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ROBERT J. FREEMAN

March 3, 2015

E-Mail

To: Courtney French (cofrench@gannett.com)

From: Robert J. Freeman, Executive Director *RJF*

The staff of the Committee on Open government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Ms. French:

I have received your letter of February 4, as well as a variety of documentation relating to it. You have sought an advisory opinion concerning a request by the partner of WGRZ, your client, Jim Heaney, Editor and Executive Director of the *Investigative Post*.

On November 20, Mr. Heaney sent a request pursuant to the Freedom of Information Law (FOIL) to the Fort Schuyler Management Corporation (FSMC) "related to the selection process used to designate LP Ciminelli and McGuire Development of several Buffalo Billion projects in Buffalo as administered by" FSMC. On November 28, Mr. Heaney was informed by Carl J. Kempf III, an employee of the SUNY College of Nanoscale (which now is known as SUNY Polytechnic Institute), that FSMC "is not an Agency...and, therefore, is not subject to FOIL." You corresponded with Mr. Kempf and offered contentions in support of your belief that FSMC is subject FOIL. In a letter addressed to you by Mr. Kempf on FSMC's letterhead, he expressed the view that there are "fundamental inaccuracies" in your comments.

Based on the ensuing analysis, I believe that FSMC constitutes an "agency" required to give effect to FOIL, and further, that even if it is not an agency, its records are subject to rights of access conferred by FOIL. FSMC's relationships with government and the extent to which is it under the control of and functions for the government bring its records within the scope of FOIL. This is not intended to suggest that every record sought by Mr. Heaney must be made available, but rather my belief that all such records fall within the coverage of FOIL.

As you and Mr. Kempf pointed out, FOIL pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:



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"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."

While profit or not-for-profit corporations would not in most instances be subject to FOIL because they are not governmental entities, there are several determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of FOIL.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579).

It is noted that in Westchester-Rockland, the Court rejected the contention that a distinction must be made between a volunteer fire company, also a not-for-profit corporation, "on which a local government relies for the performance of an essential public service...and an organic arm of government" (id., 579).

Another decision rendered by the Court of Appeals involved an entity that, in my view, is analogous in some respects to FSMC. Buffalo News v. Buffalo Enterprise Development Corporation [84 NY2d 488 (1994)] involved the status of a not-for-profit corporation, a local development corporation created under §1411 of the Not-for-Profit Corporation Law. In its finding that the entity ("the BEDC") "channels funds into the community and enjoys many attributes of public entities" (id., 492) and holding that the BEDC is an "agency", the Court highlighted and italicized the portion of the definition of that term that refers to any "*governmental entity*

performing a governmental or proprietary function for the state or any one or more municipalities thereof.” In the discussion of the matter, the decision states that:

“The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents in interpreting FOIL’s Federal counterpart, the Freedom of Information Act (5 U.S.C § 552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an ‘agency’ only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is ‘inextricably involved in the core planning and execution of the agency’s [BEDC] program’; thus, the BEDC is a ‘governmental entity’ performing a governmental function for the City of Buffalo, within the statutory definition.

“The BEDC’s purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in buffalo’s downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an ‘agent’ of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant’s arguments” (*id.*, 492-493).

Based on information regarding FSMC to be discussed later, like the BEDC, the former exists in part to stimulate economic growth and development for SUNY.

In a third decision involving a not-for-profit corporation, the “CDRC”, which had an “intimate” relationship with an agency, it was found that:

“...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged \$395,000 to finance capital improvements associated with the park...

“Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, *supra*, the CRDC’s intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...” (Canandaigua Messenger, Inc. V. Wharmby, Supreme Court, Ontario County, May 11, 2001).

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The Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [aff'd 739 NYS 2d 509, 292 AD2d 835 (2002)].

Although there may be distinctions in the functions of the FSMC and the entities referenced above that were found to be "agencies", there are, based on the direction offered by the courts, and particularly the Court of Appeals, a variety of similarities, which, in my opinion, would lead a court to conclude that FSMC is an "agency" subject to FOIL.

Mr. Kempf wrote that one of the "inaccuracies" among your contentions involves your "claim that FSMC's website states that 'FSMC was established by the State University of New York – a public entity.'" In the documentation that you sent to this office, which I also located by "googling" the Fort Schuyler Management Corporation, is the following statement:

"Fort Schuyler Management Corporation is a not-for-profit SUNY 501-c3 (IRS designation) affiliated corporation that was established by SUNY [that] acquires and manages properties on behalf of CSNE, as well as construct and operate facilities on those properties."

The statement clearly indicates that FSMC is a "SUNY...affiliated corporation that was established by SUNY..." The SUNY CSNE, which appears in Mr. Kempf's email address and I believe has been renamed, is the College of Nanoscale Science and Engineering.

In an effort to learn more about FSMC, its creation and its functions, I acquired its Certificate of Incorporation from the Department of State. I note that the Certificate was filed by the Research Foundation of the State University of New York and that service of process against FSMC is to be served on the Research Foundation and its Office of General Counsel. As you are aware, it has been determined that the SUNY Research Foundation constitutes an "agency" that falls within the coverage of FOIL [see e.g., Siani v. Research Foundation of the State University of New York, Index No. 6976-06 (2007); Hearst Corporation v. The Research Foundation of the State University of New York, 24 Misc. 3d 611 (2010)].

The Certificate of Incorporation states that "The membership of the Corporation shall consist of two (2) members: (1) Institute of Technology Foundation at Utica/Rome, Inc., Route 12 North Horatio Street, Utica, New York, 13502 (the 'IT Foundation') and (2) The Research Foundation of the State University of New York..." I acquired the by-laws of the IT Foundation, which specify that its purposes shall be carried out "exclusively for the benefit of SUNYIT" and to "assist in advancing the welfare and professional growth of the students, faculty and staff of SUNYIT." Its "lawful public or quasi-public objective" is to "enhance" the ability of the State University of New York and its campus near Utica-Rome to achieve its academic, research and economic development goals. Its Chief Executive Officer is appointed by the President of SUNYIT, as are its treasurer and secretary, and at least seven others associated with SUNYIT, as well as him/herself as a member. Further, in the event of its dissolution or liquidation, all of its assets or proceeds from the sale of its assets "shall be distributed to SUNYIT..."

To suggest that FSMC, despite its corporate status, is not governmental in nature or does not perform its functions solely for the State University elevates form over substance. The membership of FSMC consists of

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entities that are themselves subject to FOIL and that carry out their functions for or on behalf of SUNY. It would not exist but for its relationship with the State University.

Considering Mr. Heaney's request from a different perspective, I believe that the documents that he seeks are agency records, even if, *arguendo*, FSMC is not an agency. FOIL pertains to all agency records, and §86(4) defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the language of the law indicates and the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

Insofar as records maintained by WAC are "kept, held, filed, produced or reproduced...*for* an agency", such as SUNY or any SUNY institution, I believe that they would constitute "agency records" that fall within the scope of FOIL.

With respect to the records requested by Mr. Heaney, several are clearly accessible under FOIL, while some are likely available in part. In brief, proposals submitted in response to the RFP or RFQ might include material that may be withheld to the extent permitted by §87(2)(d) of FOIL. That provision permits an agency to withhold records to the extent that disclosure "would cause substantial injury to the competitive position" of a commercial enterprise. Staff recommendations may likely be withheld pursuant to section 87(2)(g) of FOIL

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concerning “intra-agency materials.” If ratings or ranking of the proposals exist, judicial precedent indicates that those records, although “intra-agency” in nature, consist of statistical information that must be disclosed [see Professional Standards Review Council of America v. NYS Department of Health, 193 AD2d 937 (1993)]. Contracts, change orders, MOU’s and similar documentation that reflect the terms of agreements between FSMC and private entities or payments made by FSMC are, in my opinion, generally available under FOIL.

In an effort to enhance compliance with FOIL, copies of this opinion will be sent to Mr. Kempf and Alicia Dicks, President of FSMC.

I hope that I have been of assistance.

RJF: paf

CC: Carl J. Kempf III (ckempf@sunycnse.com)
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James C. Heaney (jheaney@investigativepost.org)