

... .. Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York on the 16 day of February, 1988.

P R E S E N T:

HON. GABRIEL M. KRAUSMAN
JUSTICE

- - - - - x

In the Matter of the Application of

BERNARD EISENBERG,

Petitioner,

- against -

LEON GOLDSTEIN, as President of Kings-
borough Community College of the City
University of New York, KINGSBOROUGH
COMMUNITY COLLEGE of the CITY
UNIVERSITY of NEW YORK, JOSEPH S.
MURPHY, as Chancellor of the CITY
UNIVERSITY of NEW YORK,

Index No. 21381-87

Respondents,

For an Order Pursuant to Article 78 of
the CPLR in the Nature of Mandamus,
Requiring the Respondents to Provide
the Petitioner with Access to Certain
Records Requested Under the Freedom of
Information Law.

- - - - - x

The petitioner, Bernard Eisenberg, moves the court for a judgment pursuant top CPLR Article 78, in the nature of a writ of mandamus, ordering and compelling the respondents to provide the petitioner with access to certain records pursuant to the Freedom of Information Law. Specifically, the petitioner seeks acces to the following records:

- (a) Fund collection and expenditure records of the Kingsborough Community College Found-
ation Fund for the years 1985 to present;
and

- (b) Payroll records of the Kingsborough Community College Foundation Fund for the years 1984 to present.

The court has read and considered all of the affidavits and exhibits submitted in support of the motion as well as those in opposition, the court has considered the Memoranda of Law submitted by both sides.

The respondent interposes four (4) defenses to the petition.

- (1) The petitioner fails to state a cause of action;
- (2) The actions of the CUNY-General Counsel and Vice Chancellor for Legal Affairs in denying petitioner's request for access to private records, were in all respects, lawful and proper, were not arbitrary and capricious; nor did they constitute an abuse of discretion;
- (3) The requested records are those of a private, not-for-profit corporation that is not an "agency" within the meaning of FOIL Section 86(3); nor is the requested material "records" within the contemplation of FOIL Section 86(4); and
- (4) Inasmuch as the Foundation's fund collection records contain the names of contributors as well as the amounts of their donations; this information is exempt from disclosure under the invasion of privacy exception to the Freedom of Information Law.

The petitioner's request for access to the payroll records of the Kingsborough Community College Foundation Fund for the years 1984 to present is denied. The petitioner never requested access

to these records prior to the bringing of the petition.

At issue is whether the Kingsborough Community College Foundation, Inc. (hereinafter "Foundation") comes within the definition of an "agency" as defined in Public Officer Law Section 86(3) and whether the Foundation's fund collection and expenditure records are "records" within the meaning and contemplation of Public Officer's Law Section 86(4).

The Foundation is a not-for-profit corporation that was formed to "promote interest in and support of the college in the local community and among students, faculty and alumni of the college". (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of "principal objectives" in the Foundation's Certificate of Incorporation:

- "1. To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college."

Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College. Even though the Foundation is set up as a not-for-profit corporation, as it is such an integral part of the College allowing it to stand as a separate entity

would subvert the purpose of FOIL. I am in accord with the petitioner in rejecting as irrelevant, for the purposes of applying the FOIL, a distinction as to whether the Foundation is an independent, voluntary organization which provides public service to an agency of local government, rather than an "organic arm of government" as the vehicle for the performance of the purposes and objectives of that agency. (Westchester Rockland Newspapers, Inc. v. Kimball, 50 N.Y. 2d 575 [1980]). Even if the requested records were determined to be private documents of the Foundation, they are nevertheless records in the possession of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whelan, 69 N.Y. 2d 246 [1987]).

It is without question that the " . . . FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government . . . (citations omitted) (Capital Newspapers v. Whelan, supra, at 252). In the instant case the respondents have failed to meet their burden of demonstrating that the requested material is within the bounds of some "specific statutory protection" and therefore "the Freedom of Information Law compels disclosure not concealment." (Westchester News v. Kimball, supra, at 580).

The court rejects the respondent's contention that the requested records are exempt from disclosure in that their disclosure "would constitute an unwarranted invasion of personal privacy," (FOIL Section 87(2)(b)). The respondents have not met their burden of presenting factual evidence to support their contention. The Court of Appeals has ruled that ". . . a conclusory assertion unsupported by an factual basis . . . is therefore insufficient to bring the material

within that exemption." (Gannett Company, Inc. v. County of Monroe,
59 A.D. 2d 309 (4th Dept., 1977)).

Settle order on notice.

21

J. S. C.