At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 2nd day of MARCH, 2011

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

MICHAEL T. QUIGLEY,

Petitioner,

v.

UNIVERSITY AT BUFFALO FOUNDATION, INC.
UB FOUNDATION ACTIVITIES, INC., and
UB FOUNDATION SERVICES, INC.,

Respondents.

DECISION and JUDGMENT

INDEX NO. 2010/12370

APPEARANCES: PETER A. REESE, ESQ., for Petitioner
BENJAMIN M. ZUFFRANIERI, ESQ., and KATHLEEN A. WALL, ESQ., for Respondents

PAPERS CONSIDERED: The ORDER TO SHOW CAUSE and PETITION, with annexed exhibits;

the NOTICE OF MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW;

the AFFIRMATION [of Kathleen A. Wall, Esq.] IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW, with annexed exhibits;

the AFFIDAVIT [of Edward P. Schneider] IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW, with annexed exhibits;

the MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW;

the AFFIDAVIT OF MICHAEL T. QUIGLEY IN SUPPORT OF PETITION, with annexed exhibits;

the SUPPLEMENTAL AFFIRMATION [of Kathleen A. Wall, Esq.] IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW, with annexed exhibit;

the SUPPLEMENTAL AFFIDAVIT [of Edward P. Schneider] IN

SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW;

the REPLY AFFIRMATION [of Kathleen A. Wall] IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW, with annexed exhibits;

the REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ON OBJECTIONS IN POINT OF LAW, with annexed exhibit;

the SUPPLEMENTAL AFFIRMATION OF PETER A. REESE[, ESQ.,] IN SUPPORT OF PETITION, with annexed exhibit; and

the REPLY AFFIRMATION [of Kathleen A. Wall, Esq. in response to] TO SUPPLEMENTAL AFFIRMATION OF PETER A. REESE[, ESQ.,] IN SUPPORT OF PETITION.

Petitioner Michael T. Quigley, a writer/editor for *Artvoice*, a weekly alternative newspaper in Buffalo, made a request pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.) for various records of respondents University of Buffalo Foundation, Inc. (UB Foundation), UB Foundation Activities, Inc. (UB Activities), and UB Foundation Services, Inc. (UB Services). It appears that some but by no means all of the requested records were provided to petitioner by respondents, and that respondents further told petitioner where other of the requested records might be found, but not before respondents asserted that none of them constituted an "agency" within the meaning and subject to the requirements of FOIL (*see* Public Officers Law § 86 [3]). As a consequence, petitioner initiated the instant CPLR article 78 proceeding, by which he alleges respondents' violation of lawful procedure and seeks: a determination that respondents are each an "agency" as defined by Public Officers Law § 86 (3) and therefore must disclose to petitioner their "records" (*see* Public Officers Law §§ 86 [4]; 87 [2]); a determination that respondents are each a "public body" within the meaning of the Open Meetings Law (OML) (Public Officers Law § 100 et seq.) and therefore must conduct their "every meeting" (save for certain authorized executive sessions) in

a manner "open to the general public" (Public Officers Law § 103 [a]; *see* § 102 [1], [3]); and an award of attorneys' fees incurred by petitioner in bringing this proceeding (*see* Public Officers Law §§ 89 [4] [c]; 107 [2]).

Before this Court is a pre-answer motion by respondents to dismiss the proceeding at the threshold based on various objections in point of law, including petitioner's lack of standing, petitioner's failure to exhaust available administrative remedies, and the mootness of the matter or the absence of any continuing justiciable controversy. Respondents further seek dismissal of the petition for failure to state a cause of action, on the ground that respondents are entirely private, nongovernmental entities not subject to FOIL or the OML. Finally, respondents seek the denial of petitioner's request for attorneys' fees.

This proceeding arises out of events that began on June 17, 2010, when petitioner e-mailed to Edward Schneider, the Executive Director of UB Foundation, UB Activities, and UB Services, a "request [for] a reasonably detailed current list by subject matter . . . of all records in the possession of each of the respondents. Moreover, petitioner requested a current list of officers and directors of each respondent, IRS Form 990s ("Return of Organization Exempt From Income Tax") dating back to each's inception, incorporation certificates for each respondent, and records of all individuals employed by each, including salaries and positions in which they are employed. Petitioner sought such records or information for the purpose of writing an investigative news article into how respondent UB Foundation acquired and spent monies in connection with its lobbying for the UB 2020 legislative initiative and its proposed $15 million purchase of a low-income housing complex known as McCarley Gardens as a site for the expansion of the Downtown Medical Campus in Buffalo.

