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ABSTRACT

This paper examines eight key cases over the past two decades that have affected the way foundations raise funds to help state colleges and universities with which they are affiliated, and thereby risk losing their legal status as independent entities. Sections of the paper review three cases in which foundations were ruled public entities; three cases in which foundations were found to be independent; and two hybrid rulings that provide additional insights. The paper also offers seven "touchstones" to help insulate an affiliated foundation from legal challenges to its privacy and independence. They include: (1) having an independent board of trustees; (2) not accepting rent-free space; (3) carefully spelling out arrangements for using university personnel; (4) retaining outside legal counsel; (5) avoiding suspicion of wrongdoing and if challenged voluntarily releasing all pertinent information; (6) routinely releasing all information about public funds; and (7) having written agreements that set forth the terms of the foundation's working relationship with the university and affirming its independence. A table summarizes the eight cases. (SM)

Association of Governing Boards of Universities and Colleges

OCCASIONAL PAPER NO. 39

State University-Related Foundations and the Issue of Independence

By Thomas Arden Roha

EXECUTIVE SUMMARY

Foundations that raise funds to help state colleges and universities risk growing too close to the institution with which they're affiliated and losing their legal status as independent entities. Case law contains numerous examples of news organizations and other private or citizen's groups that take state university-related foundations to court. The result for some foundations has been a loss of privacy for their confidential donor lists or their contributions to the university president's discretionary spending fund. Unanticipated attention to a foundation's legal status can alienate donors and perhaps cost some officials their jobs.

A review of key cases over the past two decades shows that the early rulings tended to declare such foundations to be public entities, making them subject to state "sunshine" laws, Freedom of Information Act laws, and public auditing requirements. More recent rulings have tended to support the notion of state university-related foundations that can support their host institutions while operating independently. Which direction a court will lean seems to depend on how convincingly a foundation can show that it is an independent entity that does not receive support from public tax dollars.

The author offers seven "touchstones," or procedures that, when practicable, can help insulate an affiliated foundation from legal challenges to its privacy and independence. Different foundations supporting institutions in different states might choose differently among these touchstones.

Foundations that raise funds for state colleges and universities may find themselves in a difficult position. On the one hand, their primary purpose is to help these public institutions financially. Yet those that grow too close to the institutions they serve risk losing their legal status as independent entities. Much depends, of course, on the charter of the foundation and applicable state laws. But the issue of independence is an important one for most foundations. For example, the privacy of the foundation's confidential donor lists or the spending records for the university president's discretionary funds may be at stake.

If the foundation is deemed part of the state institution, the auditing arm of the state government may be entitled to audit its books and records. The foundation may be required to open all of its meetings to the public under the state's "sunshine" law, or it may have to open virtually all of its records to public scrutiny under the state's Freedom of Information Act (FOIA). And the foundation may even become subject to the state's procurement rules.

All of these changes present risks, among them the sudden public disclosure of names and addresses of foundation donors who had been promised confidentiality, and the out-of-context disclosure of how a discretionary fund is being spent. Such unanticipated attention to the foundation can alienate donors and perhaps cost officials their jobs.

State laws differ on the standards that determine whether a state university-related foundation is legally a part of the state. Moreover, even within a single state, the Freedom of Information Act may impose standards that differ from those imposed by the state's "sunshine" law, which, in turn, may impose stan-

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dards that differ from those in the state's auditing law as it relates to public institutions.

Nonetheless, certain common themes have emerged from the handful of rulings the courts have handed down on the question of independence for state university-related foundations. These rulings are split nearly equally between those finding that such foundations are independent from the state and those finding that they are not, with the more recent rulings leaning toward independence. Each case, however, turned on its own facts when applied against state law. A review of those facts and the themes that emerge from them suggest some protections foundations can establish to make it easier to defend against challenges.

Rulings Labeling Foundations Public Entities. The issue of foundation independence is raised often—not surprisingly, by members of the press. An early and well-publicized case unfolded in 1987, when the *Greenville News* and the Associated Press sued the Carolina Research and Development Foundation, an affiliate of the University of South Carolina, in the South Carolina Common Pleas Court to gain access to financial information. The news organizations' purpose was to determine whether the university had diverted public funds to the foundation to finance construction projects, among them the university's fine-arts center.

