

Matter of Siani v Farmingdale Coll. Found., Inc.

2010 NY Slip Op 33283(U)

November 3, 2010

Supreme Court, Suffolk County

Docket Number: 32200/2009

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #001 Case Disp
R/D:10/09/09
S/D:07/01/10

In the Matter of the Application of
DOMINICK J. SIANI,
Petitioner,

PLTF'S/PET'S ATTY:
DOMINICK J. SIANI (Pro Se)
39 Aberdeen Road
Smithtown, NY 11787

(For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules re: Public Officers
Law, Article 6, Sections 84-90, Freedom of
Information Law and Article 7, Open Meetings Law)

DEFT'S/RESP'S ATTY:
ANDREW M. CUOMO
Attorney General of New York
300 Motor Parkway, Suite 205
Hauppauge, New York 11788

-against-

FARMINGDALE COLLEGE FOUNDATION, INC.
(a/k/a STATE UNIVERSITY OF NEW YORK AT
FARMINGDALE FOUNDATION); STATE
UNIVERSITY OF NEW YORK; STATE UNIVERSITY
OF NEW YORK AT FARMINGDALE (a/k/a
FARMINGDALE STATE COLLEGE),

CERTILMAN, BALIN, ADLER &
HYMAN, LLP ("FOUNDATION")
90 Merrick Avenue
East Meadow, NY 11554

Respondents..

Upon the following papers numbered 1 to 67 read on this motion for an order pursuant to CPLR Sec 7804(f) Notice of Motion/Order to Show Cause and supporting papers 1-22; Notice of Cross Motion and supporting papers Answering Affidavits and supporting papers 23-33, 34-52 Replying Affidavits and supporting papers 53-67 Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this CPLR Article 78 petition by petitioner DOMINICK J. SIANI ("SIANI") seeking a judgment to compel respondents to provide records maintained by respondent FARMINGDALE COLLEGE FOUNDATION, INC. pursuant to Freedom of Information Law ("FOIL") (Public Officers Law Section 85) is denied.

On June 25, 2009 petitioner "SIANI" submitted a Freedom of Information ("FOIL") request to respondent FARMINGDALE COLLEGE FOUNDATION, INC.'s ("FCFI") treasurer, secretary and records access officer seeking six categories of "FCFI" documents and records. The records sought were:

- "1) All invoices and/or billing statements paid to the firm Certilman, Balin (Certilman, Balin, Adler & Hyman, LLP) for the period from July 1, 2005 to the present....

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- 2) Any foundation meeting minutes (directors or otherwise) authorizing expenditures to the firm Certilman Balin...
- 3) The journal entry transaction and all supporting documentation (copies requested) recording on the foundation's financial books in the Enterprise Resource Planning Software and Services Gift reported in a press release dated June 20, 2008....
- 4) Any foundation meeting minutes (directors or otherwise) accepting the gift(s) described in item # 3...
- 5) The foundation's chart of accounts (for inspection).
- 6) For each of the fiscal years ending (June 30, 2006, June 30, 2007, June 30, 2008 and June 30, 2009), I am requesting (for inspection): a) detailed cash disbursements journal (by vendor and/or in date order sequence), and (b) detailed general ledger depicting all transactions by individual account."

By letter dated July 2, 2009 "FCFI's" records access officer acknowledged receipt of petitioner's request. By letter dated July 24, 2009 "FCFI's" records access officer responded that no records to the first four requests existed and that redacted documents would be provided for requests numbered 5 and 6.

On July 29, 2009 petitioner filed a "FOIL" appeal with respondent STATE UNIVERSITY OF NEW YORK's Appeals Officer. By determination dated August 13, 2009 the "SUNY FOILS APPEAL OFFICER" found that requests # 1-4 were properly denied and that requests #5-6 were not ripe for review since respondent required additional time (45 days) to produce the redacted documents.

Petitioner's CPLR Article 78 petition seeks a judgment compelling respondents to provide complete responses to "SIANI's" "FOIL" requests claiming that respondent "FOUNDATION" is essentially a tax exempt, non-profit government agency and is therefore required to provide the records sought by petitioner. Petitioner claims that respondents failure to provide the materials and records within a reasonable period of time is arbitrary, capricious and without any legal basis.

By Order dated April 15, 2010 respondents motion to dismiss the petition was granted solely to the extent that petitioner's claims seeking judicial review of respondents response to "FOIL" items # 5 & 6 were dismissed based upon petitioner's failure to exhaust administrative remedies. Respondent's motion was denied with respect to "FOIL" items # 1-4.