By letter dated July 20, 2010 and addressed to petitioner, Schneider asserted that respondents are not subject to FOIL but nonetheless provided petitioner with a copy of the most recently filed IRS Form 990 for each of the respondents and directed him to a certain website

for past years' 990 forms. While advising that a current list of officers and directors of each of respondents could be found on the most recent 990 forms filed by respondents, Schneider nonetheless attached a list of directors and officers. With respect to employees, Schneider advised, that among the three respondents, only UB Activities had employees, and he attached to his letter a list of about 30 such employees and their salaries, while reiterating that FOIL did not compel him to do so. Finally, Schneider advised that copies of certificates of incorporation for the three respondents were publicly available and could be obtained from the "appropriate governmental sources."

Later on July 20, petitioner sent Schneider an e-mail complaining that the information provided did not comply with his request, particularly with regard to the employee salary information. By a responding e-mail of July 29, 2010, Schneider sought to persuade petitioner that the information provided was completely responsive to the original request, and that any suspected discrepancy in the employee/salary information could be explained by a perusal of the most recent Form 990 previously provided by respondents.

By letter dated August 6, 2010 and addressed to the chairmen of both the Board of Trustees of UB Foundation and the Boards of Directors of UB Activities and UB Services, as well as Schneider as Executive Director of all three respondents, petitioner challenged respondents' denial to him of records requested on June 17, 2010. Petitioner asked that the recipients of the August 6 letter comply on behalf of their organizations with procedures for the handling of FOIL appeals.

By letter dated August 19, 2010, Schneider reiterated that respondents were not subject to FOIL and therefore had not denied petitioner access to any records for purposes of FOIL. It was further asserted that respondents likewise had no obligation to respond to his August 6, 2010 appeal letter pursuant to FOIL procedures. Schneider nonetheless indicated his belief that petitioner had been provided "with all the information you requested in your June 17, 2010

e-mail message." Otherwise, petitioner was advised to specifically identify any documents that he believed that he had not received and to arrange for any future communications to take place between *Artvoice's* attorney and respondents' counsel.

By letter dated November 10, 2010 (possibly written in response to a letter of October 7, 2010) respondents' counsel wrote petitioner of her understanding that all documents requested by petitioner had either been provided by UB Foundation or obtained by *Artvoice* from public sources. Again, it was suggested that any persisting dispute be dealt with between counsel.[1]

In December 2010, petitioner commenced the instant proceeding, which was followed by the instant motion to dismiss. Upon its consideration of the parties' respective submissions, this Court renders the following determinations with regard to respondents' threshold objections to the proceeding and the merits of the petition.

STANDING

Respondents first contend that petitioner lacks standing to maintain this proceeding to press any rights conferred by FOIL and the OML. With regard to petitioner's standing to raise a FOIL claim, respondents contend that petitioner has not suffered any concrete injury in fact inasmuch as he himself was not a party to any requests for records from respondents and further because he ultimately was provided with all requested documents. The Court rejects both of those contentions. There is no logic to respondents' position that petitioner was not himself a party to the document requests because he made them on behalf of *Artvoice*; to contend that petitioner made the requests on behalf of whomever, including his employer, is to concede that petitioner made the requests. Moreover, the Court cannot conclude that the

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[1]A subsequent letter from respondents' counsel to petitioner of January 20, 2011, i.e., after the commencement of this proceeding, has earned the condemnation of petitioner's counsel, who asserts that the letter constituted an impermissible direct communication between counsel on one side of the proceeding and a represented litigant on the other side. Given its timing, the Court will disregard that letter.

requests were made strictly by *Artvoice*, as opposed to by petitioner himself, merely because petitioner identified himself as an associate editor of *Artvoice* and used *Artvoice's* e-mail system or letterhead to make them. The Court does not believe that principles of agency law apply to FOIL in such a way as to dictate that records requests made by an agent on behalf of a disclosed principal must be deemed to be the requests of the principal exclusively. Nor can the Court fathom why the individual journalist who made the unsuccessful requests, even on behalf of his publisher-employer, would not be within the zone of interests protected by FOIL (*see Matter of Scott, Sardano & Pomeranz v Records Access Officers of City of Syracuse*, 65 NY2d 294, 297 [held: "entitlement to the requested ... reports is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public"]). Public Officers Law § 89 (4) (b) explicitly provides that a "person denied access to a record" may initiate an article 78 proceeding. Moreover, it is well established that rights under FOIL are not determined by the identity or status of the records seeker (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 156 [1999]). Certainly, such rights should not hinge upon whether the seeker made the requests in his personal or professional capacity. "An agency's records 'are presumptively open to public inspection, without regard to need or purpose of the applicant' " (*Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440 [2005], quoting *Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994]).

