

Running Head: Institutionally-Related Foundations

Institutionally-Related Foundations and their Universities:
How can administrators plan ahead for issues that lurk?

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Abstract

Institutionally-related foundations originated because public university administrators felt these private organizations could manage university fundraising more efficiently. One benefit of institutionally-related foundations is that state regulations applicable to public universities are not binding for foundations. However, recent court decisions question whether institutionally-related foundations should be considered public offices. Higher education leaders find this troubling because they do not want foundation records to become public information. To prepare for the question of public versus private, administrators must understand the facts that courts will examine, as well as steps that can be taken to create distance between institutions and related foundations.

Introduction

Institutionally-related foundations provide assistance to their host institutions in developing relationships with alumni and friends. These individuals support the university through private gifts and involvement in the life of the institution. The Council for Advancement and Support of Education (CASE) defines institutionally-related foundations as “private 501 (c) 3 non-profit corporations dedicated to the support of a college...their primary purpose is to raise and manage private support for the institution with which they are affiliated” (Foundation FAQs, n.d.; <http://www.case.org/Content/Miscellaneous/Display.cfm?CONTAINERID=87&CONTENTITEMID=2506&NAVID=73>). CASE serves as the professional association for individuals working in the areas of institutional advancement: development, alumni relations, and public relations.

Some individuals may wonder why public universities choose to establish institutionally-related foundations. CASE provides eight reasons that explain the benefits of institutionally-related foundations:

1. They are able to conduct business more effectively than a state office.
2. They allow for a clear separation between the university’s private and state funds.
3. They can invest donations in a broader array of financial accounts, which usually provide increased profits to the institution.

4. They do not follow state regulations regarding property transactions, which reduces the time spent on these transactions as well as allowing for better competition.
5. They are able to engage in for-profit subsidiaries, and the university does not assume the risk from this type of investment.
6. They are preferred by donors because donors recognize that foundations can do more with the gifts (refers to reason #3).
7. They engage successful leaders in the community as well as throughout the country, and these individuals offer a wealth of influence, which is beneficial to the university.
8. They have a long-term view of the institution in terms of priorities, whereas university staff focus more on the present needs. (Foundation FAQs, n.d.; http://www.case.org/Content/Miscellaneous/Display.cfm?CONTAINERID=87&CONTENTITEMID=2506&NAVID=73#Why_do_public)

Recently, institutionally-related foundations have become targets of public scrutiny. There are two main questions that cause concern. First, are these institutionally-related foundations considered public offices? Second, are the foundations' records considered to be public records? Each state seems to answer these two questions somewhat differently, as will be discussed later in this paper. The reader will have the opportunity to become familiar with several cases that have involved institutionally-related foundations. Additionally, actions taken by leaders of institutionally-related foundations to distance themselves from their host institutions will be explored. Finally, the author will analyze the reasons for making institutionally-related foundation records public as well as those for maintaining privacy.

4-H Road Community Association v. West Virginia University Foundation

This case originally began in 1977 when the 4-H Road Community Association asked the West Virginia University Foundation for copies of a lease agreement and some other documents. The Foundation's president refused to comply with the association's request and emphasized that the Foundation was not considered a public body under West Virginia's Freedom of Information Act (FOIA). As a result, the association filed their complaint with the circuit court.

Basically, the 4-H Road Community Association believed that the West Virginia University Foundation was considered a public body due to the fact that "it was created or primarily funded by state authority" (Brown, 1997, p. 206). The Foundation brought forth evidence

that convinced the circuit court to find that the Foundation was not a public body, and furthermore, the Foundation's records were "not subject to the disclosure requirements of the West Virginia FOIA" (Brown, 1997, p. 206).

However, this case does not end with the circuit court's ruling. In the court's opinion, it highlighted that the Foundation's records regarding the lease agreement at the time of the association's request were located within the university itself. Due to the location of these records, they would have been considered public records; thus, the association could have accessed the records.

The association did not agree with the circuit court's opinion, so they filed an appeal claiming that the court "erred in concluding that the foundation was not a public body" (Brown, 1997, p. 207). Consequently, the 1989 case between the two parties resulted in an argument not about records, but the nature of the foundation, being public or private. Upon appeal, the Supreme Court of Appeals court upheld the circuit court's ruling. Therefore, the West Virginia University Foundation is not considered a public body.

