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IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

THE CHICAGO TRIBUNE,)	
)	
Plaintiff,)	
)	
- vs -)	No. 15 MR 580
)	
COLLEGE OF DU PAGE and)	
COLLEGE OF DU PAGE FOUNDATION,)	
)	
Defendants.)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable ROBERT G. GIBSON, Judge of said court, recorded on the DuPage County Computer Based Digital Recording System, DuPage County, Illinois, and transcribed by CHERYL ANN BARONE, Certified Shorthand Official Court Reporter, commencing on the 17th day of March, 2016.

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PRESENT:

MILLER SHAKMAN & BEEM, LLP, by
MS. ALEXANDRA K. BLOCK,

appeared on behalf of The Chicago Tribune,
Plaintiff;

RATHJE & WOODWARD LLC, by
MR. TIMOTHY D. ELLIOTT,

appeared on behalf of College DuPage of,
Defendant;

ROBERTS & CARUSO, by
MR. MATTHEW T. CARUSO,

appeared on behalf of College of DuPage
Foundation, Defendant.

1 THE CLERK: Line 40, the Chicago Tribune versus
2 College of DuPage.

3 THE COURT: Good morning, Mr. Elliott.

4 MR. ELLIOTT: Good morning.

5 Tim Elliott, on behalf of the College of
6 DuPage.

7 THE COURT: Good morning, Mr. Caruso.

8 MR. CARUSO: Good morning, Your Honor.

9 Matthew Caruso, C-a-r-u-s-o, on behalf of the
10 College of DuPage Foundation.

11 THE COURT: Good morning, Ms. Block.

12 MS. BLOCK: And good morning, Your Honor.

13 Alexandra Block, on behalf of the Chicago
14 Tribune.

15 THE COURT: Okay.

16 MR. ADAMS: Good morning, Your Honor.

17 Michael Adams, also on behalf of the College
18 of DuPage.

19 THE COURT: Good morning, Mr. Adams.

20 It comes on for decision.

21 The cause came on for oral argument
22 February 16, 2016.

23 The Court heard oral argument on
24 cross-motions for summary judgment; and then subsequent

1 to that, Ms. Block had sent a letter, on February 18,
2 2016, and Mr. Caruso sent a letter dated February 22,
3 2016.

4 I'm disregarding both of the letters. The
5 motions have been extensively and skillfully briefed
6 and argued, and I will rely on the briefs and the
7 arguments of the parties.

8 First, the first question is whether the
9 College of DuPage Foundation is a public body, quote,
10 unquote, or a subsidiary, quote, unquote, of a public
11 body.

12 The College of DuPage Foundation is not a
13 public body, in the first instance. Its organizers
14 incorporated 12/7/67, as a private, not-for-profit
15 corporation in Illinois, and it gave 501(c)(3) tax
16 exempt status.

17 It was not created pursuant to the Public
18 Community College Act or any statute authorizing the
19 creation of a public school, community college,
20 college, or university.

21 The Tribune argues that the College of DuPage
22 Foundation is a subsidiary of College of DuPage,
23 pursuant to the Freedom of Information Act, and that
24 under the Act, a subsidiary is considered a public body

1 under the Act.

2 All parties cite Hopf versus Topcorp, Inc., a
3 First District case. The other important Illinois
4 case, the Rockford Newspapers case, involves the Open
5 Meetings Act, while the Hopf court case involves both
6 the Open Meetings Act and the Freedom of Information
7 Act.

8 The Appellate Court in Hopf notes that the
9 two acts contain a, quote, substantially identical
10 definition of a, quote, public body, unquote.

11 The Rockford court noted that none of the
12 cases cited by the plaintiff or the defendant relate
13 directly to the question of whether a private
14 corporation can be a subsidiary of a public entity.

15 The court held against Rockford Newspapers
16 stating, quote, We find defendant's arguments to be
17 convincing. NICADD's -- an acronym -- formal legal
18 nature and the independence of its board of directors
19 and its employees from direct government control are
20 extremely significant factors.

