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At a Special Term of the Albany County
Supreme Court, held in and for the County
of Albany, in the City of Albany, New
York, on the 5th day of March 2010

PRESENT: HON. PATRICK J. McGRATH
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
HARRY KELBER,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION AND ORDER
INDEX NO. 7887-09
March 5, 2010

-against-

THE UNIVERSITY OF THE STATE OF NEW YORK,
THE STATE UNIVERSITY OF NEW YORK,
EMPIRE STATE COLLEGE and
EMPIRE STATE COLLEGE FOUNDATION,

Respondents.

APPEARANCES: BOLATTI & GRIFFITH
 Edward Griffith, Esq.
 For the Petitioner

WHITEMAN OSTERMAN & HANNA, LLP
(John J. Henry, Esq. and Amanda A. Maleszweski, Esq.)
For the Respondent Empire State College Foundation

HON. ANDREW M. CUOMO.
Attorney General for the State of New York
(James B. McGowan, Assistant Attorney General)
For the Respondents The University of the State of New York, the State
University of New York, and the Empire State College

McGRATH, PATRICK J. J.S.C.

In this proceeding pursuant to CPLR Article 78, petitioner seeks an order directing respondents to produce documents and other information under the New York Freedom of Information Law (FOIL) §§ 84-90. Petitioner also moves for leave to take disclosure pursuant to CPLR 408. Respondents oppose all the requested relief.

FACTUAL BACKGROUND

On or about March 9, 2009, petitioner sent a FOIL request to the respondents Empire State College (hereinafter "the College") and Empire State College Foundation (hereinafter "the Foundation"), seeking production of specific records relating to the Dr. Harry Kelber Endowment in Labor Studies. The College is one of the Arts and Sciences colleges of the State University of New York (SUNY). The purpose of the endowment is to defray the cost of distinguished guest lecturers at the College and to help in the development and expansion of other academically relevant projects which enhance the goals of the Empire State College. On or about April 10, 2009, the College denied petitioner's request on behalf of the College and the foundation. The denial was contained in a letter from the SUNY FOIL Appeals Officer, which states that petitioner has been provided with a significant amount of information relative to the Endowment over the years, including much of what petitioner is currently seeking. Further, it was stated that the endowment was established by the foundation, not the college, and that the foundation was outside the scope of FOIL. Nonetheless, respondents supplied petitioner with further documentation relative to the Endowment.

Petitioner appealed the denial. The Appeals Officer affirmed, stating that the foundation was not publicly funded or controlled, and therefore, according to New York case law, not subject to FOIL.

APPLICABLE LAW

FOIL requires disclosure of the records of an agency, which is defined 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 any one or more municipalities thereof, except the judiciary or the state legislature." Public Officers Law § 86 [3]. A not-for-profit corporation may fall within the definition of an agency subject to FOIL if its purpose is governmental and it has the attributes of a public entity. Matter of Buffalo News v. Buffalo Enter. Dev. Corp., 84 N.Y.2d 488, 492-93 (1994). "Records" include any information kept, held, filed, produced, or reproduced by, with or for an agency. N.Y. Pub. Off. Law § 86(4). FOIL is designed to provide the public with great access to government records, and all government records not covered by an enumerated exception contained in N.Y. Pub. Off. Law § 87(2) are presumptively available for copying and inspection. The statute is to be read liberally and its exemptions read narrowly. Matter of Russo v. Nassau County Community Coll., 81 N.Y.2d 690, 697 (1993).

The questions presented on this Article 78 are two-fold: 1) is the foundation an agency within the meaning of FOIL, and if it is not, 2) does FOIL still require disclosure because the foundation is holding or keeping records for an agency? Both parties cite many of the same cases, and compare the instant case with the facts and results therein.

