id.* ¶ 7.) The NCAA obtained an extension until June 6, 2006, for complying. (*Id.* ¶ 8.) On June 1, 2006, NCAA representatives asked the OIG to enter into a confidentiality agreement in which the OIG would provide five days notice prior to releasing any subpoenaed information. (*Id.*) The NCAA representatives indicated they wanted this advance notice and time period to obtain confidentiality agreements with the subsequent parties to receive the information. (*Id.*) The OIG informed the NCAA that it would not enter into such an agreement because it would hamper the agency’s ability to conduct an independent and confidential investigation. (*Id.* ¶ 9.)

The NCAA has estimated that it has about 1,000 documents that are relevant to the OIG’s subpoena. (NCAA Counsel Oral Argument.) Of these, only 72 were created by the NCAA. (*Id.*) The rest originated from UDC.² (*Id.*)

On June 2, 2006, NCAA’s outside counsel informed OIG that the organization would not comply with the subpoena without “additional confidential protection.” (Wormsley Decl. ¶ 9.)

² The NCAA has provided the court with three exhibits under seal which were described in open court as a log of the documents relevant to OIG’s subpoena. This exhibit would be inadequate if offered as a privilege log, and the exhibit has not been considered further. See Fed. R. Civ. P. 26(b)(5) (requiring that a party claiming a privilege “shall make the claim expressly and shall describe the nature of the documents, communications, or things, not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection”). The log does not provide the court with sufficient information to discern the nature of the documents sufficiently to assess the applicability of the NCAA’s claim of privilege.

Moreover, the log itself was submitted under seal, despite any details that would seem to be confidential. The Seventh Circuit has repeatedly insisted that litigation be conducted in public to the maximum extent consistent with respecting trade secrets, the identities of undercover agents, and other facts that should be held in confidence. *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (*citing Baxter Int’l, Inc. v. Abbot Labs.*, 297 F.3d 544 (7th Cir. 2002); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984)).

The NCAA filed its motion to quash the subpoena or obtain a protective order on June 6, 2006, along with a brief in support of its motion. OIG filed its response on June 26, 2006, which was followed by NCAA's reply brief of July 11, 2006. Oral argument was held July 28, 2006.³

II. DISCUSSION

Congress may give administrative agencies broad powers to subpoena records or papers. See *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 201, 214 (1946). Although agencies must exercise these powers responsibly, a request for records is reasonable so long as it fits within the lawful scope of the agency's authority, the documents are relevant, and the request is not excessive. *Id.* at 209. Subpoenas can be directed at persons or entities regulated by the agency or at third parties. See *EEOC v. Ill. Dep't of Employment Sec.*, 995 F.2d 106, 107 (7th Cir. 1993).

As a preliminary matter, many of the NCAA's arguments and citations are not relevant to the issues before the court. The NCAA, for example, grounds the court's "express authority" to enter a protective order in Rule 45 of the Federal Rules of Civil Procedure. (NCAA Br. 8.) It cites cases such as *Herbert v. Lando*, 441 U.S. 153, 177 (1979), and *Berst v. Chipman*, 653 P.2d 107, 187 (Kan. 1982) for the proposition that a court may modify a subpoena even when a privilege does not apply. (*Id.*) These arguments and citations, however, are appropriate to judicial discovery matters, not to a district court's review of an administrative agency's investigatory authority. See, e.g., *Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1547 (D.C. Cir. 1994) (noting the court's repeated holding that conflicts with civil discovery rules are not a

³ In oral argument, the NCAA's counsel argued only for the protective order. However, the NCAA has not withdrawn the motion to quash, so both requests will be addressed.

basis for refusing to comply with administrative subpoenas);⁴ Fed. R. Civ. P. 45 advisory committee note, 1937 adoption (stating that Rule 45 “does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority.”⁵)

The NCAA disregards the distinction between judicial subpoenas and administrative subpoenas. The distinctions are important to determine the relevance required, and the judicial limits that may be placed upon subpoena enforcement. Judicial subpoenas and administrative investigatory subpoenas are fundamentally different. Unlike a discovery subpoena, which is an exercise of judicial authority, an agency’s investigatory subpoena arises from Congress’ power under the ‘necessary and proper’ clause, to delegate authority to an administrative agency. *Okla. Press Publ’g Co.*, 327 U.S. at 214; see also 2 Am. Jur. 2d Administrative Law § 62 (noting that powers of all three branches may be combined in an administrative agency but that the separation of the powers doctrine “is one of the bases for the principle that courts may not usurp the functions of an administrative agency”).