Nor can the Court accept respondents' contention that all of the requests were complied with. In fact, respondents answered various of the requests for records by instructing petitioner to seek his information in documents or other materials to be found elsewhere. In the view of this Court, an entity does not comply with its disclosure obligations under FOIL merely by pointing out the public accessibility of the records or information from other sources (*see Matter of Muniz v Roth*, 163 Misc 2d 293, 297 [Sup Ct Tompkins Co 1994] [held: "that a document subject to FOIL is available elsewhere does not free the agency from its duty under FOIL to

disclose the document"]). The law is clear: "When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search (*see* Public Officers Law § 87 [2]; § 89 [3]; *Matter of Corvetti v Town of Lake Pleasant*, 239 AD2d 841, 843 [3d Dept 1997])" (*Beechwood Restorative Care Ctr.*, 5 NY3d at 440-441).

With regard to petitioner's standing to raise claims under the OML, respondents argue that petitioner never sought to attend any meetings of the governing boards of any of the respondents, never asked for a list of meeting dates, and was never denied access to respondents' board meetings. Respondents further deny the petition's allegation ("upon information and belief") that respondents "conduct their meetings in secret" and without notice to the public or the media, although respondents just as strenuously deny that any of them is a "public body" subject to the OML. Beyond that, respondents imply that even if they are subject to the OML and even if petitioner was denied some opportunity to attend a closed meeting conducted in violation of the OML, then petitioner nonetheless would lack standing to allege any such violation because he was not personally adversely affected by any business discussed or transacted by respondents at any such closed meeting. In sum, respondents maintain that, as someone whose interests are indistinct from those of the public generally, petitioner sustained no injury in fact and thus lacks standing to allege any violation of the OML.

There is no question that the standing of a party to seek judicial review of particular claim or controversy is a jurisdictional threshold matter that must be resolved by the Court before reaching the merits of the application (see *Society of Plastic Indus. v County of Suffolk*, 77 NY2d 761 [1991]), and that is no less true in a proceeding seeking redress under the OML. However, it is clear to this Court that a strict requirement of standing under the OML is something enforced by the courts in cases, unlike this one, in which the petitioner seeks to

rectify a particular past violation pursuant to Public Officers Law § 107 (1), i.e., by means of a judicial declaration or determination to the effect that some action taken by the public body at a closed meeting is invalid (*see Matter of Goldin v Board of Educ. of Wappingers Cent. School Dist.*, 306 AD2d 410 [2d Dept 2003], *lv denied* 100 NY2d 514 [2003] [petitioner failed to demonstrate injury to his own civil, personal, or property rights as direct result of a redistricting plan implemented by a board of education, and thus lacked standing to challenge any of the actions that allegedly violated OML]; *cf. Weatherwax v Town of Stony Point*, 97 AD2d 840 [2d Dept 1983] [petitioner whose personal health insurance coverage was affected by decision made at closed meeting had standing under OML]). This case, unlike the aforementioned ones, does not involve a challenge to the propriety of some action taken by respondents in a manner allegedly at odds with the OML. Inasmuch as petitioner is not alleging a particular injury as a result of some specific past action taken by respondents at a closed meeting, it seems superfluous for this Court to analyze whether petitioner has sustained an injury in fact as a result of some such past action. Rather, the Court here is concerned only with the more abstract controversy of whether respondents are each a "public body" subject to the provisions of the OML and thereby required to conduct their future meetings in a manner open to the public. Petitioner says that respondents are public bodies; respondents deny that. Further, assuming for the moment that respondents are in fact subject to the OML, the Court observes that, if respondents' view of things were adopted, then respondents could violate the OML with impunity, and further could continue doing so indefinitely, unless and until it concretely injured someone or some class or persons by some action taken at a closed meeting. The Court doubts that that is the law, or at least doubts that it should be. The Court further notes that where a court's decision to deny standing would effectively insulate a governmental action from judicial review, a court has discretion to find that standing exists (*see Rudder v Pataki*, 93 NY2d 273, 280 [1999], citing *Boryszewski v Brydges*, 37 NY2d 361 [1975]). The Court's preference

thus is to reach the merits of the question of whether respondents each constitute a public body under the OML, such that their future meetings must be conducted in compliance with the OML.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Respondents note that one cannot seek judicial relief under FOIL unless and until he exhausts his administrative remedies, as by administratively appealing the denial of the record request and having that appeal likewise denied (*see* Public Officer Law § 89 [4] [a], [b]). Again, respondents base their objection in point of law on their view that *Artvoice*, and not petitioner, made the initial records request and instituted the administrative appeal. Respondents thus contend that, although *Artvoice* may arguably have exhausted its administrative remedies, petitioner did not exhaust his. Again, the Court will not dispose of this matter based on some artificial distinction between a personal and a professional request for the disclosure of records under FOIL. Instead, the Court will again conclude that it was petitioner who made the series of record requests here (even if he did so on behalf of his employer) and who thereby exhausted his administrative remedies.