The Court of Appeals addressed the issue of whether a not-for-profit corporation constitutes an agency in Buffalo News v. Buffalo Enter. Dev. Corp., 84 N.Y.2d 488 (1994). In that case, respondent (BEDC) was a local development not-for profit corporation. Petitioner, publisher of Buffalo's daily newspaper, sought financial information via a FOIL request, which respondent refused to grant. The Court held that because BEDC channeled public funds into the community and enjoyed many attributes of a public entity, it was an "agency" within FOIL's reach. Specifically, the Court noted that the BEDC was required to publicly disclose its annual budget; it described itself as an agent of the City of Buffalo; that its membership was limited to individuals or entities residing in or doing business in the City of Buffalo; that at one time it maintained its offices in a public building; and that it was managed by a board of directors consisting of several permanent directors which included the mayor of the City of Buffalo and the commissioner of community development for the City of Buffalo. These factors made the BEDC's purpose "undeniably governmental." Id. at 493.

The following year, the Third Department revisited the holding of Buffalo News in Farms First v. Saratoga Economic Dev. Corp., 222 A.D.2d 861 (3d Dept 1995). The Court noted that the respondent's "objectives and operations are substantially different from those of the BEDC, such that even the liberal interpretation of the term 'agency' articulated in Buffalo News does not encompass respondent." The respondent in Farms First, an independent entity formed by private businessmen to further their own interests, was never furnished public office space; no County employee ever served on its board; it received some of its funding from private individuals and corporations; and it was not subject to most of the financial controls exerted over the BEDC by the City of Buffalo. "Significantly, while the Court of Appeals found that the BEDC described itself as an 'agent' of the City, and that a substantial portion of its activities consisted of the administration of loan programs and, concomitantly, the disbursement of funds on behalf of the City, respondent does none of these things; rather it has simply contracted with the County on a fee-for-service basis, much as any other independent business entity might." Id. at 862. Respondent was found not to be subject to the mandates of FOIL.

The same Court in Matter of Ervin v. Southern Tier Economic Dev., Inc., 26 A.D.3d 633 (3d Dept. 2006), compared Buffalo News with that of respondent Southern Tier Economic Dev., Inc., (EDA) which had been founded by members of the business community to further the city of Elmira's economic development. Specifically, the City and respondent entered into a development and building loan agreement involving the construction and operation of the "First Arena", a facility housing two hockey rinks, restaurants and related businesses. By comparison to the BEDC, respondent here was created by private business persons; had a nine-member board which is comprised of six private individuals and three ex officio government officials, none of whom exercise any financial control over respondent; the City did not control or oversee the management

of First Arena; respondent did not hold itself out as an agent of the City or administer loan programs or disburse funds on behalf of the City; lastly, EDA was a private company and the audit of its financial records was retained by respondent and has not been made a part of any public record. The Court held that "although respondent is performing a governmental function by fostering the economic development of the City, it is not an agency of the City for purposes of FOIL." *Id.* at 635.

The Second Department reached a similar result in Lugo v. Scenic Hudson, Inc., 258 A.D.2d 626 (2d Dept. 1999), wherein two not-for-profit corporations, both of which worked closely with State agencies, were found not to be subject to FOIL. The corporations were formed by private individuals and were governed by a self elected board of directors; both were primarily privately funded, and their operating budgets did not require approval by any governmental body. The Court noted that "[a]lthough the defendants' objectives appear to coincide partly with those of the New York State Department of Environmental Conservation and the Office of Parks, Recreation and Historical Preservation, and they work closely with those two State offices, the defendants are not controlled by either of the agencies." *Id.* at 627.

In Matter of Rumore v. Board of Educ. of City School Dist. of Buffalo, 35 A.D.3d 1178 (4th Dept. 2006), the court conducted the same analysis as above, noting that a not-for-profit corporation may fall within the definition of an agency subject to FOIL if its purpose is governmental and it has the attributes of a public entity. The Court noted EIC's budget was not approved by any government agency; that EIC has a self-elected Board of Directors; that the School District had no authority to hire or discharge any employee of EIC; that EIC did not have its offices in District-owned buildings; and that EIC provided services to the District on a fee-for-services basis, and it provided services to other clients as well as the District.