Weston v. Carolina Research and Development Foundation

This case again focused on the question of whether the Carolina Research and Development Foundation was considered a public body. The *Greenville News* filed a complaint with the South Carolina Common Pleas Court, which stated that the Carolina Research and Development Foundation refused to allow access to specific financial records. These records would show that the "university had diverted public funds to the foundation to finance construction projects, including the university's fine arts center" (Brown, 1997, p. 209). Moreover, the *Greenville News* asserted that these financial records would demonstrate to the court that the Foundation received support from public funds.

This lawsuit became particularly ugly because the Foundation was forced to disclose "details of university President James B. Holderman's discretionary funds, which were managed by the foundation...[these] funds were used to supplement his income and finance lavish

expense account purchases” (Brown, 1997, p. 209). Holderman resigned along with the Foundation’s executive director, the university’s chief financial officer, and nine Foundation board members (Brown, 1997).

Eventually, this case made it onto the South Carolina Supreme Court’s docket, where the court found that the Foundation was a public body. However, there was an interesting twist in this case also. The court stated that the “FOIA did not apply to business enterprises which receive payment from public bodies in return for supplying specific goods or services on an arm’s-length basis” (Brown, 1997, p. 210). As such, it was almost as if the court was providing the Foundation with some direction regarding how to maintain a more private nature in the future. Brown (1997) states that “while the South Carolina case marks the beginning of a trend toward more public disclosure, the particulars of the case—as with most of the other state cases—make generalization difficult” (p. 210).

Toledo Blade Company v. University of Toledo Foundation

In July 1991, the Toledo Blade Company, publisher of the *Blade* newspaper in Ohio, asked the University of Toledo Foundation to “make available for inspection certain of its financial records, including transaction ledgers for the years 1986 through 1991, pursuant to R.C. 149.43” (Blade v. UT Foundation, 1992). According to the Ohio Department of Job and Family Services’ (ODJFS) Public Records and Confidentiality Laws guide, “RC 149.43 is known as the ‘Public Records Act’ and is the general records law governing the status of state and local government records when requested by a third party” (ODJFS, 2004).

While the University of Toledo Foundation originally agreed to allow the *Blade* to inspect the records, they claimed that they were not a public office, and therefore the Foundation was not subject to the Public Records Act. Then, a couple of weeks later, the Foundation sent a letter to the *Blade* stating “that it would produce the records only after redacting the names of, and any personal information identifying, donors” (Blade v. UT Foundation, 1992). Consequently, the

Blade filed against the Foundation in September 1991 in order to force the Foundation to provide the names of donors.

This case was argued before the Supreme Court of Ohio. The court held that “a private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a ‘public office’ pursuant to R.C. 149.011 (A), and is subject to the public records disclosure requirements of R.C. 149.43 (B)” (*Blade v. UT Foundation*, 1992). Additionally, the court held that “the names of donors to such a gift-receiving arm of a public university are ‘public records’ pursuant to R.C. 149.43 (A) (1), and are not subject to any exception” (*Blade v. UT Foundation*, 1992).

In the concurring opinion, the judge stated that he joined in the judgment “albeit reluctantly” (*Blade v. UT Foundation*, 1992). He continued by stating, “It troubles me that a person’s private charitable activities can be the subject of public scrutiny” (*Blade v. UT Foundation*, 1992). Furthermore, he claimed that according to R.C. 149.011(G) “personal and financial information about individual donors, in my view, does not fall within this definition [of public record] and is not subject to R.C. 149.43 (B)” (*Blade v. UT Foundation*, 1992).

The judge, who wrote the dissenting opinion, held that the University of Toledo Foundation is not a public office. He cited that the Foundation’s sole purpose is to receive, hold, invest and administer property, and disburse funds for the benefit of the university (*Blade v. UT Foundation*, 1992). Additionally, he stated that the Foundation “is not supported by any public funds, handles or controls no public funds, has no public employees, or public payroll, has no members of the University of Toledo upon its staff, has no members of the university on its board of trustees, [and] apparently has no direct or interlocking controls by and between itself and the university” (*Blade v. UT Foundation*, 1992).

The dissenting judge also considered the “purpose of the Ohio ‘public records’ law” (*Blade v. UT Foundation*, 1992). The law’s purpose, according to Holmes, is to enable the public to look into the “activities of public offices and their officers relative to the use and expenditure of

public funds” (Blade v. UT Foundation, 1992). Accordingly, the Foundation’s donor records should be protected from disclosure.

Overall, this case determined that the University of Toledo Foundation was considered a public office under Ohio state statutes. The court also held that the Foundation was subject to the Ohio Public Records Act. Therefore, the Foundation must disclose the names of their donors. It should be noted that since this case was decided by the court, the Ohio legislature has added an exemption to the Public Records Act for donor records.

Mark Gannon and Arlen Nichols v. Board of Regents of the State of Iowa and the Iowa State University Foundation

Mark Gannon and Arlen Nichols filed this lawsuit against the Iowa State University Foundation as citizens and taxpayers of the state of Iowa. An interesting note is that Mark Gannon was a former land manager for Iowa State University and Arlen Nichols is a retired Des Moines businessman. They believed that the Foundation was a government body and its records should be public. The ISU Foundation motioned for summary judgment, which means that they had the “burden of showing nonexistence of material fact” (Gannon & Nichols v. ISU Foundation, 2003). Since the Iowa State University Foundation motioned for summary judgment, the court also had to analyze the case more favorably toward the nonmoving party, which was Mark Gannon and Arlen Nichols.

Basically, the Iowa District Court for Story County ruled that the Iowa State University Foundation was not a public body, and its records were private. The court reached this decision due to the following reasons:

1. The foundation was not supported by tax revenues. The foundation is compensated by Iowa State University through its fee-for-service relationship and also generates revenue for operating expenses through investment income and administrative and management fees.
2. Only one University official is by title a voting member of the foundation’s board of directors.
3. The fact that the foundation is in possession of some public funds and corresponding records does not transform it from a private corporation into a government body. (Rulings, 2004, p. 1;

<http://www.case.org/Content/Miscellaneous/Display.cfm?contentItemID=3812>)

The Iowa District Court relied heavily on the Iowa State University Foundation's service agreement with the university. This service agreement stated in clear terms that "the Foundation's database system and donor records constitute 'confidential information and trade secrets'" (Rulings, 2004, p. 2). Moreover, the agreement delineated the reasons for maintaining privacy of donor records by stating that "Preserving the confidentiality of Foundation Confidential Information is paramount to the effectiveness of the Foundation in carrying out its purposes. Public or other indiscriminate disclosure of the Foundation's confidential information could violate the need for discretion and confidentiality" (Rulings, 2004, p. 2). At the same time, the foundation was quick to reiterate that it would maintain "an atmosphere of openness in its operations, consistent with the prudent conduct of its business" (Rulings, 2004, p. 2).

Cape Publication, Inc. v. The University of Louisville Foundation, Inc.

This case took place in the Jefferson Circuit Court in the state of Kentucky. It began with the *Courier-Journal* asking the University of Louisville Foundation for its donor records. The *Courier-Journal* maintained that the Foundation was a public body, and its records should be public. However, the Foundation asserted that it was a private corporation, and its records were private.

The circuit court found that the Foundation was a public body due to the following reasons:

1. The foundation's initial incorporators were the university and its trustees and the university effectively recreated the foundation every time it amended the foundation's articles of incorporation.
2. The current foundation board has eleven members and the by-laws mandate that the university president and four trustees be board members.
3. The university produced a brochure stating that the University of Louisville Foundation 'was founded...to oversee funds donated to the University of Louisville.'
4. Although the majority of the foundation's funding comes from private sources, in recent years the foundation has received substantial amounts of

funding from the Commonwealth through the 'Bucks for Brains' program. Nothing in the record establishes whether these funds are commingled or kept in separate accounts. If the foundation were not the university's agent, it could not legally receive the 'Bucks for Brains' money. (Rulings, 2004, p. 2; <http://www.case.org/Content/Miscellaneous/Display.cfm?contentItemID=3812>)