21 The College of DuPage Foundation's formal
22 legal nature and the independence of its board of
23 directors favor it not being a subsidiary of College of
24 DuPage.

1 The other factor, the independence of its
2 employees from direct governmental control, cuts in
3 favor of the Tribune.

4 The College of DuPage Foundation has no
5 employees of its own, and its staff consists of College
6 of DuPage employees, who split time working on College
7 of DuPage matters and College of DuPage Foundation
8 matters.

9 Although the Rockford court also discussed
10 the governmental sources of the not-for-profit's
11 funding and the College of DuPage does provide funding
12 to the Foundation by way of facilities, equipment, and
13 employees, the Rockford court stated, quote, The amount
14 of or percentage of governmental funding of a private
15 entity should have no bearing on whether that entity is
16 characterized as a subsidiary for purposes of the Open
17 Meetings Act.

18 The Rockford court went on to discuss the
19 degree of governmental control and the nature of the
20 functions performed by the not-for-profit, finding them
21 potentially relevant factors but very weak in that
22 particular case.

23 The control factor is weak in this case, as
24 well. The College of DuPage Foundation is formally a

1 private, not-for-profit corporation, with an
2 independent board of directors, whose voting members
3 consist of prominent private citizens, who are not
4 officers, directors, or employees of College of DuPage.

5 Those board members and officers have
6 fiduciary duties and can be legally accountable to the
7 organization, other directors, and officers, the
8 State's Attorney General's Office, the IRS, and
9 government -- other governmental agencies.

10 The College of DuPage does not own the
11 College of DuPage Foundation. Unlike the College of
12 DuPage, the Foundation does not have the power to tax.

13 The Tribune has cited no cases in this
14 jurisdiction where a court has held that a private,
15 not-for-profit foundation is a subsidiary of a public
16 school, public community college, or a public college
17 or university.

18 This Court notes that both the Rockford court
19 and the Hopf court ruled against the plaintiff on the
20 subsidiary issue. Any such construction of subsidiary,
21 as argued by plaintiff, should be enacted by the
22 legislature, not decreed by this Court.

23 Second, answering that question in the
24 negative leads to the second question, which is whether

1 the Foundation has a public record, quote, pertaining
2 to the transaction of public business regardless of
3 physical form or characteristics.

4 A public record that is not in the possession
5 of a public body, but is in the possession of a party
6 with whom the agency has contracted to perform a
7 governmental function, shall be considered a public
8 record of the public body.

9 In as much as the grand jury subpoena to the
10 College of DuPage has been produced, it can't be
11 seriously argued that a grand jury subpoena is not
12 public record to be produced, even when it is in the
13 possession of a party with whom the agency is
14 contracted to perform a governmental function on behalf
15 of the public body and that directly relates to the
16 governmental function.

17 So the important question is whether the
18 College of DuPage Foundation has contracted to perform
19 a governmental function on behalf of COD.

20 No Illinois caselaw has been cited on either
21 side.

22 The Tribune argues that authority from other
23 states, such as Ohio, Iowa, and Louisiana, support the
24 notion that financially supporting public educational

1 institutions is a governmental function.

2 The Tribune also persuasively argues that the
3 Foundation's function, as expressed in its bylaws, is
4 to support the educational mission of the college, to
5 assist the college in providing broader educational
6 opportunities for students, alumni, citizens, and
7 employers; to encourage third parties to bestow on the
8 college gifts, grants, or bequests of money or property
9 for the promotion of the college mission, values, and
10 educational opportunities.

11 It is undisputed that the Foundation is not
12 merely soliciting donations from individual citizens
13 and private corporations for the college educational
14 programs, but the Foundation also holds all private
15 donations to the College, even those the Foundation did
16 not solicit.

17 The College of DuPage has no separate
18 endowment, so all donations are routed through the
19 Foundation.

20 The Foundation does this through a Memorandum
21 of Understanding between the Board of Trustees,
22 originally executed June 22, 2009.

23 The College and the Foundation have no real
24 legal authority, by way of caselaw, to argue to the

1 contrary; and as skilled lawyers do, attempt to
2 distinguish the factual circumstances and the wording
3 of the applicable statutes in the out-of-state cases.

4 The West Virginia case cited in the
5 Foundation's favor was a holding that the Foundation
6 was not a public body, under West Virginia law; but
7 today, this Court is similarly holding that the County
8 of DuPage Foundation -- College of DuPage Foundation,
9 excuse me, is not a public body, under Illinois law, in
10 rejecting the Tribune's first line of attack.

11 West Virginia apparently does not have a
12 Freedom of Information Act provision, akin to Illinois'
13 provision, relative to contracting with a public body,
14 as nothing was delineated in the decision suggesting
15 otherwise.

16 The Court finds that while the Foundation is
17 not a public body, that the federal grand jury subpoena
18 is a public record of the Foundation, obtained under
19 contract with a public body, to perform a governmental
20 function on behalf of the public body, and it directly
21 relates to the governmental function pursuant to 5 ILCS
22 140/7(2).

23 Given the foregoing decision, there is no
24 need to address the Tribune's third assertion that the

1 federal grand jury subpoena is a public record of the
2 College of DuPage in the first instance, independent of
3 the Foundation, due to the College's alleged handling
4 of the subpoena.

5 Parenthetically, the danger that the
6 Foundation and other similarly situated entities in
7 other states have cited is the allegedly harmful affect
8 that disclosure of private donors would have on college
9 fundraising and the privacy issues relating to
10 individual donors who wish to remain anonymous.

11 This Court notes that Section 7 of the
12 Illinois Freedom of Information Act contains expansive
13 exemptions to disclosure, which may well protect any
14 such donor records.

15 Consequently, summary judgment shall enter in
16 favor of the Chicago Tribune and against the
17 defendants, College of DuPage Foundation and the
18 College of DuPage.

19 So that leaves the issue of attorney's fees.

20 MS. BLOCK: Yes, Your Honor.

21 Could we have until next Friday, the 25th, to
22 present the petition for attorney's fees?

23 THE COURT: Yes, and then we will give time for
24 response and even reply, if you want to reserve reply

1 time.

2 How much time --

3 I know you haven't seen the petition, so you
4 are somewhat at a loss as to exactly how much time
5 you'll need; but what would you suggest as timeframe?

6 MR. CARUSO: Well, I'd ask for 28 days because I
7 have a client that meets -- it's like once a month, the
8 executive committee.

9 THE COURT: That's fine.

10 MR. CARUSO: And may I ask that the file remain
11 sealed, so I can consult with my client whether they
12 want to appeal, until such time --

13 THE COURT: I think it's reasonable, under the
14 circumstances.

15 MS. BLOCK: Your Honor, the sealing order that you
16 entered in --

17 Well, first, let me preface it by saying, I
18 would object to that.

19 THE COURT: Yes.

20 MS. BLOCK: The sealing order that Your Honor
21 entered in July 2015, specifically stated that upon
22 judgment in the Tribune's favor, it would dissolve; and
23 I note that under Section 2-1203 of the Illinois Code
24 of Civil Procedure, staying enforcement of a ruling on

1 the request for declaratory judgment or injunction,
2 requires a separate motion with --

3 THE COURT: But they can't be --

4 MS. BLOCK: -- good cause stated.

5 THE COURT: -- expected to have had that here,
6 when this decision is just being announced this
7 morning.

8 So I think it's reasonable to -- during the
9 appeal period or post -- post-trial or post-hearing
10 period for motions, I think it is reasonable to see if
11 the defendants are going to file any motions, file
12 appeal, file a motion to stay pending appeal, or
13 anything of that nature because once the -- once the
14 bell's rung, it can't be unrung here, relative to the
15 production of the document and the unsealing of the
16 file.