In Siani v. Research Found. of the State Univ. of N.Y., 2007 N.Y. Misc. LEXIS 9122 (N.Y. Sup. Ct. Mar. 26, 2007), the Research Foundation of the State University of New York asserted that it was not subject to FOIL. Supreme Court reviewed the powers and duties of the research foundation as found in its charter, which were to assist in developing and increasing facilities of the state university by making and encouraging gifts, grants, and donations of property, to receive, hold, and administer gifts and grants and to finance studies and research of benefit to and in keeping with the educational purposes and objectives of the university. The activity of the research foundation was included in the university's financial statements. The Court looked at the "functional relationship between the research foundation and the university, and the power it had with respect to sponsored programs of the university," (Smith v. City Univ. of New York, 92 N.Y.2d 707 (1999) and Perez v. City Univ. of N.Y., 5 N.Y.3d 522 (2005)) and held that the research foundation exercised a governmental function and was thus subject to the provisions of the FOIL.

In the unreported case of Matter of Newsday, Inc., v. Board of Regents of the State of New York, Index No. 8454-07, Ulster County Supreme Court, May 30, 2008 (Cahill, J.), the court held that the Stony Brook Foundation (SBF), a not-for-profit private corporation was not an agency within the meaning of FOIL. The SBF was created to accept and encourage gifts to be used for the advancement of the interests of SUNY Stony Brook. SBF and SUNY entered into a contract whereby

SBF agreed to "perform the services of fundraising and administration of gifts and grants for SUNY Stony Brook...[and] hold[] donations in a fiduciary capacity for the benefit of SUNY Stony Brook, at the sole discretion of SBF...as is consistent with its corporate purpose." The Court noted that all but one of the trustees of SBF were from the private sector and not subject to appointment or approval by SUNY or the State and not otherwise affiliated with SUNY. The SUNY President was the only ex-officio voting member of the SBF who was also a SUNY employee.

As to the second prong of the instant analysis which concerns whether the records are being held or kept for an agency, both parties cite Encore College Bookstores v. Auxiliary Serv. Corp., 87 N.Y.2d 410 (1995). In that case, the respondent (ASC), a not-for-profit corporation, provided a campus bookstore SUNY Farmingdale through a subcontractor. Petitioner operated another off-campus bookstore and sought to obtain the list of books compiled by the subcontractor so that it could sell the same books. According to the ASC bylaws, its general purpose was "to establish, operate, manage and promote educationally related services for the benefit of the [SUNY] Campus Community, including faculty, staff and students in harmony with the educational mission and goals of the College." As explained in ASC's agreement with SUNY, the university "requires certain auxiliary services at the Campus in order to carry out its essential educational mission," and the corporation was "organized for the purpose of providing such services." The Court held that "[b]ecause ASC receives a copy of the booklist compiled by its subcontractor ... to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a government agency. In other words, the booklist information is 'kept' or 'held' by ASC 'for an agency'."

In addition to the holding as stated above Runmore, supra, the court also noted that the records at issue were not 'kept, held, filed, produced or reproduced by, with or for' an agency. The record established that EIC never provided the records at issue to the District, nor were they generated at the request of or on behalf of the District. Id. at 1180.

In Mohawk Book Co. v. State Univ. of N.Y., 288 A.D.2d 574 (3d Dept. 2001). In that case, SUNY Albany (SUNYA) contracted with a book selling conglomerate to operate the campus bookstore. A small bookstore owner attempting to compete with the campus store sought disclosure of the faculty booklists submitted to the university and used by the campus bookstore in ordering titles pursuant to FOIL. The Court held that "to the extent that SUNYA faculty members possess and maintain course syllabi or written booklists, we find such information constitutes 'records' ... notwithstanding the fact that they are not centrally maintained or collected by SUNYA's administration. Such records are kept by the faculty members who are employees of SUNYA and assist in fulfilling respondents' educational mission by informing students of the material that they need to purchase for their course work. Inasmuch as they are held by individual faculty members, they are 'held ... for an agency.' That SUNYA does not require faculty to generate or maintain booklists is irrelevant for purposes of determining whether they are records under FOIL, as the statute has been interpreted as requiring only that the documents be held or kept by the agency." Id. at 576-77.

ARGUMENTS

Empire State College submits the Affidavit of its Vice President for Administration, Paul Tucci, who states that as the Records Access Officer for Empire State College, he is generally responsible for the finance and operational administration of the College. He states that the foundation is a corporation established under 501(c)(3) of the Internal Revenue Code "to assist in advancing the welfare and development" of the College. The by-laws are attached as an Exhibit to the Affidavit. The foundation is empowered to solicit donations from private donors and manage those funds to supplement tuition funds and tax-payer money appropriated from the Legislature. The foundation may make grants, scholarships, endowments, and other financial arrangements to the College, as well as to faculty, staff or students.