News reports had suggested that there were four separate instances in which public funds were diverted to the foundation. According to the *Greenville News* and the Associated Press, those four instances demonstrated that the foundation received and expended public funds, and hence was a public body subject to South Carolina's Freedom of Information Act.

Suspicions raised by the pending litigation, along with pressure from some state legislators, prompted the foundation to release limited amounts of information, including details of the university president's discretionary funds that were managed by the foundation. Those details showed that foundation funds were used to supplement the university president's salary and to support what appeared to some people to be lavish expense-account purchases.

The headlines and the resulting public outcry formed a backdrop for the deliberations of the South Carolina Supreme Court as

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it considered whether the Carolina Research and Development Foundation constituted a public body subject to South Carolina's Freedom of Information Act. The court ultimately ruled that the foundation fell within the state's definition of a public body based on the following passage from that state's Freedom of Information Act: "The FOIA defines 'public body' as any organization, corporation, or agency supported in whole or in part by public funds or expensing public funds." Because of the four transactions in which public funds either were diverted directly to the foundation or were managed by the foundation, the South Carolina Supreme Court upheld a lower court and ruled in favor of the news organizations' view that the foundation is a public body. (See *Weston v. Carolina Research & Development Foundation*, 401 S.E.2d 161 (S.C. 1991).)

An Ohio court noted that an entity need not be operated by the state to be a public office.

A similar case unfolded in Toledo, Ohio, in the early 1990s. The conflict apparently began when the faculty union of the University of Toledo adopted a resolution requesting an investigation of spending by the University of Toledo Foundation. The faculty charged that the academic programs of the university were suffering because the foundation was spending too much on athletics and on administration. The investigation prompted by the resolution revealed that the president's discretionary fund provided by the foundation had been used for entertaining and other purposes that the faculty union regarded as inconsistent with the intent of the donor whose gift had been used to replenish the discretionary fund.

The investigation was chronicled in the local newspaper, the *Toledo Blade*. In an April 4, 1991, news report, the *Blade* called the foundation a "secretive organization that controls almost $40 million in university endowments and investments."

The *Blade* decided to conduct its own investigation. A lawyer for the *Blade* wrote a letter to a lawyer for the University of Toledo Foundation asserting that the foundation was a "public office" as defined in the Ohio Freedom of Information Act. The lawyer stated that the newspaper wanted to inspect the foundation's records, just as any citizen is permitted to do in situations involving the records of a public office.

The foundation's lawyer responded that the foundation was not a public office and was not obligated to release information under Ohio's FOIA. As a compromise, the foundation offered to provide voluntarily all information the newspaper requested, with the exception of the names of donors and other information identifying them.

The *Blade* rejected the foundation's compromise offer and filed a lawsuit seeking an order directing the foundation to turn over all records the newspaper had requested, including the names of donors.

The same week in which the *Blade*'s lawsuit was filed, the foundation's board of directors took three actions designed to enhance its independence from the university (possibly reflecting some insecurity about the strength of its legal claim of independence). The foundation (1) removed the university president and four university trustees from the foundation's board of directors, (2) approved a budget to pay the salaries and benefits of eight university employees who worked for the foundation, and (3) remodeled and relocated the foundation's offices so that they were physically separate from the university's development office.

These actions were of little significance to the court, which ruled that the foundation is a "public office" subject to Ohio's FOIA. The ruling focused on the passage in the Ohio Code that defines a public office as "any state agency, public institution, political subdivision or any other organized body established by the laws of this state for the exercise of any function of government." The court noted that an entity need not be *operated* by the state to be a public office. The ruling also stated that a private nonprofit corporation could be a public office if it performs public functions or is supported, even partly, by public funds.