As the Supreme Court has noted, in the early development of administrative law, “courts were persuaded to engraft judicial limitations upon the administrative process.” *United States v. Morton Salt*, 338 U.S. 632, 642 (1950). Administrative investigations “fell before the colorful and nostalgic slogan ‘no fishing expeditions.’” *Id.* However, in *Morton Salt*, the Court concluded that those administrative agencies that are charged with investigative and accusatory duties are authorized to conduct their work in ways that constitute, for all practical purposes, fishing. *Id.* at

⁴ The civil discovery rules may come into play, however, once the agency becomes a litigant in subsequent civil proceedings. *Thornton*, 41 F.3d at 1547 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)).

⁵ *But see* David D. Siegel, *Practice Commentaries* C45-1, Fed. R. Civ. P. 45 (noting that although the power of administrative agencies to issue subpoenas does not come from Rule 45, its provisions may be relevant; also describing Rule 45 as a rule of trial and discovery).

643. Agencies, much like a grand jury, can investigate “merely on suspicion that the law is being violated,” or merely to assure themselves that the law is being followed. *Id.* at 642-43. “When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.” *Id.* at 643.

Such power is, of course, subject to the limits that Congress imposes. See, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984) (noting that “unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence ‘relevant to the charge under investigation’ (citation omitted)”). Some courts have noted that an agency’s authority to investigate is not necessarily in play when the agency is merely adjudicating disputes between private parties. See, e.g., *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979) (noting that the information requested in all administrative subpoenas must be “reasonably relevant” to the agency’s inquiry, but the relevancy of an investigative subpoena is measured against the agency’s ‘general purposes,’ while the relevancy of an adjudicative subpoena is measured against the charges in the complaint).

A. *The Motion to Quash*

Generally, courts will enforce an administrative subpoena “if (1) it reasonably relates to an investigation within the agency’s authority, (2) the specific inquiry is relevant to that purpose and is not too indefinite, (3) the proper administrative procedures have been followed, and (4) the subpoena does not demand information for an illegitimate purpose.” *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 986 (7th Cir. 2000); see also *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 645 (7th Cir. 1995) (approving enforcement so long

as the subpoena “seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency’s authority”).

There are two major exceptions. First, under federal common law, traditional privileges, such as the attorney work-product doctrine, can be maintained against an agency subpoena. *Ill. Dep’t of Employment Sec.*, 995 F.2d at 107 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 397-99 (1981)). Secondly, a court may modify or exclude portions of a subpoena that are “unduly burdensome or unreasonably broad.” *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (quoting *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980)). An unduly burdensome or unreasonably broad subpoena is one that threatens “the normal operation of a respondent’s business.” *Id.* (quoting *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981)).

In this matter, the NCAA is not contesting the relevancy, the specificity, scope, or purpose of the OIG’s request.⁶ Under the Inspector General Act of 1978, the OIG is charged with auditing and investigating the programs and operations of the Department of Education. 5 U.S.C. App. 3 §§ 2, 11(2). Its mission includes the promotion of economy and efficiency, and the detection of fraud or abuse. *Id.* at § 4. The agency is authorized to subpoena “the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary” to perform its functions. *Id.* at § 6(a)(4).

i. The NCAA’s denial that it is seeking a privilege

⁶ The NCAA asserts that the OIG could obtain the information it seeks from other sources but has cited no case law or statute that would require the OIG to do so. *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 333, 336 (5th Cir. 1997), the case mentioned in its brief, merely upheld the authority of the Department of Agriculture Inspector General’s Office to seek information from a person receiving federal funds in connection with a Department of Agriculture program.