Finally, even if it were at all arguable that petitioner himself failed to exhaust his administrative remedies, the Court would recognize the incongruity -- let alone the futility (*see Matter of Cosgrove v Klingler*, 58 AD2d 910 [3d Dept 1977]; *see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]) -- of a records seeker's having to exhaust his administrative remedies under a statutory and regulatory scheme that the records keeper has, in response to an entire series of records requests, explicitly and steadfastly insisted does not apply to it at all (*see Matter of Pasik v State Bd. of Law Examiners*, 114 Misc 2d 397, 407 [Sup Ct NY Co 1982] [held: where records keeper asserted that it was totally exempt from FOIL, further requests for records would have been futile and the exhaustion doctrine is no bar to the proceeding], *mod on other grds* 102 AD2d 395 [1st Dept], *appeal withdrawn* 64 NY2d 886

[1985]).

MOOTNESS/NONEXISTENCE OF A CONTINUING JUSTICIABLE CONTROVERSY

Again, respondents contend that they provided petitioner with all documents requested by him.[2] Again, the Court notes that respondents purported to comply with some of the requests not by delivering all of the requested documents, but rather by referring petitioner to other potential sources of some of the information sought, including public databases administered by governmental officials or entities. Thus, the Court cannot conclude that the matter has been rendered moot by respondents' compliance with all of the document requests of petitioner. Even if the Court could conclude that, however, the fact remains that respondents purported to comply with the document requests not as a matter of petitioner's rights under FOIL, but solely as a matter of respondents' grace. The Court thus observes that an actual justiciable controversy persists between the parties on the issue of whether respondents are each an "agency" subject to the requirements of FOIL. The Court feels that its resolution of that controversy is obviously important to both parties (judging by their strenuous litigation of the issue) and would by no means be merely "advisory" (*see Ford v Cardiovascular Specialists, P.C.*, 71 AD3d 1429, 1429-1430 [4th Dept 2010]).

APPLICABILITY OF FOIL

"The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 NY3d 225, 230 [2005] [internal quote marks and citation omitted]; *see Matter of Perez v City Univ. of New York*, 5 NY3d 522, 528

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[2]Again, the Court must ignore any provision of documents as of a date after the filing of the petition in this matter (*see* footnote 1, *supra*).

[2005] [FOIL guarantees "[t]he people's right to know the process of governmental decision-making and to review the documents . . . leading to determinations"]; *see also* Public Officers Law § 84 ["(G)overnment is the public's business and . . . the public . . . should have access to the records of government in accordance with the provisions of (FOIL)"]). The obligation under FOIL to make all public "records" "available for public inspection and copying" is one imposed upon an "agency" (Public Officers Law § 87 [2]; *see* § 86 [4]). FOIL defines an "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state" or a political subdivision thereof (Public Officers Law § 86 [3]). By the same token, a potentially publicly accessible "record" is defined as "any information kept, held, filed, produced or reproduced by, with or for any agency" (Public Officers Law § 86 [4]). The term "agency" under FOIL must be given "'its natural and most obvious' meaning" and must be "'liberally construed'" to further the general purpose of FOIL (*Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 697-698 [1993]; *see Buffalo News*, 84 NY2d at 492; *see also Matter of Capital Newspapers v Whalen*, 69 NY2d 246, 252 [1987]).

Clearly, the issue here is whether respondents possess or lack the essential attributes of governmental entities performing a governmental or proprietary function for the State or, in this case, for the public university and governmental entity or entities known as the State University of New York (SUNY) (*see* Education Law § 351) or the State University of New York at Buffalo (SUNYAB or UB) (*see* Education Law § 352 [3]) (*Buffalo News*, 84 NY2d at 490-492). In determining whether an entity is a governmental agency performing a governmental or proprietary function, the Court considers

> "whether the entity is required to disclose its annual budget, maintains offices in a public building, is subject to a governmental entity's authority over hiring or firing personnel, has a board comprised primarily of governmental officials, was

created exclusively by a governmental entity, or describes itself as an agent of a governmental entity (*see generally Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 490-493 [1994]; *Matter of Ervin v Southern Tier Economic Dev., Inc.*, 26 AD3d 633, 634-635 [2006]; *Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 37-38 [2005]; *[Matter of] Farms First [v Saratoga Economic Dev. Corp.]*, 222 AD2d [861,] 862 [1995])" (*Matter of Justice v King*, 60 AD3d 1452, 1453 [4th Dept 2009], *appeal dismissed* 12 NY3d 908 [2009], *cert denied* ___ US ___, 130 S Ct 496 [2009]).

