

**Matter of Nassau Community Coll. Fedn. of
Teachers v Nassau Community Coll.**

2013 NY Slip Op 34109(U)

February 25, 2013

Supreme Court, Nassau County

Docket Number: 8550/12

Judge: Thomas Feinman

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

In the Matter of the Application of

TRIAL/IAS, PART 9
NASSAU COUNTY

NASSAU COMMUNITY COLLEGE FEDERATION
OF TEACHERS, LOCAL 3150, NYSUT, AFT,
AFL-CIO, M. DEBRA DeSANTO, as President of the
Nassau Community College Federation of Teachers,

INDEX NO. 8550/12

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Petitioners,

MOTION SUBMISSION
DATE: 1/3/13

- against -

MOTION SEQUENCE
NOS. 1, 2

NASSAU COMMUNITY COLLEGE, COUNTY OF
NASSAU, STATE UNIVERSITY OF NEW YORK,
NASSAU COUNTY COMMUNITY COLLEGE
FOUNDATION, and DR. DONALD P. ASTRAB, in his
official capacity as President of Nassau Community College,

Respondents,

For Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules.

The following papers read on this motion:

- Notice of Petition and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

RELIEF REQUESTED

The petitioners move for an order and judgment granting the relief demanded in the Verified Petition. The respondents submit opposition. The respondent, Nassau County Community College Foundation, (hereinafter referred to as the "Foundation"), cross-moves for an order pursuant to CPLR §7804(f), dismissing the petition as and against the Foundation on the grounds that the petition has no basis in law or fact, in that the Foundation is not an agency subject to Public Officers Law §86(3), (Freedom of Information Law, (FOIL)). The petitioner submits opposition to the cross-motion.

[* 2]

The petitioners seek the following relief: a finding and declaration that: (1) the respondent Nassau Community College, (hereinafter referred to as the "College"), violated FOIL, Public Officers Law §84, *et seq.*, by failing to provide the petitioners with the billing information of its attorneys, Ingerman Smith, LLP, as requested by petitioner's July 13, 2011 letter; (2) that the College violated FOIL by constructively denying petitioners' July 13, 2011 FOIL request when the College responded that the records requested would be provided by December 31, 2012, more than seventeen (17) months after the request was made by petitioner; (3) that the Foundation is an agency within the meaning of FOIL, *Public Officers Law* §86(3); that the Foundation violated FOIL when it refused, to date, to provide records requested by petitioners; (5) an order immediately enjoining respondents' unlawful conduct and requiring compliance with all laws and regulations applicable to petitioners' FOIL request; (6) an order directing that respondents immediately provide petitioners with the information lawfully requested under FOIL, *Public Officers Law* §84 *et seq.*; (7) an order awarding to petitioners costs and fees of the instant proceeding.

This matter was conferenced with the Court whereby it was agreed to by all parties that the only outstanding FOIL request to the College was the outstanding FOIL request for the billing information of the College's attorneys, Ingerman Smith, LLP. The College was granted an extension to comply with such FOIL request by December 31, 2012. The College, by way of letter dated December 27, 2012, demonstrated compliance with petitioner's request for the attorney billing of counsel Ingerman Smith, LLP.

As the College complied, the petition as and against the College is now moot.

The Foundation, by way of cross-motion, argues that it is not an agency subject to the Public Officers Law §86(3), FOIL.

Section 86(3) provides as follows:

"Agency" means 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.

In determining whether an entity is a public body for purposes of the Open Meetings Law (OML) and the FOIL, various criteria or benchmarks are material, including 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. (*Perez v. City University of New York*, 9 AD3d 310).

A museum that was not controlled by municipal officials, and thus was not a governmental agency, was not compelled to disclose documents pursuant to the FOIL, even though five of the seven museum trustees were city officials, city had no authority to hire or fire museum officer. The city representatives sat on museum board's executive committee, and the museum's operating and capital budgets were primarily privately funded and were not subject to city approval or public hearings. (*Metropolitan Museum Historic Dist. Coalition v. De Montebello*, 20 AD3d 28).