The NCAA asserts that it is seeking the court's aid because the OIG's subpoena is unduly burdensome. (NCAA Reply Br. 2.) The gist of its argument runs like this. The NCAA's rules in support of amateurism are well-known, and ferreting out cheaters is difficult work. (NCAA Br. 5.) Its enforcement division depends on tipsters and other outsiders to provide unconfirmed or private information about athletes, officials, and supporters. (*Id.*) However, this source of information, which includes unsubstantiated rumors of the most personal nature about peoples' lives, will dry up if the NCAA cannot assure its informants of secrecy.⁷ (*Id.*) In this respect, compliance with the OIG's subpoena – or the lack of a protective order – could undermine the confidence that future informants have in the NCAA's pledges of confidentiality. (*Id.*; Price Aff. ¶¶ 7-12) This threatens, the NCAA says, the normal operations of its business.

The NCAA insists strongly that it is not claiming a privilege (NCAA Reply Br. 2), and for good reason. The Supreme Court has stated clearly that parties cannot defeat an administrative subpoena by claiming a common law privilege of confidentiality, apart from those privileges that have been honored historically. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 195 (1990) (holding that a university did not enjoy a privilege to protect its peer review process from disclosure to the EEOC).

⁷ In support of its argument, the NCAA offers an example involving its release of confidential information to a federal grand jury after receiving, it says, verbal assurances that the information would not be further disseminated without prior notice. (Price Aff. ¶ 11.) The NCAA alleges that, as a result, the organization is defending a lawsuit filed by the family of an Alabama high school football player. (NCAA Br. 10.) The complaint alleges, among other things, that University of Tennessee football coach Phillip Fulmer passed along false rumors to the NCAA that a recruiting coach from arch rival University of Alabama was "involved with" the mother of the football player, who was being recruited by both schools. (NCAA Br. Ex. E ¶¶ 4-9.) The few details provided make it hard to determine what confidential information was released and how the collection and preservation of such information actually advances the NCAA's goals.

Much like the NCAA in this case argues that its investigations are essential to uphold its rules of amateurism, the University of Pennsylvania argued that peer review was necessary to promote academic integrity. *Id.* at 189, 197. Similarly, the university claimed that the confidentiality of peer review documents was critical to protecting the process – and ultimately the quality of university education. *Id.* at 193, 196. “In order for the peer review process to function, the university must be able to provide meaningful guarantees of confidentiality and thereby to obtain candid and detailed comments about the tenure candidate.” Appellant Br., 1988 WL 1025709 *10 (1988). The university, supported by amicus briefs filed by the nation’s most prestigious universities and numerous educational associations, argued that the tenure decision process was at the core of academic freedom. “The decision to grant, or not to grant, tenure therefore is at the core of academic freedom; it is through the award of tenure that a university charts the course of teaching and scholarship for decades to come.” *Id.* at *18.

The Supreme Court did not disagree about the importance of confidentiality to the “proper functioning of the peer review process.” *Univ. of Pa.*, 493 U.S. at 193. Yet the Court did not find this to be sufficient reason to create a privilege for which there was no statutory or historical basis. *Id.* at 195.

The Court also cited Congress’ decision not to exempt peer review documents from EEOC subpoena powers when it extended Title VII of the Civil Rights Act of 1964 to educational institutions. *Id.* at 189. The Court observed that while privileges may be appropriate when “sufficiently important interests” outweigh the need for probative evidence, “[t]he balancing of conflicting interests of this type is particularly a legislative function.” *Id.* The Court refused to create a new privilege when Congress had declined to legislate one. *Id.*

Congress did not, at least it is not apparent from existing legislation, consider the NCAA's interests in confidentiality in passing the Inspector General Act of 1978. However, it has heard the NCAA's concerns. (See Price Aff. ¶¶ 12-13 (noting testimony before two House subcommittees).) So far, it has declined to accord the organization any special exemptions or privileges.

The Supreme Court's admonition against new privileges has prevailed in other cases where the argument for confidentiality was compelling. For example, the Court refused to establish a privilege for news reporters, despite their claims that their ability to pledge confidentiality was critically important to carrying out their First Amendment mission. See *Branzburg v. Hayes*, 408 U.S. 665, 667, 693 (1972) (declining to grant a testimonial privilege to newsmen subpoenaed by a grand jury).⁸ The Seventh Circuit also declined to create a privilege for an Illinois state agency, despite a state statute making unemployment compensation proceedings confidential. *Ill. Dep't of Employment Sec.*, 995 F.2d at 108-09.