The court observed that the foundation was created in 1990 through the merger of two

Seven Touchstones of Independence

No single factor is determinative in judging a foundation's independence; courts have shown they will examine all of the facts surrounding a foundation's operations. But the basic questions likely to be pursued are predictable. Here are the questions and some suggestions for foundation officials to consider:

1. Does the foundation have an independent board of trustees? If a majority of a foundation's board of directors are state university employees, a court almost certainly will rule that the foundation is an arm of the state. Even having state university employees as a minority on the board of directors will be considered a sign that the foundation is not independent.

A foundation wishing to maintain its independence would be wise to eliminate all state university personnel from its board. If this is impossible, a foundation may consider keeping them on the board but only as nonvoting members. University officials who are not on the board still may be invited to attend board meetings as guests and to make reports on the university's needs. Placing one member of the university governing board on the foundation board can be an excellent way to ensure good communication between the bodies. [Editor's note: For further information on the active roles governing boards play in overseeing foundations, see *College & University Foundations: Serving America's Public Higher Education* (particularly Chapter 10), which AGB published in 1997.]

2. Who pays for the office space? Frequently, foundations that support state universities benefit from rent-free office space provided by the university. But courts have considered rent-free space to be a public benefit, the equivalent of the state paying the rent. Thus, foundations that pay little or no rent may find this factor makes them appear to be an arm of the state.

The safest option is for the foundation to move out of university space and rent space privately. If moving is not feasible financially or politically, the best alternative is for the foundation to pay rent to the university at rates that reflect the space's fair market value. In exchange, that space should be dedicated solely to foundation activity and personnel; only foundation personnel, for example, would be given keys to the offices. Similarly, the foundation should acquire its own furniture. If university office furnishings must be used, then a fair-market rent should be paid for those furnishings. If a foundation board or committee meeting is held in a university conference or meeting room, then a fee should be paid for that temporary use.

It often is difficult for foundation administrators, whose nerves have been steeled in hard-fought budget battles, to voluntarily pay for something they might have for free. But paying market-value rent should be seen as another way of contributing to the university. Rent dollars are the same shade of green as traditional grant dollars, and the university can use them for the same purposes.

3. Is the foundation serviced by university personnel? Frequently, foundations that serve state universities are themselves served by personnel who are paid by the university. This factor can lead courts to the conclusion that the foundation is benefiting from state tax dollars and, thus, is an arm of the state. Ideally, only its own employees should serve the foundation. But realistically, a full-time separate support staff is not always affordable, particularly when there are valuable efficiencies in sharing staff with the university. Whatever arrangement is chosen should be spelled out in the agreement between the foundation and university.

organizations, one of which received funds for the university, and noted that the foundation's mission was to "receive, hold, invest funds, administer property, and to spend funds for the benefit of the university." Moreover, the university had pooled $17 million of its money with $23 million of the foundation's money to form a single investment portfolio.

The court ruled that although the foundation performed no policy-making role within the university, it did perform an indispensable function and is hence a public office. Because the foundation's record keeping is a public function, the court reasoned, and because the public interest is served when citizens can know the sources of donations and the ways in which a public university

4. Does the foundation receive legal advice from the state attorney general? In most states, the attorney general's office has a branch that does legal work for the state university. In some cases, that branch also will do legal work for the foundation that serves the state university. This presents an obvious problem for a foundation wishing to maintain its independence. But it is a problem for two additional reasons not yet discussed. First, many state laws say that the state attorney general may advise only state entities. If the attorney general advises the foundation, it may appear that the attorney general considers the foundation to be part of the state. Second, if state law limits the attorney general to representing only branches of the state, then an attorney general's office that serves the foundation may not be protected by the attorney-client privilege. Hence, foundations that wish to maintain their independence should retain outside legal counsel.

5. Is there suspicion that the foundation is engaging in improper conduct? The primary mandate of a court is to apply the law and administer justice fairly and evenhandedly. Nonetheless, the law is sufficiently unclear that a judge could, consistent with the law, shade his or her ruling in either direction. Conscientious judges may feel compelled to shade their rulings in the direction that is most likely to advance justice. Thus, if there is reasonable suspicion in the press, or in documents presented to the court, that a foundation that serves a state university has engaged in wrongdoing, the court may feel compelled to use the law as a tool to expose that wrongdoing. In so doing, the court could establish a legal precedent that haunts the foundation for decades.

Wise foundations, of course, avoid suspicion of wrongdoing. If a reasonable source alleges misconduct (be it a local newspaper or a faculty or student committee), the foundation may be well advised to release voluntarily all information about the transaction or incident under suspicion. It is better to release all information about one transaction or incident voluntarily than to be forced to release all information about all of the foundation's transactions.

6. Does the foundation routinely release all information about public funds? Some foundations that serve state universities receive public tax dollars in the form of matching contributions and public contracts. It makes a compelling argument to say that the public has a right to know how its tax dollars are spent. But if a litigant is seeking release of all of a foundation's records under the state's FOIA, it can be equally compelling to respond that all information about public funds held by the foundation already has been released. Thus, a foundation wishing to maintain its privacy by retaining its independence should consider annually releasing all information about how public funds are held or spent by the foundation. Such a voluntary approach avoids setting a judicial precedent requiring a foundation to release all of its information whenever anyone asks.

7. What does the agreement between the foundation and university say? A foundation that values its privacy and independence should enter into a written agreement—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. The agreement should require the foundation to affirm its independent status to potential donors.

In addition, the agreement could set forth the terms and conditions of the foundation's lease of office space from the university and other reimbursements to the university for costs incurred by the foundation. It could delineate the procedure for the foundation to make grants to the university and help define the working relationship between the foundation and the institution. More important, the written agreement could be very useful in maintaining the independence of the foundation if and when that independence is challenged.

spends its money, the foundation's records, including the names of donors, are subject to public disclosure.

Aside from these multiple strands of argument, however, the ruling seemingly turned on a different set of facts: that the foundation operated out of rent-free university office space; that foundation employees were paid by the university; and that the university, lacking any other fund-raising program, had *turned over to the foundation direct bequests and gifts that were made payable to the university.* Summing up, the court stated, "Clearly, then, these entities received support from public taxes."

Following that ruling, the *Blade* thoroughly reviewed the foundation's records and published the names, addresses, and income

levels of donors and potential donors, donor giving histories, and other details of a personal financial nature.

While it is debatable whether the *Blade*'s aggressive reporting served the public interest, there can be little doubt that the Ohio Supreme Court's decision caused concern in the executive offices of many foundations that support state universities. (See *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 65 Ohio St. 3d 258, 602 N.E.2d 1159 (1992).)

That concern was not alleviated when the Kentucky Supreme Court issued an equally complicated ruling in 1992. The issue in this case was whether the Kentucky State University Foundation was subject to the state's public-disclosure law. The court was influenced by the three key links between the foundation and the university: (1) the foundation's board of directors was the same set of people who were serving on the university's board of regents; (2) the foundation was located on the university campus; and (3) the foundation availed itself of university personnel.

Because it seemed so clear that the Kentucky State University Foundation was benefiting from the university's (the public's) support, one might have jumped to the conclusion that the Kentucky State University and the Kentucky State University Foundation were one entity. The only barrier between the two was the thin pieces of paper on which were written the articles of incorporation of the Kentucky State University Foundation.

And sure enough, the Kentucky Supreme Court ruled that this paper barrier was insufficient. The court ruled that if a state university functions, in part, through a separately incorporated foundation, then that foundation is part of the university and is thus a public entity subject to the state's public-disclosure law.

This ruling, however, may have been dictated by particulars of the case. Kentucky Justice Joseph E. Lambert, though concurring with the opinion, suggested that if the foundation had tried harder to establish and maintain its independence from the university, the decision might have been different. "My reason for concurring is that at the time this suit was instituted, the Kentucky State University Foundation was functioning as an agency of the university," he wrote. "It maintained offices on the campus, used the services of university personnel, and its bylaws required its board to be the same as the board of regents of the university. While these facts are sufficient to render it an agency of the university, not every university foundation should be so regarded.

"A group of citizens should be entitled to form an organization for purposes of raising money and engaging in other activities beneficial to a state university without being subject to the Open Records Act," he continued. "In my view, the determination should be whether any such organization was, in fact, an agency of the university or was a private entity merely intended to serve a public purpose." (See *Frankfort Pub. Co. v. Kentucky State University Foundation*, 834 S.W. 2d 681 (Ky. 1992).)

Rulings Labeling Foundations Independent. One of the earliest cases to augur for the independence of university-related foundations arose in West Virginia in the late 1980s, when the local 4-H Road Community Association requested copies of certain coal leases held by the West Virginia University Foundation. The foundation balked, arguing it was an independent entity and not part of the state. In a complex verdict, the local court held that the West Virginia University Foundation indeed is not a public body but found that the university actually held the requested coal leases. This made the foundation subject to the state's public-records disclosure law.

Uneasy about the durability of its victory, the 4-H Road Community Association appealed its own successful case to the West Virginia Supreme Court, alleging that the local court had erred in the reason it gave for ordering the leases released. Specifically, the appeal alleged that the West Virginia University Foundation was not a public body. The evidence presented showed that the foundation was almost totally independent from the state university, except for some modest dealings between the two to promote operational efficiencies.

The 4-H Road Community Association argued, however, that the foundation would not have any money, indeed would not even

exist, but for the desire of private individuals to aid West Virginia University, a state institution. In essence, the 4-H Road Community Association argued that because the funds were given and held for the benefit of a state entity, the entity holding them also was a state entity.

The West Virginia Supreme Court of Appeals rejected this argument, noting that private individuals had donated the money to the foundation and that no evidence suggested that the foundation had used public money, property, or employees. Consequently, the court ruled that the foundation is not a public body and thus was exempt from the state's public-disclosure law. (See *4-H R. Community Ass'n v. West Virginia University Foundation, Inc.*, 182 W. Va. 434, 388, S.E. 2d 308 (1989).)

By the early 1990s, more courts began to regard university-related foundations as independent.

By the early 1990s, more courts began to regard university-related foundations as independent. In 1992, the Louisiana Supreme Court handed down a Solomonic ruling that permitted the Louisiana inspector general to review certain, but not all, records of a foundation connected to Nicholls College: "Because the foundation is not a public body, the state's right to inspect must be limited to the records of the public funds," the court ruled. "The receipt of public funds by the foundation does not entitle the state to inspect all of the foundation's financial records." (See *Guste v. Nicholls College Foundation*, 592 So.2d 419, *cert denied*, 593 So.2d 651 (Louisiana 1992).)

Such budding respect for foundation independence appeared again in a 1995 ruling in Indiana. Here the Indiana Supreme Court ruled that a not-for-profit foundation that solicited and managed funds from private sources for use by or for the benefit of Indiana University is not a public agency for purposes of Indiana's Public Records Act. The ruling meant that the foundation was not obligated to open its files to the public. The court so ruled despite three key links between the two entities: (1) The foundation managed the university's endowment fund for a fee; (2) several university officials served on the foundation's board of directors; and (3) the university seemingly did not have its own fund-raising program. (See *State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342 (Indiana 1995).)

Two Hybrid Rulings Provide Additional Insight. With the Indiana decision, it could be said that the courts had completed the task of charting the boundary separating public foundations from independent ones. Many of the earlier rulings stood for the proposition that acceptance of public support—be it direct financial support or in-kind financial support in the form of services from university personnel or rent-free office space—will cause the foundation to be ruled a public entity. The more recent rulings stand for the proposition that a foundation that is financially independent from the university may retain its status as a private entity.

Yet two other rulings—in cases *not* involving state university-related foundations—offer additional insight. A 1991 case involving Michigan State University produced a ruling suggesting that even if an entity is found to be a public entity, a court still may shield the entity's private donor records and other personal information from public scrutiny.

In this case, the Michigan State University Clerical-Technical Union (MSU-Union) sought from Michigan State University (MSU) the names and addresses of certain donors. MSU provided the names of donors, except for those who had requested anonymity, but refused to provide their addresses. The MSU-Union was not satisfied and sued the MSU board of trustees, claiming violations of the Michigan FOIA. Throughout the litigation, the MSU board conceded that MSU was a "public body"—that is, an entity that is part of the state of Michigan. Thus, it was clear from the outset that the Michigan FOIA applied to MSU. At issue was whether the application of a privacy exemption included in the act prevented release of donor names and addresses.

The lower court ruled in favor of the MSU-Union and ordered release of all the information the MSU-Union had sought, including donor names and addresses. The lower court based its decision on the fact that the donors had permitted their names to be listed in an annual publication that lists donor names (except those who wished to remain anonymous) and a range of dollar amounts, often designated as one of several "clubs," for each donor's gift. The lower court made the questionable assertion that "a donor who allows his name to be published by the university has no right to privacy in his address."

The Michigan Court of Appeals reversed the lower court. While acknowledging that MSU is a public body subject to Michigan's FOIA, the court stated that donors' addresses constitute personal information and that their release would be an invasion of privacy. The court stated that the public interest did not outweigh the potential harm of disclosure and that donor addresses have a minimal relationship with the university's function as a public agency. Release of the donor addresses, the court said, could subject donors to harassment from the MSU-Union and make the donors targets of unwanted solicitations. Finally, the court ruled that release of the donor addresses would contravene the public interest because it would have a chilling effect on donations to the university and other public bodies that rely on private contributions. (See *Michigan State University Clerical-Technical Union v. Michigan State University Board of Trustees*, 475 N.W.2d 373, 190 Mich. Ap. 300 (Mich. App. 1991).)

An equally significant case involving parties other than university foundations occurred in Pennsylvania in the late 1990s. Two dealers in used textbooks made a request under Pennsylvania's version of the FOIA, known as the Right-To-Know Act, for information about two independent nonprofit corporations that operated the campus bookstores at Millersville University and West Chester University. The campus bookstores had canvassed faculty members for information about textbooks and other instructional materials they would be requiring for their courses. Thus, only the independent campus bookstores, and not the state universities, had the information sought by the plaintiffs. The plaintiffs argued that the independent campus bookstores were in a symbiotic relationship with the universities—that because one of those entities was a public entity, the other must be public as well.

While noting that the universities themselves are public entities subject to Pennsylvania's FOIA, the court refused to rule that the independent corporations that run the bookstores are subject to the FOIA. "SSI [one of the entities operating the bookstores] exists to provide students with services not furnished by the university, including the operation of the bookstore," the court wrote. "While SSI does receive certain services from the university, this assistance is paid for, either directly or through payment in kind. And, as noted above, SSI is a self-sustaining corporation legally distinct from [the university]. In sum, the fact that SSI must work closely with the university in order to carry out its stated purposes does not, in our view, eliminate its status as an independent entity." (See *Dynamic Student Services v. State System of Higher Education*, 697 A.2d 239 (Pa. 1997).)

A logical extension of this ruling would hold that if a foundation exists as an independent entity, and if any services it receives from the university are paid for, "either directly or through payments in kind," then the foundation should be exempt from the application of the FOIA, at least under Pennsylvania law.

Which Way the Wind Blows. A common theme in the South Carolina, Ohio, and Kentucky cases is the notion that support from the public purse causes foundations that serve state universities to be deemed state entities. The theory seems to be that the public has a right to know about entities that receive tax dollars. In a participatory democracy that values open government, this theory resonates powerfully among taxpayers as well as Supreme Court justices.

However, as the West Virginia, Louisiana, and Indiana cases show, an equal number of rulings have declared that foundations that support state universities are not state entities. Which direction a court will move in seems to depend on how convincingly a foundation can show that it is an independent entity that does not receive support from public tax dollars.