17 MS. BLOCK: Well, I might suggest that those are
18 two separate issues.

19 THE COURT: Uh-huh.

20 MS. BLOCK: I understand why the Foundation would
21 want to postpone an order that they turn over the
22 documents; but at this point, the judgment -- you know,
23 summary judgment has -- has been entered in the
24 Tribune's favor.

1 There is no reason why the Tribune should be
2 prohibited from publishing information about that
3 result.

4 THE COURT: Well, the result, that can be
5 published.

6 We're talking about -- I mean, this order
7 today is not going to be sealed.

8 MR. CARUSO: Your Honor, her -- there's a problem
9 with her premise.

10 There was another court order that said,
11 shall remain sealed until further order of court,
12 because we had a problem with, what does "sealed" mean,
13 and then we had the deposition with medical information
14 filed in the court record.

15 I believe, we clarified that subsequent to
16 the order counsel mentioned so --

17 THE COURT: If the question is: Is today's order
18 sealed?

19 No, today's order is not sealed.

20 MS. BLOCK: As long as we're clarifying that
21 today's order and the result of the cross-motion --

22 THE COURT: Correct.

23 MS. BLOCK: -- on the cross-motion for summary
24 judgment is not sealed.

1 THE COURT: You weren't asking for that, in any
2 event; correct?

3 MS. BLOCK: I didn't think --

4 MR. CARUSO: Well --

5 MS. BLOCK: We've had differing interpretations of
6 what needs to be sealed, so I just wanted to clarify.

7 MR. CARUSO: My understanding was the entire court
8 file was sealed, and I was asking that that continue
9 until we decide whether --

10 THE COURT: Well, because of the nature of what's
11 in the court file, any prior orders relative to
12 sealing, during this 30-day period, will remain in
13 effect, but it won't -- it won't --

14 Certainly, the Court's not going to announce
15 a decision in open court and then say the order is
16 private. That --

17 MR. CARUSO: I understand.

18 THE COURT: That doesn't make any sense.

19 So the order here today is not considered
20 sealed. It will be a matter of court record and open
21 to the public to review.

22 MR. ELLIOTT: Your Honor, may I chime in a moment,
23 on behalf of the College of DuPage?

24 THE COURT: Yes.

1 MR. ELLIOTT: As you know, we turned over the
2 records in our possession quite some time ago.

3 THE COURT: Right.

4 MR. ELLIOTT: And one of our arguments has been
5 that the only relief they are seeking and can obtain is
6 as against the Foundation.

7 The Tribune's arguments against the College
8 of DuPage was that we had physically had the document,
9 then handed it off, and you didn't reach that issue
10 today; and their other argument was that -- that, I
11 guess, I'd characterize almost as a veil-piercing
12 theory between the Foundation and the College of
13 DuPage; and I think, you rejected that argument today.

14 Is it appropriate for the summary judgment to
15 be entered against us because I don't think you are
16 entering relief against us, against the College of
17 DuPage?

18 I do understand that you are saying that you
19 believe there is a contract and that the College of
20 DuPage Foundation has an obligation to produce it,
21 under that contract.

22 That's not necessarily ruling against the
23 College of DuPage.

24 THE COURT: Ms. Block, do you want to respond to

1 that?

2 MS. BLOCK: I -- I disagree to that -- disagree
3 with that.

4 The contract theory is that there was a
5 public document, that's a public document of the
6 College of DuPage, that the Foundation now has,
7 pursuant to a contract with the College of DuPage.

8 It's a joint liability theory.

9 I believe you correctly stated that judgment
10 would enter against both defendants on that theory.

11 THE COURT: Initially, in looking at this,
12 analyzed what you're stating, Mr. Elliott, and
13 certainly, if there's post-trial motions or appeals,
14 this may well be a part of that; but I agree with
15 Ms. Block that even though your recitation of what the
16 order is going to be today and what the ruling was and
17 the decision announced from the bench is correct, when
18 it's under that theory of the contractual relationship
19 with a public body, the order would be against both
20 entities.