There is an agreement between the college and the foundation, attached to Mr. Tucci's Affidavit, which sets forth the foundation's mission, which includes promoting the "quality and visibility of the college." The foundation seeks to encourage "philanthropy and stewardship" to "support the future growth of the college in becoming an international model of adult learning."

The foundation is governed by a Board of Directors that is autonomous from the College. There are 21 voting members on the Board of Trustees, two of which are employed by the College, including the College President, who is a voting ex officio member. The College's Assistant Vice President for Development is the foundation's executive director, and is a non-voting member. The other 19 voting members are business, professional and community leaders. Mr. Tucci is treasurer of the foundation, but is not a voting officer of the board. All members of the board are nominated by the board itself, with no input from the College, or any other New York State official.

Mr. Tucci states that the board's autonomy is evident from its functions. It solicits donations and invests them without the approval or participation of the College. The foundation ensures that the donated funds are utilized pursuant to the donor's wishes, and the foundation authorizes all payments to designated programs. The funds are guided by donor preference, which, he argues makes them "private in nature."

He characterizes the foundation as a "financial management and investment entity", run by business professionals who use their expertise to maximize the value of privately donated funds. The private nature of the foundation allows the members to invest with flexibility and in accordance with donor preference, as opposed to adherence with State appropriation and procurement laws.

With respect to the Harry Kelber endowment, Mr. Tucci notes that it was established by the foundation in 1982 to help defray the cost of honoraria for distinguished guest lecturers at the College's Harry Van Arsdale School of Labor Studies, and to help in the development and expansion of other academically relevant projects which enhance the Van Arsdale Center. Petitioner was never intended to have any authority over the endowment; his name was given to the endowment to acknowledge his College service.

He notes that in response to the instant FOIL request, records were voluntarily provided to petitioner. Mr. Tucci states that at the time of this disclosure, he believed these records were "the only additional documents responsive" to petitioner's request. Since then, Mr. Tucci has become aware of additional documents in the possession of the College which would be responsive to the request, which he has attached hereto, with certain private information (tax payer identification numbers) redacted. He states that he has made a diligent search, and that the College has no additional materials which are responsive to the petitioner's request.

Counsel for the State respondents argues that private organizations do not become governmental agencies, subject to FOIL merely because they advance the interests of a governmental agency (Matter of Ervin v. Southern Tier Economic Dev., Inc., 26 A.D.3d 633 (3d Dept. 2006)), that where an entity enjoys financial and functional independence of any government official, said entity is not an "agency" within the meaning of FOIL (Matter of Rumore v. Board of Educ. of City School Dist. of Buffalo, 35 A.D.3d 1178 (4th Dept. 2006)). Respondents argue that the foundation does not manage public funds nor does it provide essential services that the College would have to provide for itself. *Cf.* Encore College Bookstores v. Auxiliary Serv. Corp., 87 N.Y.2d 410 (1995).

It is also noted that the College has alleged that it has made a diligent search for all existing documents which are responsive to petitioner's FOIL request in its possession, and that all such documents have been provided. Such an affirmation has been held to suffice in dismissing a petition as moot. *See* Rattley v. N.Y. City Police Dept., 96 N.Y.2d 873 (2001) ("When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to 'certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search.' The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate.").

The Court agrees that the amended petition should be dismissed on these grounds as to the State Respondents.

The Foundation has supplied the court with the Affidavit of Evelyn Buchanan, Executive Director of the Foundation. She echoes the foundation's purposes as stated in the Tucci affidavit and adds that the foundation 1) is not required to disclose its budget to SUNY or any other public agency, 2) is not obligated to submit its budget to the public at large and 3) undergoes annual independent audits of its financial operations. Its funds and records are private. Ms. Buchanan further elaborates on the contract mentioned in the Tucci affidavit, which acknowledges that the foundation "has been established to support the Campus by serving as a means of receiving and managing gifts and making these revenues available to the Campus for approved programs and activities as well as a vehicle for managing real property for the benefit of the Campus." The contract only requires the foundation to maintain financial records; therefore, many of the records sought are not maintained pursuant to a contractual obligation. She also notes that the foundation should be viewed as a

“financial management and investment entity.” Critically, she notes that the foundation only uses private funds to fulfill its corporate mission, and does not control or administer any public funds.