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An association library, which is a private, non-governmental entity, is not subject to FOIL, although it may be subject to the Open Meetings Law. (N.Y. State Comm Open Govt. AO 11533). The Freedom of Information Law does not apply to a private organization or a private investigator. (N.Y. State Comm Open Govt. AO 11533). Receipt of government funds alone does not cause community action agency to be treated as an agency subject to the Freedom of Information Law. (N.Y. State Comm. Open Govt. AO 10758).

Not-for-profit corporation that provided services to school district on a fee-for-services basis was not an "agency" within the meaning of FOIL; corporation's budget was not approved by any governmental agency, corporation had a self-elected board of directors, school district had no authority to hire or discharge any employee of corporation, and corporation's offices were not in district-owned buildings. (*Rumore v. Board of Educ. of City School Dist. of Buffalo*, 35 AD3d 1178). Records requested under FOIL from not-for-profit corporation that provided services to school district did not fall within the ambit of FOIL; corporation never provided the records of the district, nor were the records generated at the request of or on behalf of the district. (*Id.*)

Here, the Foundation filed its Certificate of Incorporation with the State of New York in 1979, which provides that the Foundation is a Not-for-Profit Corporation created for the following purposes:

"To accept, hold invest, re-invest and administer any gifts, bequests, devises, benefits or trusts and property of any sort, without limitation as to amount of value, and to use, disburse or donate the income or principal thereof for the benefit of Nassau Community College, its students and faculty, including but not limited to the following: To make grants to Nassau Community College for operating and capital expenditures, to make grants to the faculty and students; to grant scholarships and loans to the faculty and students; to endow professorships and assist financially the continuing development of the faculty and staff and program of the College; to act without profit as Trustee of educational, or charitable trusts."

Although the Foundation advances the interest of the College, a government agency, the Foundation is not an agency subject to FOIL. (*In the Matter of the Application of Dominick J. Siani v. Farmingdale College Foundation, Inc.*, 2010 NY Misc. 5745). The Foundation has demonstrated that it receives no government funding, is supported by private donation, has sole and full control and ownership of all its assets and funds, expended and invested as directed by the Foundation's Board. The Foundation provides that it solicits private individuals and alumni which ultimately benefit the College, however acts independently of the College and the College does not control the Foundation's acts. Additionally, the overwhelming majority of the Board is self-elected. Therefore, the Foundation, a not-for-profit corporation that provides services to the College, is funded by private donation, to advance the College, whereby the College does not control the acts of the Foundation, is not an "agency" within the meaning of FOIL. (*Rumore v. Board of Educ. of City District, supra; Metropolitan Museum Historic Dist. Coalition v. De Montebello*, 20 AD3d 28).

The petitioner, in opposition, suggests that the then President of the College, Donald P. Astrab, was a principal officer of the Foundation. However, the respondent provides the then President did not hold any office in the Foundation. While the petitioner submits that ten of the Foundation members are current or former employees of the College, the petitioner has not

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demonstrated the assertion. In any event, the Foundation has demonstrated it is comprised of twenty-three Directors who act independently from the College. Petitioner's assertion that the Foundation receives grant monies is unavailing, as, *assuming arguendo*, that the Foundation has received grant monies, the receipt of government funds alone does not constitute "agency" subject to FOIL. (N.Y. State Comm. Open Govt. AO 10758).

In light of the foregoing, as the Foundation is not an "agency" subject to FOIL, the cross-motion is granted, and therefore, the petition, as and against the Foundation, is dismissed.

ENTER: 

J.S.C.

ORIGINAL

Dated: February 25, 2013

cc: Richard E. Casagrande, Esq.
Bracken Margolin Besunder LLP
Ingerman Smith, LLP

ENTERED
MAR 01 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE