

November 9, 2017

Kelly Dupuis
FOIL Appeals Officer
Office of University Counsel
SUNY Plaza
Albany, NY 12246

*RE: Freedom of Information Request denial - Mercer Family Foundation Records
(20170804DS)*

Dear Ms. Dupuis:

I, Daniel Sherwood, on behalf of the Climate Investigations Center (“CIC”), hereby appeal the denial of access regarding request *20170804DS*, sent to Records Access Officer Douglas Panico of the State University of New York at Stony Brook (“University”), Administration Building, 100 Nicolls Road, Stony Brook, NY 11794.

I. STATEMENT OF FACTS

The request was submitted on 8/4/2017 and sought the following:

1. Any record, document, or correspondence exchanged between the State University of New York at Stony Brook (Stony Brook University) and Stony Brook Foundation, Inc. related to the use, disbursement, or investment of funds from the Mercer Family Foundation's 2011 to 2015 financial contributions;
2. Any record, document, or correspondence exchanged between Stony Brook University and Stony Brook Foundation, Inc. related to the past, present, or future contributions from the Mercer Family Foundation.¹

At the close of the fifth business day since filing (5:00 pm on 8/11/17), CIC sent a follow-up email to Mr. Panico asking when to expect a response.² Mr. Panico, through Records Management Officer and FOIL Coordinator Allison Matos, responded later that day, acknowledged the request, and labelled it *20170804DS*.³ On 8/28/17, 20 business days following the acknowledgement, CIC sent another follow-up email inquiring about the status of *20170804DS*.⁴ On 9/11/17, 30 business days from acknowledgement, CIC received a notice of extension from Ms. Matos, containing the following: “I currently anticipate providing the responsive records by October 13, 2017.”⁵ On 10/10/17, CIC received the denial from Mr. Panico reporting that “[t]o the extent records responsive to [the] request may exist, it has been determined that said records would be exempt from FOIL disclosure in accordance with Public Officers Law § 87(2)(d) as trade secret

¹ See Attachment A (CIC Initial Request, August 4, 2017).

² See Attachment B (CIC Follow Up I, August 11, 2017).

³ See Attachment C (University Acknowledgement, August 11, 2017).

⁴ See Attachment D (CIC Follow Up II, August 28, 2017).

⁵ See Attachment E (University Extension, September 11, 2017).

information... and under Public Officers Law § 87(2)(b) as an unwarranted invasion of the donor's personal privacy.”⁶

II. REQUESTED RECORDS NOT EXEMPT

CIC appeals the Records Access Officer's determination on its face because CIC did not request the information on which the rejection is based. As is demonstrated by the plain language of *20170804DS*, copied above and attached, CIC sought information regarding the “use, disbursement, or investment, of funds” and “[a]ny record, document, or correspondence ... related to past, present, or future contributions from the Mercer Family Foundation.”⁷ In other words, CIC sought *how* the donated funds were used by Stony Brook University and any related communications exchanged between the University and its corresponding 501(c)(3), the Stony Brook Foundation.

The use of funds and related communications could shed light on several subjects; for instance, staff discussing a new faculty chair supported by the funds, discussion as to what department is best suited for a new position, a new scholarship, or the process of distributing the funds. Any or all would be responsive and would not trigger the exemptions cited by the University. In short,, *20170804DS* sought information on how the University used donated funds but nothing related to the “donor's personal privacy” or “trade secret information.”⁸

Further, it is well established that the State of New York's Freedom of Information Law operates with a presumption of access to the requestor.⁹ According to Pub. Off. Law §87(2), all records are publicly available except when “records or portions thereof” qualify for denial based on Pub. Off. Law §87(2)(a)-(i) exemptions. The language, “portions thereof,” indicates that the statute was composed to encourage segregability, allowing responsive information to be released and exempted information to be redacted. Robert J. Freeman, Executive Director of the Committee on Open Government, issued an advisory opinion reflecting this statutory interpretation:

[T]he introductory language of §87(2) ... indicates a recognition on the part of the drafters of the statute that there may be situations in which a single record or report includes both information that must be disclosed and information that may be withheld... [If] it is determined that portions of the records fall within one or more of the grounds for denial, those aspects of the records may be deleted, but the remainder must be disclosed.”¹⁰

Given the plain meaning of the text in Pub. Off. Law §87(2), paired with the fact that *20170804DS* did not seek the information listed as exempt from release, the 10/10/17 denial was improper. Beyond the agency not properly understanding *20170804DS*, the law cited in the denial, Pub. Off. Law § 87(2)(b) and (d), were also improperly relied upon.