⁸ The OIG cites, for reasons not clear to the court, *N.L.R.B. v. Mortensen*, 701 F. Supp. 244 (D.D.C. 1988), as authority for the proposition that the First Amendment protects media from responding to some document requests. (See OIG Resp. Opp'n 8.) This district court order was entered during the early uncertainty over the holding of *Branzburg*, a 4-1-4 decision in which Justice Powell's short concurrence gave the Court its majority. The Supreme Court later declared that *Branzburg* did not authorize a newsman's privilege. *Univ. of Pa.*, 493 U.S. at 201. In *University of Pennsylvania*, the Court addressed the institution's First Amendment claim of privilege after disposing of its common law claim. Inasmuch as Constitutional claims are generally accorded greater weight than common law claims, the following quote is worth noting: The case we decide today in many respects is similar to *Branzburg v. Hayes* (citation omitted). In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary. Petitioners there, like petitioner here, claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of First Amendment principles. In the course of rejecting the First Amendment argument, this Court noted that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. *Id.* (citing *Branzburg*, 408 U.S. at 682).

In light of such decisions, the NCAA may well have realized that a privilege argument to protect amateurism in college sports might seem less compelling than the already rejected bids to protect academic freedom or freedom of the press. So instead, the organization asserts its claim that the OIG's subpoena should be quashed or limited because it is unduly burdensome. (NCAA Br. 4.) The immediate question before this court is whether such a claim has any legal merit or is merely a disguised request for a privilege.

ii. The NCAA's claim of undue burden

The NCAA's argument that the OIG's subpoena is "unduly burdensome" cannot be true in the ordinary sense of this exception. Cases such as *United Air Lines*, *Quad/Graphics*, and *Bay Shipbuilding* stand for the proposition that a court may modify an administrative subpoena when the time or resources that a business must be expend in complying with the subpoena threatens its normal operations. See also *Shaffner*, 626 F.2d at 38 (noting that a court may impose reasonable conditions and restrictions "on the time and manner of production" when an investigative subpoena threatens "to seriously impair or unduly disrupt the normal operations of the business.")

Such is not the case here. The NCAA has already identified and logged the documents sought by the OIG. (NCAA Counsel Oral Argument.) There are only about 1,000 items, less than the number produced in many civil cases. (*Id.*) The NCAA does not argue that its daily operations will come to a standstill because of the resources it will further expend in delivering the documents to the OIG. Rather, NCAA's claim rests on the same contention made by the educators in *University of Pennsylvania* and the news reporters in *Branzburg*, namely "our success depends on confidentiality."

The court could summarily dismiss the NCAA's claim as a cloaked request for a privilege but for a few cases that have found an agency subpoena to be unduly burdensome in the effects wrought by compliance, rather than the cost of complying. One such case is *Commodity Trend*. There, the court appeared to find a subpoena excessively burdensome because the target of the subpoenas, a firm that published advice and advertisements pertaining to the commodities markets, subsequently curtailed its sales operations and reduced its work force. *Commodity Trend*, 233 F.3d at 987. Two of the firm's columnists also "refused to write articles for fear of government reprisal." *Id.* The court found that these facts demonstrated that the subpoenas had changed the firm's normal operations. *Id.* The NCAA cited this case as authority for the proposition that an agency subpoena can be unenforceable when compliance could have a "stifling impact" on the way an enterprise conducts its business. (NCAA Br. 4-5.)

Yet the holding of *Commodity Trend* is not so patent as the NCAA would have it. First, in discussing whether the subpoenas were burdensome, the court was analyzing whether it had any authority to look beyond the subpoenas to the merits of the enforcement action by the agency, which had limited investigatory authority.⁹ *Commodity Trend*, 233 F.3d at 986-87. Secondly, for all the disruption that the subpoenas may have caused (which likely resulted from awareness of the agency's investigation rather than the subpoenas *per se*), the Seventh Circuit affirmed the district court's order of enforcement.¹⁰ *Id.* at 995.

⁹ For a discussion of the investigative authority of the agency involved, see *Commodity Futures Trading Comm'n v. Tokheim*, 153 F.3d 474, 475 (7th Cir. 1998).

¹⁰ The Seventh Circuit ruling affirmed the district court's prior decision to enforce "in part" the agency's subpoenas. *Commodity Trend*, 233 F.3d at 995. The wording "in part" apparently refers to its analysis that the district court had granted the subpoenas to the extent that the agency was investigating anti-fraud laws. *Id.* at 985. The district court granted summary judgment on the firm's challenge to a Commodities Exchange Act registration requirement but upheld the Commodity Futures Trading Commission's authority to investigate alleged fraud. The district court then upheld a commission subpoena requiring firm officials to
(continued...)

Commodity Trend concerned a pre-adjudicatory investigation to determine whether the agency had jurisdiction over the subpoenaed firm. *Id.* at 984. The primary issue before the court was whether the agency's regulatory scheme encompassed all of the firm's activities and whether certain regulations violated the firm's First Amendment rights. *Id.* at 985. The court upheld the agency's investigation into whether the firm was engaging in any deceptive activities, and its affirmance of the subpoenas was incidental to this ruling. *See id.* at 994-95. In this respect, *Commodity Trend* holds only that subpoenas impacting an entity's business dramatically may still be permissible if the agency is not exceeding the scope of its authority. Such a proposition does little to advance the NCAA's claim.

Commodity Trend is not the NCAA's only authority, however. The organization also cites a decision suggesting that an agency subpoena threatening the confidentiality of certain proprietary materials may be unduly burdensome. In *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d 601, 603 (S.D. Ind. 2001) (Hamilton, J.), non-white job applicants filed charges with the Equal Employment Opportunity Commission ("EEOC") that an automotive company was engaging in discriminatory hiring tests. The EEOC issued a subpoena for the hiring tests and related validation studies. *Id.* The company and its consulting firm, which developed the tests, sought a protective order to require the EEOC to keep these tests confidential, despite the agency's authorization to share information with the complaining parties. *Id.* The companies argued that the EEOC's release of their tests to parties who had no obligation to keep the information secret would likely destroy the integrity and value of the tests. *Id.* at 609.

¹⁰(...continued)
testify about the alleged violations of the Exchange's anti-fraud rules. *See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 1999 WL 965962 (N.D. Ill. 1999).

The *AON Consulting* court, noting its authority to find a subpoena to be excessively burdensome, *id.* at 604, conditioned enforcement on EEOC's willingness to enter a confidentiality agreement, *id.* at 609. The court found support in the Supreme Court's recognition that employment tests "present an extraordinarily compelling case for confidentiality." *Id.* at 608 (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)).

Aon Consulting, although well reasoned, as a district court decision carries no precedential value. It is also of limited relevance to the extent that Congress has sharply defined the investigatory scope of the EEOC, in comparison to agencies such as the OIG, whose investigative authority is plenary. Moreover, the case that guided the court in its decision, *Detroit Edison*, concerned an agency order enforcing a labor union's discovery request in the course of an adjudication. See *Detroit Edison*, 440 U.S. at 303-04. The *AON Consulting* court did not consider the distinctions, in scope and relevance, between an adjudicatory subpoena on behalf of a private party, which was effectively the issue in *Detroit Edison*, and an agency's investigative subpoena, the issue in *University of Pennsylvania*.¹¹

The NCAA cannot prevail on its argument that the subpoena must be quashed because it is unduly burdensome. The OIG's subpoena is relevant to its statutory authority, and compliance will not require the NCAA to expend extraordinary time or resources. The NCAA's request does not differ in substance from the past attempts of educators and reporters to obtain

¹¹ Two other district courts have considered the confidentiality claims regarding an employment test in nearly the same context. In *EEOC v. C & P Tel. Co.*, 813 F. Supp. 874 (D.D.C. 1993), the court followed the *AON Consulting* line of reasoning in ordering EEOC to sign a confidentiality agreement before test documents were produced. However, in *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 893, 895-96 (E.D. Wis. 1999), the court found that the city's claims about the harm resulting from compliance were unfounded or greatly exaggerated and that the city had failed to establish a legal basis for challenging the agency subpoena. "[A] court's authority to so condition the release of relevant subpoenaed information to the EEOC is debatable." *Id.* at 895.

a privilege for nearly identical reasons, and the Supreme Court has rejected those bids. The NCAA cannot avoid the control of precedent merely by repackaging its claim under a different label.

B. The Alternative Motion for a Protective Order

The court's consideration of a protective order is guided by the same concerns that underpin the judicial review of an agency investigative subpoena generally. Subpoena enforcement proceedings are summary in nature. *United Air Lines*, 287 F.3d at 649. The court's oversight role is limited to ensuring that the investigation lies within the agency's authority, the request is not too indefinite or vague, and the information sought is reasonably relevant. *Id.* The NCAA maintains that it needs a protective order because disclosure will force the organization to change the way it conducts its business. As noted above, the NCAA is really asserting a privilege that is unsupported in law. However, there are two additional reasons why the NCAA's request for a protective order must be denied.

First, the evidence before this court suggests that the NCAA's fears about the harmful effects that will result from the unprotected production of its records to the OIG are exaggerated and speculative. In both *University of Pennsylvania* and in *Branzburg*, the Supreme Court expressed considerable skepticism about whether the plaintiff's claims of dire consequences were true. *Univ. of Pa.*, 493 U.S. at 200-01 (noting that while "some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect claims of bias or unfairness); *Branzburg*, 408 U.S. at 695 (declaring doubt that "the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime [to a news reporter] will always be or very often be deterred by the prospect of dealing with those

public authorities characteristically charged with the duty to protect the public interest as well as his”).

The same remarks could be made here as well. The possibility of disclosure may only persuade the NCAA’s tipsters to give concrete examples of their concern rather than engaging in rumor-mongering. Moreover, such tipsters might conceivably be relieved that their information is not only going to an organization dedicated to promoting amateur sports but also to public officials, such as the OIG, who are charged with ensuring that tax dollars are being spent lawfully and for their intended purposes.

The court can accept the NCAA’s assertion that tips about wrongdoing could be less forthcoming if the public, or a portion thereof, comes to believe that the organization’s enforcement division cannot keep its promises of confidentiality. However, this does not mean that disclosure to the OIG will implant this belief in the relevant public mind. Nor would public concerns about confidentiality necessarily lead to a decline in information about wrongdoing. The NCAA, an organization composed of voluntary members, does not lack influence over its members and the athletes who play for them. The power to fine or suspend from participation in college sports is not inconsequential, and the NCAA’s sanctions against popular coaches or programs are often major news in many American cities.¹² The NCAA’s assertion that its enforcement activities

¹² See, e.g., Mark Alesia, *IU’s Sampson Reprimanded by Coaches’ Group; Action Comes as a Result of NCAA Violations in Recruiting During His Time at Oklahoma*, Indianapolis Star, Aug. 16, 2006 at Sports 1.

would be seriously impaired rests largely on a conclusory assertion from David Price, the NCAA's vice president for enforcement services.¹³

The issuance of a protective order would also require this court to assume, despite the OIG's evidence to the contrary, that disclosure to this governmental agency will result in public revelation. Such a presumption runs contrary to the Supreme Court's instruction that administrative agencies are entitled to the presumption "that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). In *Schreiber*, the officer of a television programming company refused to produce certain materials about his company's programs, which he asserted contained trade secrets and confidential data, until the FCC agreed to protect the materials from public disclosure. *Id.* at 284-85. The district court found the FCC's investigation to be statutorily authorized but granted a protective order, which the Ninth Circuit affirmed. *Id.* at 286-287.

The Supreme Court took up the case to discuss the respective roles of the courts and administrative agencies. *Id.* at 288. It reversed the lower court decisions. *Id.* at 300. It ordered the district court "to enforce the Commission's orders and subpoena without qualification." *Id.* at 300. "[Congress] has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution."¹⁴ *Id.* at 291.

¹³ Citations in Price's affidavit to the Congressional testimony of the late Professor Charles Alan Wright and Professor Josephine Potuto would be inadmissible hearsay in an evidentiary hearing. See, e.g., *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003) (noting that a district court had no duty to scour an affidavit containing inadmissible hearsay or references to unauthenticated documents "to glean what little admissible evidence it may have contained").