CASE LAW SUMMARY

CASE NAME	CONFLICT	RULING
Weston v. Carolina Research & Development Foundation	In an effort to determine whether the University of South Carolina had diverted public funds to the foundation to finance construction projects, two news organizations sued an affiliate of the university to gain access to its financial information.	Citing the foundation's use of public funds, the South Carolina Supreme Court ruled that the foundation was a public body.
State ex rel. Toledo Blade Co. University of Toledo Foundation	After chronicling the faculty union's investigation of spending by the University of Toledo Foundation, a local newspaper expressed its desire to inspect the foundation's records. Calling the foundation a public office, the newspaper sued when the foundation refused to disclose the names of its donors.	The Ohio Supreme Court ruled the foundation a public office due its use of rent-free office space and control of direct bequests and gifts made payable to the University, both of which constituted support from public taxes.
Frankfort Pub. Co. v. Kentucky State University Foundation	At issue was whether or not the Kentucky State University Foundation was subject to the state's public-disclosure law. The foundation operated on campus space and had a board of directors identical to the university's.	The Kentucky Supreme Court ruled that the foundation was a public entity and that the paper on which its articles of incorporation were written was insufficient to prove otherwise.
4-H R. Community Ass'n v. West Virginia University Foundation, Inc.	Hoping to obtain copies of coal leases held by the West Virginia University Foundation, the 4-H Road Community Association alleged that the foundation was a public body subject to the state's public disclosure law. They argued that if the foundation's funds were given and held for the benefit of the university, a state entity, the foundation must be a state entity, too.	The West Virginia Supreme Court noted that the foundation received its funds from private donations. Since there was no evidence that the foundation used public funds, or public property and employees, the court ruled that it was not a public body.
Guste v. Nicholls College Foundation	The Louisiana inspector general sued a foundation connected to Nicholls College in order to get permission to review its financial records.	The Louisiana Supreme Court ruled that the foundation was not a public body and that the state could inspect only the records of public funds used by the foundation.
State Board of Accounts v. Indiana University Foundation	The State Board of Accounts sued Indiana University Foundation in an effort to open the foundation's files to the public under the state's Public Records Act.	The Indiana Supreme Court ruled that a not-for-profit foundation that managed funds for a public university was not a public agency for purposes of the Public Records Act.
Michigan State University Clerical-Technical Union v. Michigan State University Board of Trustees	When the MSU Union requested donor information from MSU, MSU provided the names of donors, but not their addresses. The MSU Union claimed that this was in violation of Michigan's FOIA and sued the MSU board of trustees.	Although MSU conceded that it was a public body, the Michigan Court of Appeals ruled that the donors' addresses constituted personal information and that the release of such information would be an invasion of privacy.
Dynamic Student Services v. State System of Higher Education	Under the state's FOIA, two used-textbooks dealers requested information from two independent nonprofit corporations that ran campus bookstores at two local universities. The dealers claimed that the bookstores were in a symbiotic relationship with the universities and were therefore public entities.	The court ruled that self-sustaining corporations such as those operating the bookstores were legally distinct from the university and should be considered independent.

Foundations would be wise to ask their lawyers to review their state's code to determine the extent to which the language of local statutes and court precedents may threaten the foundation's independence and privacy. These attorneys may be able to offer advice on additional steps the foundation may take to clarify the relationship with its institution.

With that advice and with the tips listed on pages 4-5, each foundation must then assess for itself the importance of independence and privacy and whether the steps necessary to maintain them are financially, politically, and practically desirable. ◆

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AGB recognizes its leadership responsibilities to members and to a diverse system of higher education. The association strongly believes in citizen control of our colleges and universities, rather than direct governmental control, and works to ensure that higher education remains a strong and vital national asset.

AGB carries out its mission adhering to the following objectives:

- To educate individual trustees and boards on matters that affect their institutional oversight responsibilities.
- To promote wider understanding of and appreciation for citizen leadership and lay governance as the only effective ways to ensure the quality and independence of American higher education.
- To advance the philosophy that all elected or appointed trustees serve in the public trust and should consider themselves trustees of higher education as a whole.
- To strengthen the relationship between trustees and chief executives in the fulfillment of their distinct yet complementary responsibilities.
- To stimulate cooperation with public-policy makers, government agencies, and private organizations that have a stake in the effective governance and quality of colleges and universities.
- To identify and study emerging public-policy issues of concern to higher education by providing forums for their discussion and by encouraging appropriate member initiative.

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