The court made an interesting commentary when ruling on this case by stating,

While freedom of information may be cited as a public right, it is also to the public's benefit to encourage contributions to public institutions in a time of federal and state budget crises. Respecting the privacy interests of individuals who request anonymity also may serve to encourage those individuals who would otherwise not contribute to make significant donations to the University...The University of Louisville as well as thousands of other institutions similarly situated depend on having the ability to honor requests for anonymity which may be based on something as simple as an individual just wanting to keep his or her affairs private. Without the ability to honor such a request, the Foundation has a legitimate fear that donations may otherwise be lost. Anonymity can serve an important and valid purpose, both for the individuals seeking anonymity and the University which benefits from the donor's gift. (Rulings, 2004, p. 3; <http://www.case.org/Content/Miscellaneous/Display.cfm?contentItemID=3812>)

Overall, the court might be commenting on this issue as another hint to institutionally-related foundations. One answer to maintaining the donors' privacy interests is to suggest filling out a form requesting anonymity with any donor contribution to the Foundation.

Guste v. Nicholls College Foundation

Guste is the state of Louisiana's attorney general, and he maintained that the state should be allowed to review the Foundation's records pursuant to the Public Records Act. The Nicholls College Foundation asserted that it was not a public body, and therefore, the Public Records Act did not apply to the corporation.

The court found that the Foundation was not a public body, and generally, its records were not public. However, they also found that certain records coming from public funds must be disclosed as they stated, "the right of inspection is limited to the records of receipts and expenditures of public funds. The Inspector General does not have the right to examine records regarding private donors, nor other receipts or expenditures unrelated to the transmitted fees" (Guste v. Nicholls College Foundation, 1992).

State Board of Accounts v. Indiana University Foundation

This case began in 1990, when Indiana's Attorney General opined that the Indiana University Foundation "was subject to examination by the Board and, therefore, that its records were open to inspection under the Public Records Act" (State Board of Accounts v. IU Foundation, 1995). After this opinion, the Foundation refused to disclose its records to a journalist, and they decided to file "a declaratory judgment action against the Board seeking a determination that the Board does not have audit authority over its accounts" (State Board of Accounts v. IU Foundation, 1995).

The court found that the Foundation was not a public agency and was not subject to the Public Records Act. A key issue in this case was the fact that the IU Foundation charges a fee for the services provided to the university. Therefore, the Foundation was not operating at the public's expense.

Roha's Seven Touchstones of Independence

According to Roha (2000), there are some basic questions that are likely to be asked of foundation officials when they become involved in these types of cases. He provides "Seven Touchstones of Independence" that should assist directors of institutionally-related foundations as well as other university administrators. Each of these will be examined separately in the following pages.

First, "Does the foundation have an independent board of trustees?" (Roha, 2000, p. 4). Basically, an institutionally-related foundation should not have state university employees serving on its board of trustees. Those foundations that have state employees serving as the majority on their boards will not be considered independent (Roha, 2000).

Second, "Who pays for the office space?" (Roha, 2000, p. 4). Institutionally-related foundations that are provided with office space compliments of the university will find it quite difficult, if not impossible, to prove that they are not receiving a public benefit. Foundations should

rent their own space privately, or if that is not an option, then the foundation should pay the university “rates that reflect the space’s fair market value” (Roha, 2000, p. 4).

Third, “Is the foundation serviced by university personnel?” (Roha, 2000, p. 4). Again, foundations that are serviced by university personnel will not be considered independent because they would be receiving a state benefit. However, many foundations recognize that it is quite costly to hire their own university personnel. Thus, the foundation should delineate clearly in their agreement with the university the specific arrangements made for personnel (Roha, 2000).

Fourth, “Does the foundation receive legal advice from the state attorney general?” (Roha, 2000, p. 5). Foundations that wish to maintain that they are independent of their institutions should hire outside legal counsel. Many states have a branch within their attorney general’s office that handles legal issues for the university. If foundations allow legal counsel from the attorney general’s office to advise them on their legal matters, then they will be perceived as receiving a state benefit (Roha, 2000).

Fifth, “Is there suspicion that the foundation is engaging in improper conduct?” (Roha, 2000, p. 5). At first glance, a person might wonder how such a question is relevant. Isn’t the law clear as to which entities are public and which are not? The answer is “no.” Judges that sense wrongdoing on the part of the foundation “may feel compelled to shade their rulings in the direction that is most likely to advance justice...the court may feel compelled to use the law as a tool to expose that wrongdoing” (Roha, 2000, p. 5). Therefore, foundations will find they are best served not only by avoiding questionable practices but also by releasing information when they are asked about a specific transaction in question. By doing this, the foundation will avoid the possibility of being forced to provide all records and information to the public (Roha, 2000).

Sixth, “Does the foundation routinely release all information about public funds?” (Roha, 2000, p. 5). Foundations that are proactive in their approach will find that they are questioned less by the public. For example, a foundation could release information pertaining to the use of public funds on an annual basis (Roha, 2000).

Finally, “What does the agreement between the foundation and university say?” (Roha, 2000, p. 5). A critical document for the foundation and the university is the written agreement. According to Roha (2000), this agreement should be “negotiated by attorneys for both the foundation and the institution—setting forth factors affirming the foundation’s independence. The agreement should state specifically that the foundation is controlled by its own board of directors and is independent of the state institution” (p. 5). As referred to in questions two and three, the foundation also should state clearly in the agreement how they are paying the university for office space and service by university personnel (Roha, 2000).

Overall, institutionally-related foundations that use these “Seven Touchstones of Independence” as a guide to distance themselves from their institutions will be less likely to find themselves in the midst of a legal nightmare. Thus, administrators should heed the following advice: consult outside legal counsel to examine state codes affecting a foundation’s independence, assess whether any of the “seven touchstones” are feasible in their specific situations, and take the appropriate actions to create distance between the foundation and the institution.

Recent Action taken by One Institutionally-Related Foundation

The Iowa State University Foundation decided to develop a public information policy, which “sets out the practices of the foundation regarding disclosure of information held by it and describes the extent and nature of those materials which will be made available from the foundation to the public” (ISU Foundation’s Public Information Policy, 2002). The ISU Foundation categorizes its documents into three distinct areas: information that must be disclosed pursuant to law, information that is voluntarily disclosed, and information that is not disclosed due to specific reasons.

The first category involves documents that the Foundation is required to disclose by state and federal law, which includes the following:

1. The Foundation’s Annual Information Return (IRS Form 990)

2. The Foundation's Request for Tax-Exempt Status (IRS Form 1023)
3. The Foundation's Articles of Incorporation and Biennial Report (ISU Foundation's Public Information Policy, 2002)

The second category pertains to documents that the Foundation voluntarily discloses, which includes the following:

1. The Foundation's By-laws
2. IRS Form 990 beyond the previous three years
3. Information regarding actions of the Foundation Board of Directors and Governors
4. Organizational chart
5. Information regarding Foundation employment
6. Salary information
7. Conflict of interest policy
8. The Foundation's audited financial statements
9. The Foundation's annual reports including financials
10. Information regarding the Foundation's operating expenses
11. University review of endowment accounts
12. Donor Bill of Rights
13. Model standards of practice
14. Statement of ethics
15. Priority project process
16. Gift acceptance policy
17. Guidelines for named endowed positions and scholarships
18. Gift clubs
19. Corporate matching gift policy
20. Biographical information of donors who consent to disclosure
21. Agreements with ISU's Alumni Association
22. The Foundation's investment policies
23. The Foundation's financial investments
24. Disbursement guidelines
25. Contracts between the Foundation and ISU
26. Payments between the Foundation and vendors
27. Allocation of unrestricted estate gifts (ISU Foundation's Public Information Policy, 2002)

Finally, the third category addresses information that the ISU Foundation will not disclose due to specific reasons:

1. Private information (i.e., trust documents, wills, and employee personnel records)
2. Biographical information of donors who desire privacy
3. Gift amounts (unless the donor consents to disclosure)
4. Personal information regarding employees
5. Meeting agendas, minutes and notes of the Board of Directors, Governors and Committees
6. Individual expense vouchers and trip reports
7. Prospect lists and prospect cultivation plans
8. ISU's institutional advancement database (ISU Foundation's Public Information Policy, 2002)

By announcing their public information policy and making it available online, the ISU Foundation is responding to this recent scrutiny into the affairs of institutionally-related foundations by the public. They hope that their voluntary disclosure of many of their documents will protect them from future lawsuits. To view Iowa State University Foundation's updated public information policy, click on the following link: <http://www.foundation.iastate.edu/policy/public-info.html>.