¹⁴ In *Schreiber*, the subpoena was issued pursuant to an FCC hearing, and plaintiff sought a protective order not just for documents produced in compliance with the subpoena but also for testimony given at the hearing. 381 U.S. at 284-85. Thus the court's opinion and the quotation above are directed not just at the court's ability to enforce administrative subpoenas (continued...)

Despite this limited role, some courts nonetheless have accepted conditions on an agency subpoena, similar to the notification requirement that the NCAA is seeking. However, in the most relevant cases, the conditions were proposed by the agency, not the court. For example, in *Federal Trade Commission v. Texaco*, 555 F.2d 862, 867 (D.C. Cir. 1977), the Federal Trade Commission, at Congress' behest, was investigating whether the producers were underreporting their gas reserves in order to obtain higher rates from the Federal Power Commission. A group of natural gas producers persuaded a district court to place various restrictions on the commission's use of their documents. *Id.* at 883.

The D.C. Circuit Court of Appeals held that the court's conditions were "premature and improper," at least until the gas companies had produced the requested information and the FTC had an opportunity to rule on their "specific requests for confidential treatment." *Id.* at 884. However, the court accepted the FTC's proposed order, in which the agency agreed to provide the companies with ten days advance notice before disclosing any documents designated by the companies as confidential to anyone outside the FTC. *Id.* The court noted that other courts previously had placed protective orders on the enforcement of subpoenas. *Id.* at 884 n. 62. "The *Schreiber* decision makes clear, however, that it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality." *Id.*

In this case, the OIG's handling of any documents produced by the NCAA is governed by several statutes and internal rules. First, the Freedom of Information Act exempts investigatory files "compiled for law enforcement purposes" from its disclosure requirements if disclosure would constitute an unwarranted invasion of personal privacy or reveal the identity of a confidential source. 5 U.S.C. § 552(b)(7)(C), (D). The OIG investigation was opened to

¹⁴(...continued)
but also its authority to oversee agency procedural rules. See *id.* at 290-91.

determine whether federal funds were misappropriated. (Wormsley Decl. ¶ 6.) The investigation is being conducted by a special agent with training in criminal investigation. (*Id.* ¶ 1.) The OIG's enabling act requires the OIG to report to the Attorney General whenever it has any "reasonable grounds" for believing that federal criminal laws have been violated. 5 U.S.C. App. 3 § 4(d). These facts suggest that any documents produced by the NCAA would be exempt from disclosure, and the OIG has asserted that all records related to the UDC inquiry will be maintained as investigative files and that such records will be withheld from public disclosure

pursuant to the law enforcement exemptions. (Wormsley Decl. ¶ 8; Declaration of Chauntonya Eason ("Eason Decl.") ¶¶ 3-4.)

Secondly, disclosure of any personal information about an individual is regulated by the Privacy Act of 1974, which sets forth the limited conditions in which records containing personal information can be released without the consent of the person whose information is recorded. See 5 U.S.C. § 552a(b)(1)-(12). This act provides both civil remedies and criminal penalties for its violation. *Id.* at § 552a(g), (i). Disclosure of personal information is also exempt under the Freedom of Information Act if release of the record "would constitute a clearly unwarranted invasion of personal privacy," U.S.C. § 552(b)(6). The OIG has stated that it is its policy and practice to redact or withhold all records as allowed by this exemption. (Eason Decl. ¶ 4.)

Thirdly, the OIG's general manual establishes rules for the disposal of evidence. (OIG Resp. Opp'n Ex. 3.) This manual requires that once items are no longer "of evidentiary value," they must be returned to their owner or original custodian, or destroyed. (*Id.* at 3.)