She states that if the foundation did not perform these functions, SUNY would have to hire another private entity to do the same. She claims that the foundation’s functions are not activities that SUNY is charged by policy or law with performing in order to fulfill its educational or research mandate, and therefore, the foundation is not performing any governmental or proprietary function for the State.

Counsel for the foundation argues that the foundation is not an agency within the meaning of FOIL because respondent is privately funded and controlled. *Citing Matter of Ervin v. Southern Tier Economic Dev., Inc.*, 26 A.D.3d 633 (3d Dept. 2006); *Matter of Rumore v. Board of Educ. of City School Dist. of Buffalo*, 35 A.D.3d 1178 (4th Dept. 2006); *Metro. Museum Historic Dist. Coalition v. De Montebello*, 20 A.D.3d 28 (1st Dept. 2005); *Lugo v. Scenic Hudson, Inc.*, 258 A.D.2d 626 (2d Dept. 1999); *Farms First v. Saratoga Economic Dev. Corp.*, 222 A.D.2d 861 (3d Dept. 1995).

Counsel further argues that the instant case is identical to *Matter of Newsday, Inc., v. Board of Regents of the State of New York*, index No. 8454-07, Ulster County Supreme Court, May 30, 2008. Further, that although the foundation’s mission is to assist and support the College and its students and it works closely with the College, neither of those factors render the foundation subject to FOIL. *Lugo v. Scenic Hudson, Inc.*, 258 A.D.2d 626 (2d Dept. 1999).

In the event this court finds that the Foundation is subject to FOIL as an agency, it is argued that any information sought as to donor information should be shielded, noting that a donor’s privacy interest is protected by the Internal Revenue Code (26 USC 6104(d)(3)(A)), as well as by the FOIL statute itself, which recognizes an exemption for documents that “if disclosed would constitute an unwarranted invasion of personal privacy.”

Petitioner notes various factors that would support their position that the records are subject to FOIL, specifically, that the endowment is administered by one of the College’s deans, Dr. Michael Merrill, who is also Dean of the Van Arsdale Center. Petitioner notes that the endowment was proposed by the College President and approved in 1982 by the College Council, and organization appointed by the New York State Governor to advise the College President. Petitioner also notes the foundation’s prominence on the College’s organizational chart. The State University has classified the foundation’s fundraising to be a “permanent source of revenue.”

Petitioner also argues that SUNY has oversight over the foundation, through the issuance of operational guidelines that all SUNY foundations must adhere to, which allows the SUNY trustees the authority to approve contracts between campuses and their foundations, as well as monitor foundations’ financial statements and any auditing reports.

The State University guidelines require that each foundation execute an agreement with its

corresponding State University campus. Petitioner argues that pursuant to this agreement, SUNY has "virtually complete control over the activities of its corresponding foundation." The foundation's contract provides that the foundation may not engage in activities not approved by SUNY/the College; that the foundation must keep complete records of all of its activities; that these records must be audited and submitted to SUNY for inclusion in the State University's annual financial report; that the foundation must make all of its books and records available to the State University for audit; and that the foundation is subject to audit by the New York State Comptroller.

Petitioner argues that when records are kept by a private organization in order to discharge a "delegated duty" of the agency, then such organization "holds" or "keeps" records for an agency. Encore College Bookstores v. Auxiliary Serv. Corp., at 417. Petitioner argues that the primary responsibility for the acceptance and administration of gifts, grants and endowments is vested by the Education Law in the Board of Trustees of the State University. Education Law 255(2)(a). That statute states that

"The state university trustees are further authorized and empowered...[t]o take, hold and administer on behalf of the state university or any institution therein, real and personal property or any interest therein and the income thereof either absolutely or in trust for any educational or other purpose within the jurisdiction and corporate purposes of the state university. The trustees may acquire property for such purposes by purchase, appropriation or lease and by the acceptance of gifts, grants, bequests and devises, and, within appropriations made therefor, may equip and furnish buildings and otherwise improve property owned, used or occupied by the state university or any institution therein..."