The fact that an entity is organized as a private, not-for-profit entity is not determinative of its obligations under FOIL (see *Buffalo News*, 84 NY2d at 492-493 [holding a not-for-profit local development corporation to be an "agency" within the meaning of FOIL]; see *Westchester-Rockland Newspapers v Kimball*, 50 NY2d 575, 580-581 [1980] [holding "voluntary organization" such as volunteer fire department or company to be subject to FOIL]; *see also Matter of Candagaua Messenger, Inc. v Wharmby*, 292 AD2d 835 [4th Dept 2002] [holding respondent "Recreation Development Corporation" to be an "agency" as defined by FOIL]; *see generally Stoll ex rel. Mass v New York State Coll. of Veterinary Med. at Cornell Univ.*, 94 NY2d 162, 168 [1999] [holding that the "more public aspects of the (private entities' affairs) may well be subject to FOIL"]). in other words, even a nominally private entity will be held to be "performing an essential governmental function" if it was created "to lessen the burdens of government" and "act in the public interest," if it administers public funds for public purposes, if it is subject to extensive public regulation, funding, and other review, if it has numerous public officials on its board of directors, and if it otherwise "enjoys many attributes of public entities" (*Buffalo News*, 84 NY2d at 490-492; *see Westchester-Rockland Newspapers*, 50 NY2d at 580-581; *Matter of Rumore v Board of Educ. of City School Dist. of Buffalo*, 35 AD3d 1178, 1180 [4th Dept 2006], *lv denied* 8 NY3d 810 [2007]).

Here, with respect to whether respondents' attributes are predominately public or private, the record demonstrates that respondent UB Foundation was chartered in 1962 by the Regents of SUNY as a not-for-profit educational/charitable corporation. It appears that the

chartering of UB Foundation was somewhat contemporaneous with the State's takeover of the formerly privately run UB. The State charter describes the purposes for which UB Foundation was formed as being "the promotion of science, literature, art, history, or other department of knowledge or of education at" UB, more particularly, by "the solicitation, receiving, holding, and investing of monies and properties of every description and the using of such monies and property and the income therefrom for the purposes herein set forth, including but not limited to providing library aid, classroom, laboratory and other equipment; scholarships, fellowships and professorships and other financial aid to students and faculty; student and/or faculty activities; cultural and scientific studies, programs and publications, and alumni activities, all in such manner as best carries out these purposes." In its most recently filed IRS Form 990, it is recited that the mission of UB Foundation is to "support and promote the activities and programs of" SUNYAB. According to its charter, upon dissolution of UB Foundation or revocation of its charter, all of the assets of UB Foundation shall be distributed to SUNY.

In support of their motion to dismiss the petition, respondents assert that they exist to "raise private money from private sources and to disburse such funds to aid [UB] in achieving its goals." Respondents more particularly assert that the mission of UB Foundation "is to support and promote the activities and programs of [UB] by providing advice and counsel regarding philanthropy and fund-raising, managing private gifts and grants, and providing a strong base of private-sector support for [UB] through the Foundation's trustees and directors." Respondents assert that the Foundation "appeals to donors" who might be interested in making donations to the "be used locally to support the Buffalo Campus" but who would be uninterested in "making contributions to the State of New York or one of its agencies." Respondents thus assure the Court that UB Foundation is "funded entirely by private donations" and "does not

handle public funds in any capacity."[3]

Respondents further assert that UB Foundation is not under the control of the State in general or UB in particular, is "not an instrumentality of" the State, and may freely contract without the approval of UB. It is noteworthy, however, that the initial Trustees of UB Foundation were designated in its original State charter and that, according to that charter, all successors to the initial Board of Trustees of UB Foundation "shall be elected by the Board of Trustees of [SUNY]," which likewise is empowered to fill any vacancies in such position for the unexpired term until the next election. Respondents nonetheless assert that the SUNY trustees "have never exercised" their power to elect successor trustees of UB Foundation. Instead, respondents assure this Court, the Board of UB Foundation "nominate[s]" or "selects and approves its own trustee nominees," who are then invariably "confirmed" or "approved" by the SUNY Trustees, who assertedly have never "independently exercised any power over [UB] Foundation's Board of Trustees." If that indeed has been the historical practice, it is not borne out by the minutes of a certain recent meeting of the SUNY Trustees, which minutes tend to show that the SUNY Trustees have in fact "elected" or re-elected" current trustees and directors of the UB Foundation.[4]