These statutes, and the OIG's sworn statements that it will seek to protect the materials from disclosure, remove any incentive for this court to interfere with the agency's Congressional

authority. In *Federal Trade Commission v. MacArthur*, 532 F.2d 1135, 1138 (7th Cir. 1976), the Federal Trade Commission subpoenaed numerous documents to determine whether a company was engaging in deceptive practices. The

district court issued a protective order, limiting any subsequent disclosure of the documents, but the Seventh Circuit rescinded it. *Id.* at 1143. “In the case of this non-public investigation and without any showing of good cause, the imposition of a protective order was uncalled for.” *Id.*

The OIG maintains that the NCAA’s request for an order requiring the agency to provide five days notice prior to disclosing the documents to anyone, including the Department of Justice, would hamper its ability to conduct an independent and confidential investigation. (Wormsley Aff. ¶ 9; OIG Resp. Opp’n 14.) A notification requirement would require the OIG to tell the NCAA not only what information was being divulged but to whom. (Wormsley Aff. ¶ 9.) The confidentiality of the government’s organization would be compromised.¹⁵ As the OIG pointed out in oral argument, not only would this violate the department’s policy about not confirming or denying the existence of a criminal investigation, it would halt the investigation and allow the NCAA to begin additional litigation. Such an order would involve the court well beyond its limited role of ensuring that an agency’s actions do not exceed its statutory and Constitutional authority. One last issue is noted. While the NCAA asserts that its request for a protective order is based on its need for effective enforcement of its rules, its briefings and argument demonstrate a laudable concern for the privacy of its informants and other persons connected with its investigation. Congress, in enacting laws such as the Privacy Act of 1974 and the Family Educational Rights and Privacy Act of 1974, and the courts, in safeguarding an

¹⁵ The NCAA’s proposed order does not limit its dissemination of information about the information revealed by the OIG’s disclosure notifications. (See NCAA Br. Ex. D.)

individual's right of privacy against governmental intrusion, have recognized the importance of the interest in privacy. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

However, it seems unlikely that the NCAA could establish standing to seek protection of these privacy interests. An association has standing to bring suit on behalf of members who could otherwise sue in their own right when the interests at stake are germane to the association's purpose, and individual participation is not necessary. *Plotkin v. Ryan*, 239 F.3d 882, 884 n. 4 (7th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). Here, however, the persons whose privacy may be at stake are individuals who, at most, are members of associations that are members of the NCAA.

Nothing prevents the NCAA from notifying those individuals whose privacy interests are at stake and assisting them, if requested, in seeking relief. However, several circuits, including the Seventh, have held that while privacy concerns may be heightened when an agency subpoena is seeking an individual's private records, the enforceability of the subpoena is still measured by whether it is reasonable. See, e.g., *United States v. Lehman*, 887 F.2d 1328, 1335 (7th Cir. 1989) (reviewing the reasonableness of an administrative subpoena for a livestock dealer's personal

records); *In re Subpoena Duces Tecum*, 228 F.3d 341, 348-49 (4th Cir. 2000) (declaring that probable cause was not a requirement to affirm an Attorney General's investigatory subpoena for a doctor's relevant patient and financial records); *Doe v. United States*, 253 F.3d 256, 269-70 (6th Cir. 2001) (citing and agreeing with cases in the Second, Ninth and District of Columbia Circuits holding that the reasonable relevance standard applies to private financial records). In *Lehman*, the Seventh Circuit measured reasonableness by whether the subpoena met the

Oklahoma Press standards of relevance, reasonable specificity, and not excessive. 887 F.2d at 1335.

These requirements are met. The OIG's subpoena is authorized by statute, related to its mission, sufficiently specific, and narrowly confined to the documents pertaining to UDC.

A protective order is simply uncalled for. The NCAA is seeking a privilege from complying with the OIG's lawful request for information to determine whether public funds are being lawfully spent and for their intended purpose. The NCAA's fears about the impact that compliance will have on its operations are speculative, and in all likelihood, exaggerated as well. Moreover, federal privacy and disclosure statutes, the agency's procedures toward handling evidence, and the sworn statements of OIG employees that the agency will seek to protect the confidentiality of the documents negate any justification for this court to interfere in the authority that Congress has delegated to this agency.

III. CONCLUSION

For the reasons stated above, the OIG's Motion to Compel Subpoena Enforcement (Doc. No. 1.20) is **GRANTED** and the NCAA's Motion to Quash or, in the Alternative, for A Protective Order (Doc. No. 1.1) is **DENIED**. The NCAA shall have ten days from the issuance of this ruling to comply.

ALL OF WHICH IS ENTERED this 8th day of September 2006.

John Daniel Tinder, Judge

United States District Court

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