As the State University has delegated this duty to the foundation, petitioner argues that the foundation holds and/or keeps the records for an agency. Petitioner also argues that the foundation is itself an agency because the foundation performs "governmental functions" under Education Law 355(2)(a).

It is also argued that the foundation has attributes of a public entity, because the "Board's very existence depends on the discretion and good will of the State University and the College", noting that the foundation must comply with the aforementioned State University guidelines and is "functionally controlled by the State University and the College."

Petitioner claims that the unreported *Newsday* decision cited by the respondents is inconsistent with Court of Appeals precedent in Encore, supra, as well as Buffalo News, supra and should not be followed. Further, Petitioner states that the Court in *Newsday* may not have had access to all the documentary evidence presented in the instant matter.

Petitioner states that the court's decision in Siani v. Research Found. of the State Univ. of N.Y., 2007 N.Y. Misc. LEXIS 9122 (N.Y. Sup. Ct. Mar. 26, 2007) should be followed.

The state respondents reply that the foundation's choice to enter into a terminable contractual agreement with Empire State College does not make the private corporation a public agency. Respondents do not dispute that the current agreement between the College and the Foundation allows for public auditing and other mandates ensuring accountability. Respondents argue that this fact does not render the foundation an agency or impeach the foundation's independence, as the foundation can choose not to so contract.

Further, respondents argue that Encore is distinguishable from the facts herein because in that case, the organization was supplying SUNY with an essential service - textbooks. It is argued that private resources currently assist SUNY in fulfilling its mission, "but it is not within the underlying mission of SUNY itself to solicit or manage private funds."

Respondents claims that Siani does not dictate a finding for the petitioner, as the court made no finding in that case that all foundations are public entities. Rather, the court conducted a fact based analysis, reviewing "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." Citing Matter of Perez v. City Univ. of New York, 5 N.Y.3d 522, 528 (2005), quoting, Matter of Smith v. City Univ. of New York, 92 N.Y.2d 707 (1999). The foundation also claims that petitioner "mistakenly concentrates" on the terminable contractual agreement between the foundation and the college, as private entities frequently enter into contracts with public agencies which are terminable at will.

Is the foundation an agency?

The factors that weigh in favor of the respondent foundation are that only two of its 21 member board are employed by the college. The other nineteen are members of the business and professional community. There does not appear to be any residential restriction as to who may be a member. All members of the board are nominated by the board itself, without input from the college or from any state official. There is nothing in the record to suggest that the foundation has its offices in a public building. It is also clear that the foundation collects and channels private funds.

However, although the foundation argues that it is not required to disclose its budget to SUNY or the public at large, this foundation has entered into a contract with SUNY/the College. That contract is "subject to review and approval of the chancellor or designee." It states that the foundation will conduct its activities in accordance with the Guidelines for Campus-Related Foundations. The Guidelines allow periodic audit by the University Auditor, as well as "outside regulatory bodies to the extent allowed by law." The contract requires that the foundation be independently audited, but that the results of independent audit, along with the foundation's annual report, must be forwarded to the campus president as well as the University controller and auditor. The audit must be completed within 90 days after the close of the Foundation's fiscal year to enable the University to include "pertinent information" in its annual financial statements.

Furthermore, the State Comptroller may periodically conduct reviews of State University's administration of its campus foundations. Article V, Section 1 of the New York State Constitution and Article II, Section 8 of the State Finance Laws. One such review is included as an Exhibit in Petitioner's papers. See Office of the New York State Comptroller, Division of State Government Accountability: State University of New York Oversight of Campus Related Foundations, Report 2006-S-96. In that review, the State Comptroller found that two units with the SUNY system have specific oversight responsibilities for the foundations. The Office of the University Auditor conducts periodic audits of the operations of the foundation, and the Office of the University Controller monitors foundation contracts and reviews their financial statements. These statements are compiled by System Administration for inclusion in SUNY's financial statements. The Office of the University Controller examines the foundation's financial statements to detect any significant year to year variances, as well the management letters provided to the foundation by their independent certified public accountants. The report further found that the oversight foundations SUNY had put in place were "not as strong as they could be", and therefore, the State Comptroller "further reviewed financial related activities of the foundations" at five different SUNY Universities, including Stony Brook. Part of that review included a test of 343 expenditures to determine if the supporting documentation maintained by the University business offices was adequate.