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[3]It does appear, however, that UB Foundation has recently received title to the major portion of the State University Endowment Fund and further has been entrusted with the management, for purposes of intermediate investment and ultimate expenditure consistent with its donors' wishes, of a smaller portion of that State University Endowment Fund. The State University Endowment Fund consists (or at one time consisted) of assets privately given or bequeathed to SUNY or its component universities or colleges. At the time of the 2008 transfer of title and management designation, 80.4 percent of the State University Endowment Fund (the part transferred outright to UB Foundation) was earmarked by donors for UB purposes, whereas a minimal portion (the part now managed by UB Foundation for the State University Endowment Fund) was earmarked for no particular university or college.

[4]Respondents nonetheless emphasize that, during the pendency of this dispute, UB Foundation's charter was amended to conform its governance to that of other SUNY Foundations and thereby specify that its own Board of Trustees shall be responsible for electing successor trustees and for filling vacancies pending the next election. Whether that proposal was first made before or only since this dispute arose is unknown to this Court. The Court will

Respondents UB Activities and UB Services, which are creations of UB Foundation, were founded somewhat later than UB Foundation, in 1988 and 1990 respectively, likewise as not-for-profit corporations. In its most recently filed Form 990, it is recited that the mission of UB Services is to "benefit and carry out the purposes of" UB Foundation and UB 'by administering research grants and by providing financial accounting and administrative services for university programs." The certificate of incorporation of UB Services describe its purposes as being to "promote education, science and the arts at ... SUNYAB ... and to engage in activities that benefit, or relieve the burdens of, SUNYAB"; and to "provide support (including grants) and services to" UB Foundation, SUNYAB, and their respective subsidiaries, departments, divisions, or other entities controlled by, affiliated with, supporting or operated for the benefit of them. In support of dismissal, respondents urge that UB Services "administers privately sponsored research funded entirely by private monies." The certificate of incorporation originally provided that, upon liquidation or dissolution of UB Services, its funds and other property were to be distributed by its directors or, failing that, by a court. However, a 2006 amendment to its certificate of incorporation provides that, upon liquidation or dissolution of UB Services, its remaining funds and other property are to be distributed to UB Foundation "or any other [tax-exempt SUNYAB c]ampus-related entity" selected by UB Foundation. Moreover, if UB Foundation no longer exists at such time, such monies and property are to be distributed to UB or some UB campus-related entity.

The certificate of incorporation of UB Activities describes its purposes as being to "undertake and perform such activities in support of their purposes as may be lawfully requested by UB Foundation, SUNYAB, or the subsidiaries, departments, subdivisions, or other

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not place any reliance on the very recent charter amendment, for the simple reason that such amendment has not, as far as the Court knows, actually governed the election of any current member of the Board of Trustees of UB Foundation.

entities" owned or controlled by them. In its most recently filed Form 990, it is recited that the mission of UB Activities is to "undertake and perform activities in support of the educational purposes of [SUNYAB] and its various departments, divisions, or other entities." Respondents urge that UB Activities "disburses private funds used to support the charitable and education purposes of" UB. Respondents acknowledge that, for a fee, UB Activities serves as a payroll administrator for UB, albeit only with respect to certain UB employees. The liquidation or dissolution of UB Activities is governed by the same original and amended certificate-of-incorporation provisions as govern any winding up of UB Services.

With respect to the current governance and operations of the three respondents, it appears that the Boards of Directors of UB Activities and UB Services are identical to one another and overlap to some extent with the Board of Trustees of UB Foundation. It further appears to this Court that all three boards are comprised almost exclusively of private-sector individuals with no official connection to UB. The sole exception is the President of UB, who serves as an ex officio voting member of all three boards in question. As indicated, Edward P. Schneider, a private individual with no official connection to UB, is the Executive Director of all three entities in question. It seems that the initial Boards of Directors (and incorporators) of UB Services and UB Activities were comprised of then current trustees of UB Foundation, all private individuals. Respondents assert that the Boards of Directors of UB Activities and UB Services are self-perpetuating, and that successor directors of those entities are selected without any involvement of UB or the State. As indicated, only UB Activities among the entities in question has employees. Respondents emphasize that the trustees, directors, or employees of respondents are not entitled to the public indemnification available under Public Officers Law §§ 17 and 18 to officers and employees of the State, its political subdivisions, or its civil divisions. The offices of all three respondents are located on the campus of UB, space for which respondents assertedly have formal leasehold status and pay market rents. UB

Foundation has a presence on the UB website and uses that presence to solicit private donations for the benefit of UB. Moreover, on that website, UB Services is described as a "fiscal agent" for UB. Petitioner points out that UB Foundation has designated the State Commissioner of Education as its agent for receipt of service of process. Petitioner further asserts that the relationship between respondents and UB or SUNY is governed by a written policy and a formal contract or contracts, although the Court has seen only a model version of any such contract.