⁶ See Attachment F (University Denial, October 10, 2017).

⁷ See Attachment A.

⁸ See Attachment F.

⁹ *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 156 AD2d 1027, 1028 (1989); *Capital Newspapers v. Burns*, 67 NY 2d 562, 567 (1986).

¹⁰ Committee on Open Government, Advisory Opinion No. 9214 (Jan. 2, 1996), accessed at <https://docs.dos.ny.gov/coog/ftext/f9214.htm>.

a. PUBLIC OFFICERS LAW § 87(2)(B) DOES NOT APPLY TO THE MERCER FAMILY FOUNDATION AND IF IT DOES APPLY, THE INFORMATION RELEASED WOULD NOT BE AN UNWARRANTED INVASION OF PERSONAL PRIVACY.

First, the University's denial is improper as any potential information related to the Mercer Family Foundation would not apply to Pub. Off. Law § 87(2)(b) as it is not *personal* information. Secondly, CIC argues that any information that may be released, as it relates to the donor's identity, is publicly available. For this reason, the records are not exempt and do not constitute "an unwarranted invasion of the donor's personal privacy."¹¹ Lastly, CIC reiterates that it is not interested in any disclosure as it relates to the personal information of the donor and ask that, if it exists and does fall under this exemption, it be redacted.

Pub. Off. Law § 87(2)(b), cited to justify the University's denial, makes a release exempt only if it "would constitute an unwarranted invasion of personal privacy."¹² Nowhere in the statute is any mention of a foundation, organization, or individual donor or how information related to those entities would be barred from release. Since the donation was made by an organization and not a natural person "the identity of that entity would be accessible ... [and] the exception pertaining to personal privacy ... would not apply."¹³

Reading further, Pub. Off. Law § 87(2)(b) directs the "personal privacy" exemption issue to a list in Pub. Off. Law § 89(2)(b). While the list is explicitly non-exhaustive, the only section that could possibly apply to this instance is related to "personal hardship to the subject party."¹⁴ CIC disagrees with this application of the statute as the donation was made to a public university by a 501(c)(3) non-profit foundation. Due to the Mercer Family Foundation's tax status, the organization is required to identify grants and other specific information within IRS Form 990. Thus, the identity of the donor and related information, is already public, making this release no more likely to incur "personal hardship to the subject party" than readily available public information.

Lastly, in the event that this section did apply to the information sought in the request, Pub. Off. Law § 89(2)(c)(i) explicitly permits segregability: "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision ... when identifying details are deleted." With this, CIC would again state that in the event that there is personal information present in the release, the University may redact it and release requested information.

b. PUBLIC OFFICERS LAW § 87(2)(D) DOES NOT APPLY TO THE PARTIES SUBJECT TO THE REQUEST AS NEITHER THE MERCER FAMILY FOUNDATION NOR THE STONY BROOK FOUNDATION IS A "COMMERCIAL ENTERPRISE" AND IF IT DID

¹¹ See Attachment F.

¹² *Id.*

¹³ Committee on Open Government, Advisory Opinion No. 1326 (Feb. 24, 1999), accessed at <https://docs.dos.ny.gov/coog/ftext/fl1326.htm>; For the same reason Pub. Off. Law § 87(2)(b) does not apply, as CIC is not seeking any "personal information" on any "data subject," neither Pub. Off. Law § 89(2-a) or Pub. Off. Law § 96 would be applicable to this request.

¹⁴ N.Y. Pub. Off. Law § 89(2)(b)(iv)

APPLY, THE INFORMATION REQUESTED WOULD NOT BE CONSIDERED A TRADE SECRET.

CIC also appeals the University's denial of the request on the grounds that the requested release does not deal with trade secret information as described in Pub. Off. Law § 87(2)(d). The information requested would not be considered a trade secret as it would not "cause substantial injury to the competitive position of the subject enterprise" nor would the release be considered to be "submitted to" the University by a "commercial enterprise" as neither the Stony Brook Foundation or the Mercer Family Foundation could be defined as such.