The financial autonomy central to many of the cases cited above is lacking here, and thus petitioner's emphasis on the contractually agreed upon terms, including those found in the Guidelines for Campus-Related Foundations, is not misplaced. That the contract is terminable does not change the fact that the foundation is subject to financial scrutiny by the State.

The court has reviewed the decision in *Newsday, supra*, which mentions a contract between SUNY Stony Brook and the Stony Brook Foundation Inc./Stony Brook Foundation Realty, Inc., but does not mention SUNY's ability to review and audit the foundations, or the Comptroller's ability to determine whether SUNY was providing sufficient oversight of its campus related foundations, as it did in the above mentioned report at several universities, including Stony Brook.

Are the records being held or kept for an agency?

As SUNY has the authority to audit these records and use them in its annual public statements, the court would also make a finding that the records are being held for an agency. *Cf. Runmore, supra* (holding that the documents at issue were not held or kept for an agency because they were never provided to an agency); *cf. Ervin, supra* (noting that the company's financial records were retained by respondent and has not been made a part of any public record).

Based on the foregoing, petitioner is awarded judgment directing the foundation to comply with the provisions of Public Officers Law article 6. However, the court agrees with the foundation that any information sought as to a private donor's personal information (including name, address, taxpayer identification number) should be shielded, noting that a donor's privacy interest is protected by the Internal Revenue Code (26 USC 6104(d)(3)(A)), as well as by the FOIL statute itself, which recognizes an exemption for documents that "if disclosed would constitute an unwarranted invasion

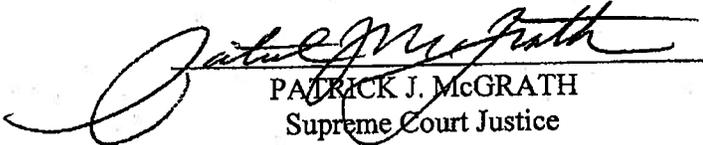
of personal privacy.”

The petitioner’s motion pursuant to CPLR 408 is moot.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for the petitioner. All original supporting documentation is being filed with the County Clerk’s Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

**SO ORDERED AND ADJUDGED.
ENTER.**

Dated: April 14, 2010
Albany, New York


PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated October 5, 2009; Amended Petition for Judgement Pursuant to Article 78 of the Civil Practice and Rules, dated Septemeber 29, 2009, with annexed Attachments 1-4.
2. Verified Answer, Respondents University of the State of New York, the State University of New York, and Empire State College, dated December 4, 2009.
3. Affidavit, Paul Tucci, dated December 3, 2009, with annexed Exhibits A-C.
4. Memorandum of Law in Support of State Respondents' Answer and Objections in Point of Law, dated December 4, 2009, with Appendix.
5. Verified Answer, Respondent Empire State College Foundation, dated December 4, 2009.
6. Affidavit, Evelyn Buchanan, dated December 3, 2009, with annexed Exhibits A & B.
7. Affidavit, John J. Henry, Esq., dated December 4, 2009.
8. Respondent Empire State College Foundation's Memorandum of Law in Opposition to the Amended Petition, dated December 4, 2009.
9. Notice of Motion for Leave to Take Disclosure, dated January 28, 2010; Notice of Deposition upon Oral Examination, with Attachment 1; Affirmation of Edward Griffith, dated January 27, 2010, with annexed Exhibits 1-23.
10. Memorandum of Law in Further Support of the Petition and in Support of Motion for Discovery, dated January 28, 2010, with annexed Exhibits A & B.
11. Letter Memorandum, State Respondents, dated February 24, 2010.
12. Affidavit, Amanda A. Maleszweski, Esq., dated March 1, 2010.
13. Respondent Empire State College Foundation's Memorandum of Law in Opposition to Petitioner's Motion for Discovery, dated March 1, 2010.