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“SIANI’s” petition seeks to compel disclosure of materials and records maintained by respondents STATE UNIVERSITY OF NEW YORK AT FARMINGDALE (“SUNY at FARMINGDALE”) and the FARMINGDALE COLLEGE FOUNDATION (“FOUNDATION”) claiming that the Freedom of Information Law (“FOIL”) and the Open Meetings Law (“OPM”) require disclosure of the records sought from the college and the non-profit agency. Petitioner claims that the respondents are “inextricably linked” acting as one entity with the “FOUNDATION” essentially performing the government function of soliciting donations while using campus buildings, computers, and college personnel. It is petitioner’s contention that based upon the non-profit’s dependent and inseparable relationship with the College, respondent “FOUNDATION” must be declared an “agency” subject to “FOIL” and “OML” disclosure requirements. Petitioner also claims that “SUNY at FARMINGDALE’s” records officer’s “FOIL” request response was not made in good faith and was contradicted by press releases issued by the College and a donor. Petitioner contends that a hearing may be required to determine the credibility of the individuals involved in maintaining and disclosing the records sought.

Respondents “SUNY at FARMINGDALE” and “FOUNDATION” each submit a verified answer and contend that no basis exists to compel disclosure of records sought by petitioner. Respondent “SUNY” claims that the August 13, 2009 “SUNY” Appeals Officer’s determination denying petitioner’s request was proper and that its records officer made a diligent search for records maintained by the College which would have been responsive to petitioner’s item #1-#4 request. Respondent “SUNY” asserts that no such records were found to exist and therefore no basis exists to vacate the Appeals Officer’s determination. Respondent “FOUNDATION” argues that, as a private, not-for-profit corporation, it is not subject to “FOIL’s” disclosure requirements. Respondent “FOUNDATION” claims that it receives all of its funding from private sources; is governed by a self-elected board of directors; and has independent control of its finances and decision making. It is respondent’s position that the “FOUNDATION” is not performing any governmental function and is therefore neither an “agency” under the terms of “FOIL” or a “public body” under “OML”. Respondent claims that the documents sought with respect to petitioner’s item # 1 request are therefore exempt from disclosure and that no records responsive to petitioners items #2-#4 requests even if respondent were required to provide a response.

The purpose of “FOIL” is to shed light on government decision making by imposing a broad standard of open disclosure in order to achieve maximum public access to government documents. “FOIL” mandates that “each agency shall .. make available for public inspection and copying all records, unless the records fall within a statutory exemption (Public Officers Law Section 87(2)). Records include any information kept, held, filed, produced or reproduced by, with or for an agency. (Public Officers Law Section 86(4)).

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In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden, 53 NY2d 186, 194, 440 NYS2d 875 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence (Matter of Fuhst v. Foley, 45 NY2d 441, 410 NYS2d 565 (1978)).

Respondent "SUNY at FARMINGDALE", a public university, is clearly an "agency" subject to "FOIL" disclosure requirements. The record shows that with respect to petitioner's requests for materials and documents encompassed in items # 2- #4, respondent "SUNY's" records officer made a diligent search for the records and determined that no such records exist. Absent submission of relevant evidence to provide a demonstrable factual foundation in support of petitioner's contention that the requested materials exist and are within the agency's control, no basis exists to vacate the August 13, 2009 administrative determination (see Matter of Frederick Franklin v. Ann Schwartz, 57 AD3d 338, 870 NYS2d 248 (1st Dept., 2008)). Moreover with respect to those records sought in item # 1, such demands, which seek invoices and billing statements paid to a law firm representing respondent "FOUNDATION" and not "SUNY at FARMINGDALE", are not the proper subject of a "FOIL" demand.

"FOIL" disclosure requirements only apply to state and municipal agencies. Under "FOIL" an "agency" 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".

With respect to respondent "FOUNDATION", the relevant evidence submitted reveals that respondent is a not-for-profit corporation whose purpose is to accept and encourage gifts to be used for the advancement of "SUNY at FARMINGDALE". Respondent "FOUNDATION" contacts private individuals and alumni to solicit donations to be used for scholarships for "FARMINGDALE" students and to improve the College's facilities. The "FOUNDATION" receives no government funding; receives all of its funding from private sources; is governed by a 26 member self elected Board of Directors(with 23 private sector members); and maintains independent decision making control over its finances. Based upon this record respondent "FOUNDATION" is not an "agency" or a "public body" as defined pursuant to "FOIL" and "OML" and is therefore not obligated to provide responses to petitioner's document demands. Accordingly it is

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ORDERED AND ADJUDGED that this CPLR Article 78 petition seeking a judgment vacating the August 13, 2009 administrative determination and compelling respondents to provide responses to petitioner's "FOIL" demands for documents, records and materials is denied. The petition is hereby dismissed.

Dated: November 3, 2010

MELVYN TANENBAUM

J.S.C.