First, Pub. Off. Law § 87(2)(d) does not apply as neither Stony Brook Foundation or Mercer Family Foundation, the entities holding responsive records, are considered a "commercial enterprise." While "commercial enterprise" is undefined by FOIL, Black's Law Dictionary defines each term separately. "Commercial" means "involving the buying and selling of goods...or involving the ability of a product or business to make a profit" and "enterprise" is defined as "[a]n organization or venture, esp[ecially] for business purposes."¹⁵ Clearly, a sine qua non of a commercial enterprise is its operation as a profit-oriented business.¹⁶ As both the Mercer Family Foundation and Stony Brook Foundation file as a 501(c)(3), explicitly "nonprofit" organizations, they are not considered commercial entities and would not be able to employ the trade secret exemption barring them from record release.

Second, if Pub. Off. Law § 87(2)(d) does in fact apply to the targeted entities, the requested records are not trade secrets. Central to the definition of trade secret cases, established by *Kewanee Oil Co. v. Bicroin Corp.*, is that "the subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business."¹⁷ This type of information may be withheld if it is deemed to cause substantial harm by analyzing the content of the information, the profitable activity it relates to, and the degree of competition in that field.¹⁸ In this case, the information sought by 20170804DS would reflect the process and method by which the University, a public institution, disburses donated funds. This information is not confidential, is not for profit, is not a commercial activity, and is not competitive in the field as it is philanthropic in nature. In contrast, courts employ the aforementioned analysis in cases involving enterprises and information fundamentally different than those at question here; for instance, corporations such as Verizon, Hearst, Irving Bank, insurance companies, and construction firms are examples of parties attempting to use this exemption in their capacity as profit-making entities.¹⁹ None of the three parties named in 20170804DS exist to earn a profit nor deal with the public to that end.

¹⁵ Black's Law Dictionary (10th ed. 2014).

¹⁶ *Encore Coll. v. Auxiliary Serv.*, 663 N.E.2d 302 (1995) where the Court determined Barnes & Noble, a commercial book and media vendor, an "undisputable" commercial enterprise.

¹⁷ *Kewanee Oil Co. v. Bicroin Corp.*, 416 U.S. 470, 474 (1973).

¹⁸ Committee on Open Government, Advisory Opinion No. 8690 (Feb. 17, 1995), accessed at <https://docs.dos.ny.gov/coog/ftext/f8690.htm>; Committee on Open Government, Advisory Opinion No. 7665 (Apr. 23, 1993), accessed at <https://docs.dos.ny.gov/coog/ftext/f7665.htm>.

¹⁹ *Verizon New York, Inc. v. Mills*, 875 N.Y.S.2d 572 (2d Dep't 2009); *Verizon New York, Inc. v. Devita*, 879 N.Y.S.2d 140 (2d Dep't 2009); *Hearst Corp. v. State, Office of State Comptroller*, 882 N.Y.S.2d 862 (N.Y. Sup. Albany County 2009); *Irving Bank Corporation v. Considine*, 525 N.Y.S.2d 770 (Sup. Ct. 1988).


Beyond the inherent differences between the parties targeted in *20170804DS* and the corporations mentioned above, the information sought in *20170804DS* is also different from the type of information generated through litigation. Again, *20170804DS* seeks information on how the funds generated by donations are used, not how the foundations raise those funds, not the citizens or organizations targeted for fundraising, and nothing that would reveal a fundraising method that would be different from other non-profits in the field. By comparison, the information contested in case law is generally commercial and confidential in nature. For instance, payroll tables, insurance information, medical procedure, automobile policies, and private company contractual data have all been determined as non-trade secrets and, thus, subject to release.²⁰ Where contractual data, policy information, and payroll tables are all directly related to private corporations' ability to earn a profit, the ways in which a public institution disburses funds transmitted to them via nonprofit corporations (Stony Brook Foundation and Mercer Family Foundation) does not. Clearly, the information disputed in court is different from that requested by CIC and would not be considered a trade secret.

III. CONCLUSION

As required by the Freedom of Information Law, the head of the governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

A handwritten signature in black ink that reads "Daniel A. Sherwood". The signature is written in a cursive, flowing style.

Daniel A. Sherwood, J.D.
Climate Investigations Center
P.O. Box 91
Alexandria, VA 22314

²⁰ *Id.*; *Markowitz v. Serio*, 862 N.Y.S.2d 833 (2008); *Professional Standards Review of America v. New York State Department of Health*, 597 N.Y.S.2d 829 (3d Dept. 1993); *American Society for the Prevention of Cruelty to Animals v. Board of Trustees*, 556 N.Y.S.2d 447 (Sup. Ct. 1990).