Examining all of the foregoing factors through the legal prism informed by such cases as *Perez* and *Buffalo News*, the Court concludes that none of the respondents is an agency governed by FOIL (*see Ervin*, 26 AD3d at 634-635 [3d Dept 2006]; *Matter of Siani v Farmingdale Coll. Foundation, Inc*, 2010 NY Misc Lexis 5745, Sup Ct Suffolk Co 2010 *7).[5] Generally speaking, the most that can be said with regard to respondents' asserted status as governmental agencies is that they were created to carry out certain purposes that coincidentally are the purposes of UB and/or SUNY, with which it works closely (*see Justice*, 60 AD3d at 1453; *Lugo v Scenic Hudson, Inc.*, 258 AD2d 626, 627 [2d Dept 1999]). Such purposes include soliciting private donations of monies for the benefit of UB and its operations and ultimately expending those funds in order to extend scholarships to UB students, supplement the salaries of UB officials and professors, and otherwise support UB's operations and facilities (*see Siani*, 2010 NY Misc Lexis 5745 *7) . Nonetheless, the fact remains that all of the funds raised by UB Foundation and/or funneled through the Foundation and the related entities into UB's operations are garnered from private sources (*see Justice*, 60 AD3d at 1453;

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[5]Although petitioner is able to cite an advisory opinion of the Committee on Open Government that concludes that SUNY Foundations are governmental agencies for purposes of FOIL (and the OML), this Court notes that such advisory opinion is not binding upon respondents or this Court (*Matter of John P. v Whalen*, 54 NY2d 89, 96 [1981]; *see Buffalo News*, 84 NY2d at 492).

Metropolitan Museum Historic Dist. Coalition, 20 AD3d at 37 [1st Dept 2005]; *Lugo*, 258 AD2d at 627; *Siani*, 2010 NY Misc Lexis 5745 *7; *see also Matter of Newsday v Board of Regents of the State University of New York*, Sup Ct, Albany County, May 30, 2008, Cahill, J., index No. 8454/07; *cf. Matter of Siani v Research Foundation of the State Univ. of New York*, 2007 NY Misc Lexis 9122 *5 [Sup Ct Albany Co 2007]). Respondents thus administer no public funds of any kind.[6] Just as important, the public entities, meaning UB and SUNY, have no control over the raising, investment, and disposition of those funds until such time as respondents devote them to UB purposes (*see Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37; *Siani*, 2010 NY Misc Lexis 5745 *7; *cf. Siani*, 2007 Misc Lexis 9122 * 5-6). Moreover, respondents' operating budgets are not required to be approved by any governmental body (*see Justice*, 60 AD3d at 1453; *Rumore*, 35 AD3d at 1180; *Ervin*, 26 AD3d at 635; *Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37; *Lugo*, 258 AD2d at 627). The fact that any residual assets of respondents might devolve upon UB or SUNY upon the liquidation or dissolution of respondents is merely consistent with respondents' purposes in raising and administering those private funds in the first place.

The Boards of Directors and Trustees of respondents are dominated by private individuals, and only one of twenty board members of UB Foundation is a public official (*see Siani*, 2010 NY Misc Lexis 5745 *7; *Newsday*, Sup Ct, Albany County, May 30, 2008, Cahill, J., index No. 8454/07, *supra*). That official, the UB President, is *ex officio* a voting member of all three boards, but by himself is in control of none of them (see *Ervin*, 26 AD3d at 635; *Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37; *cf. Buffalo News*, 84 NY2d at 492-493). Succession to the Boards of Directors of UB Services and UB Activities is under the

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[6]The Court draws no distinction between the private funds raised by UB Foundation itself and the formerly public funds, consisting of 80.4% of the State University Endowment Fund, conveyed to UB Foundation by the State University Endowment Fund in 2008 (*see* footnote 3, *supra*). The formerly public funds originated with private donors as well.

control of those respective boards, and not any public entity. The fact that the SUNY trustees have elected or confirmed successor trustees of UB Foundation precludes this Court from concluding that UB Foundation is not even theoretically under State control, but the Court ultimately is persuaded by the claim that UB Foundation's Board of Trustees is historically self-perpetuating and free of interference from the State as a practical matter. Apparently no authority over the employees of UB Activities is exercised by any state entity (*see Justice*, 60 AD3d at 1453; *Rumore*, 35 AD3d at 1180). Respondents occupy space on campus (*cf. Justice*, 60 AD3d at 1453; *Rumore*, 35 AD3d at 1180), but evidently do so subject to formal arrangements and market rents. It is the view of the Court that such formalities relating to property use, like the existence and terms of the policies and model agreements under which all campus-related foundations are to operate at UB, bespeak the independent and private rather than any government-controlled nature of respondents and their functions. In sum, respondents are not controlled by governmental officials and there is no danger that governmental officials could act through respondents in order to shield their actions from public scrutiny (see *Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37-38).