Opposing Opinions in the Public/Private Records Debate

In *The Chronicle Review*, this issue of donor privacy and accountability was debated. Cohen (2004) outlined the reasons why an institutionally-related foundation's records should be public record, while Bass (2004) asserted that donor privacy was of utmost importance and had to be protected in order to preserve donor's trust in the foundation.

Cohen (2004) begins his argument with excessive drama, "Freedom of information is under siege" (p. B14). He continues by stating, "...at a time when public universities are experiencing major financial challenges—and, as a result, raising tuition significantly—withholding such information could have deleterious effects on the institutions and the people who attend and support them" (Cohen, 2004, p. B14). Mainly, Cohen believes that institutionally-related foundations should disclose their records to the public for the following reasons:

1. The foundations' public status...foundations operate as fund-raising and investment departments of public universities.
2. The demographics of higher education donors...many of the donors to university foundations are making big gifts and expecting a lot in return.
3. The corporatization of higher education...if university foundations can prevent such disclosure, corporate efforts to influence public universities through charitable gifts will be able to proceed without effective scrutiny.
4. Consumer impact...university commitments to individual donors are all but guaranteed to have implications for taxpayers and tuition payers alike.
5. Public accountability...university foundations are not immune from misusing resources. (Cohen, 2004, p. B14)

Bass (2004) presents a different view on the issue of privacy and accountability in institutionally-related foundations. He recognizes that universities and their foundations are experiencing an increase in competition for philanthropic gifts; thus, it is even more imperative to

ensure donor confidence is maintained. Bass (2004) adds that “given the many real concerns that donors may have about invasions of privacy by the news media and exposure to unwanted charitable and business solicitations, foundations need to be able to reassure potential donors that their privacy will be respected” (p. B15). Donor privacy is not only a matter of good stewardship but also a matter of professional ethics (Bass, 2004).

In response to Cohen’s argument, Bass (2004) explains that institutionally-related foundations already have regulatory requirements in place to ensure accountability, such as the Form 990 federal tax return. This form is available for the public to view, and many times foundations disclose other records voluntarily to the public. He also refutes Cohen’s assertion that donors will have some control over the institution through their donation; Bass (2004) maintains that “institutions are in no way obliged to accept gifts that they feel detract from their public purpose, undermine their mission, or are at odds with strategic priorities” (p. B15).

Overall, Bass (2004) recommends that institutionally-related foundations should try to be as transparent and accountable as possible, while maintaining donor privacy. Moreover, he suggests reviewing the Iowa State University Foundation’s Public Information Policy, discussed earlier in this paper, in order to consider whether such a document would be helpful to the foundation and university.

Impact on Higher Education Administrators

Why is this issue of donor privacy versus accountability troubling to higher education administrators? Higher education administrators find this particularly troubling because they fear losing the trust of their donors. Administrators recognize that the majority of donors would not want their names, addresses, names of friends, giving histories, and incomes published on the front page of the local newspaper (Brown, 1997).

Institutionally-related foundations at many institutions prefer to be recognized as private entities because it allows them to bypass certain state regulations and procedures. Earlier in this paper, the author covered the eight main reasons, cited by CASE, that institutions prefer to use

institutionally-related foundations as the fund-raising arms of their universities. However, recent court decisions fail to provide clear guidance on the issues of whether these institutionally-related foundations are public offices and whether their records are considered to be public. The reason for this lack of direction may be due to the fact that each state has its own regulations regarding public records and what constitutes a public office. Some courts have determined that the majority of these institutionally-related foundations are interwoven into the fabric of their corresponding universities and therefore recognized as public bodies. Other state courts declared that these types of foundations are not public offices, and they are not required to disclose their records to the public.

As a result of these confusing rulings in several states, higher education administrators must understand the facts that courts will examine if their universities are faced with a similar case, as well as the steps that can be taken to create some distance between the institution and the related foundation. Additionally, the institutionally-related foundation would be best served by developing policies pertaining to the disclosure of certain records. Overall, higher education leaders must recognize the opposing sides of the issue and determine how they wish to ensure donor privacy while remaining accountable to the public. By weighing these issues with equal importance, institutionally-related foundations will be more likely to maintain donor confidence and trust, resulting in support for their host institutions.

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