21 Now, as a practical matter in the first
22 instance, the Foundation is in the -- is in
23 possession -- or their attorneys in possession of the
24 document and -- but if, for whatever reason, there was

1 a failure to turn over, the public body, the College of
2 DuPage, who's entered into a contract with this other
3 entity, the College of DuPage Foundation, would have an
4 obligation.

5 My reading of the statute and the purpose of
6 the statute would be the public body would also have
7 the obligation to produce that -- that document, as
8 well; and if it wasn't physically in their possession,
9 they would have to ask the party that they contracted
10 with to produce it and/or turn it over to the public
11 body, for production.

12 So that -- that's what the order's going to
13 be. It will be summary judgment as to both parties;
14 but your point is noted that as to the three potential
15 arguments, the first is ruled in favor of the -- of the
16 defendants, but ultimately that doesn't carry the day
17 because the second's ruled in favor of the -- of the
18 Tribune, and then the third becomes moot because of the
19 decision as to the second.

20 So --

21 MS. BLOCK: Your Honor, may I just clarify that
22 there -- there will be a date, whether it's 28 days --
23 Mr. Caruso wants to consult with his client -- for the
24 Foundation to determine whether to turn over the

1 document or take an appeal?

2 I mean, we need some date by which they
3 will --

4 THE COURT: Right.

5 MS. BLOCK: -- you know, decide this and release
6 the document, if they're not going to appeal.

7 THE COURT: Well, let's -- 30 days would take us
8 to --

9 Well, it would take us to a weekend, but
10 essentially to April 18th, when we get through the
11 weekend; so I would suggest that we set a date either
12 later that week or the following week.

13 Now, I'm going to be moving to 2009; but
14 given the nature of this, I'm going to need to have
15 this heard by -- rather than have a new -- a new
16 judge -- Judge Rohm is going to be in this courtroom,
17 but rather than have him start from scratch, it doesn't
18 make any sense on a fee petition and any post --
19 post-judgment motions or stays pending appeal, that he
20 try to -- try to ascertain all of that.

21 So -- so I will hear the -- hear anything --
22 any follow up to today's decision.

23 MS. BLOCK: Your Honor, I will be available
24 Tuesday, April 19th, to set this over, if that works?

1 MR. ELLIOTT: I've got a two-week jury trial in
2 Wisconsin, those two weeks.

3 THE COURT: Okay.

4 MR. ELLIOTT: I don't see any reason to delay it,
5 though. Mr. Adams, from our office, can attend --

6 THE COURT: All right.

7 MR. ELLIOTT: -- because this is principally the
8 Foundation's issue, so --

9 THE COURT: Okay.

10 MR. ELLIOTT: I don't see a reason to delay it.

11 MR. CARUSO: I believe that's okay.

12 THE COURT: All right. April 19th, then at -- at
13 9 o'clock, and it will be heard in 2009.

14 MS. BLOCK: Thank you.

15 THE COURT: All right. You're welcome.

16 MR. CARUSO: Thank you, Your Honor.

17 MR. ELLIOTT: Thank you, Your Honor.

18 (Whereupon the hearing in the
19 above-entitled matter was continued to
20 April 19, 2016.)
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1 IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
2 DU PAGE COUNTY, ILLINOIS
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5 I, CHERYL ANN BARONE, hereby certify that I
6 am a Certified Shorthand Official Court Reporter
7 assigned to transcribe the computer based digital
8 recording of proceedings had of the above-entitled
9 cause, Administrative Order No. 99-12, and Local Rule
10 1.01(d). I further certify that the foregoing,
11 consisting of Pages 1 to 21, inclusive, is a true and
12 accurate transcript completed to the best of my
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21 Official Court Reporter
22 Eighteenth Judicial Circuit of Illinois
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