APPLICABILITY OF THE OML

"In enacting the [OML], the Legislature sought to ensure that 'public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy' (Public Officers Law § 100)" (*Perez*, 5 NY3d at 528). "Thus, all 'public bodies' are subject to the [OML]" (*id.*, at 528), the primary purpose of which is to require that "[e]very meeting[7] of a public body [other than a valid executive session] shall be open to the general public" (Public Officers Law § 103 [a]): In applying the OML, the

[7]A " '[m]eeting' is defined as the official convening of a public body for the purpose of conducting public business" (Public Officers Law § 102 [1]).

Court must construe its provisions liberally in accordance with such stated purpose (*see Perez*, 5 NY3d at 528; *Matter of Gordon v Village of Monticello*, 87 NY2d 124, 127 [1995]; *Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 418 [1995]). A " 'public body' means any entity, for a which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof" (Public Officers Law § 102 [2]). In determining whether an entity is a "public body" for purposes of the OML, the court in each case must consider, among other "criteria or benchmarks," the "authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (*Matter of Smith v City Univ. of N.Y.*, 92 NY2d 707, 713 [1999], *rearg denied* 93 NY2d 889 [1999]; *Perez*, 5 NY3d at 528; *see Snyder v Third Dept. Judicial Screening Committee*, 18 AD3d 1100, 1101 [3d Dept 2005], *lv denied* 5 NY3d 711 [2005]). The Court well understands that just because an entity is a public "agency" for purposes of FOIL does not necessarily mean that it is a "public body" for purposes of the OML (see *Citizens For Alternatives to Animal Labs, Inc. v Board of Trustees of State Univ. of New York*, 92 NY2d 357, 362 [1998]). The Court is less clear, however, concerning whether the fact that an entity has been deemed *not* to be a public "agency" for purposes of FOIL necessarily means that it is *not* a "public body" for the purposes of the OML. At oral argument, however, petitioner conceded that, if respondents are not subject to FOIL, then they are not subject to the OML either.

In any event, for the reasons set forth hereinabove, the Court concludes that none of the respondents is a "public body" subject to the OML. Here, the nominally private and not-for-profit status of respondents militates against a finding that they are public bodies performing a governmental function for the State, although such status is not necessarily determinative (*see*

Canandaigua Messenger, Inc., 292 AD2d at 835 [holding respondent "Recreation Development Corporation" to be a "public body" as defined by OML]). What is determinative here is the fact that, although respondents' purposes coincide with those of the governmental entities known as UB or SUNY, respondents nonetheless solicit, receive and administer only private funds, and no public funding. Just as weighty is the fact that respondents' actions and functions are not under the practical legal control of any governmental body. Clearly, the fact that respondent UB Foundation was originally chartered by the Regents of SUNY is not determinative of its status as a "public body," as "not every entity whose power is derived from state law is deemed to be performing a governmental function" (*Perez*, 5 NY3d at 528).

ATTORNEYS' FEES AND COSTS

Under FOIL, a court may in its discretion award reasonable counsel fees and litigation costs to a party that "substantially prevailed" in the proceeding, provided that the court finds that "the agency lacked a reasonable basis in law for withholding the record" (Public Officers Law § 89 [4] [c]; *see Beechwood Restorative Care Ctr.*, 5 NY3d at 441).[8] Similarly, in any proceeding brought pursuant to the OML, "costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party" (Public Officers Law § 107 [2]). Here, given the foregoing conclusions that none of the respondents constitutes either a public "agency" under FOIL or a "public body" under the OML, there is no basis in this case for an award of counsel fees and litigation costs to petitioner as a "successful" or "prevail[ing]" party.

Accordingly, the petition is DISMISSED in its entirety.

SO ORDERED:

Patrick H. NeMoyer

HON. PATRICK H. NeMOYER, J.S.C.

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[8]A former requirement, i.e., that "the record involved was, in fact, of clearly significant interest to the general public," has been deleted from the statute (*see* L 2006, ch 492, § 1).

GRANTED

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BY KEVIN J. O' CONNOR