

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

No. D-202-CV-2017-01620

DANIEL LIBIT,

Plaintiff,

v.

THE UNIVERSITY OF NEW MEXICO
FOUNDATION, INC. and THE BOARD OF
REGENTS OF THE UNIVERSITY OF NEW
MEXICO,

Defendants.

EXPEDITED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

COME NOW *Amici Curiae* The New Mexico Foundation for Open Government (“NMFOG”) and The Brechner Center for Freedom of Information (“The Brechner Center”), by and through their attorneys, Charles R. Peifer and Gregory P. Williams of the firm of Peifer, Hanson & Mullins, P.A., and, on an expedited basis, move the Court for leave to file an *Amicus Curiae* Brief in the above-captioned matter.

As grounds for this motion, *Amici Curiae* state as follows:

1. NMFOG is a non-profit, nonpartisan organization committed to helping citizens, students, educators, public officials, media and legal professionals in New Mexico understand, obtain and exercise their rights and responsibilities under New Mexico’s “sunshine laws,” including the Inspection of Public Records Act and Open Meetings Act.
2. In pursuit of these purposes, NMFOG has participated in judicial proceedings, either as a party or as *amicus curiae*, where access to public records and information is at stake.

See, e.g., San Juan Agr. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, 885; *see also Palenick v. City of Rio Rancho*, 2013 NMSC-029, 306 P.3d 447 (amicus); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, 299 P.3d 424 (amicus); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853 (amicus); *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246 (party), *overruled by Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

3. The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

4. NMFOG and The Brechner Center seek leave to file a joint *amici curiae* brief in this matter because of the important issue presented by this case, which is whether a foundation that operates in conjunction with a public university is exempt from the New Mexico Inspection of Public Records Act ("IPRA").

5. Because NMFOG and The Brechner Center are devoted to matters of open government and access to public records, they are uniquely situated to offer this Court assistance in addressing the issues before it in this case.

6. A copy of the proposed *amici* brief is attached hereto as Exhibit 1.

7. Pursuant to Rule 1-007.1, counsel for *amici* contacted counsel to determine their clients' position on this request. Plaintiff and Defendant Board of Regents of UNM consent to the filing of the *amici* brief. Defendant UNM Foundation opposes.

8. *Amici* are filing this motion on an expedited basis so that the Court may consider it at the time it considers Plaintiff's Motion for Summary Judgment, as well as Defendant UNM Foundation's own summary judgment motion. As of the date of this filing, briefing on both motions is in progress but not complete, and a hearing has not yet been set.

WHEREFORE, New Mexico Foundation for Open Government and The Brechner Center for Freedom of Information, requests leave to file the attached brief as *amici curiae*.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By: /s/ Gregory P. Williams

Charles R. Peifer

Gregory P. Williams

Post Office Box 25245

Albuquerque, NM 87125-5245

Tel: 505-247-4800

Email: cpeifer@peiferlaw.com

gwilliams@peiferlaw.com

*Attorneys for The New Mexico Foundation for Open
Government and The Brechner Center for Freedom
of Information*

We hereby certify that on the 7th day of March the foregoing was filed and served electronically and emailed to counsel as more specifically set forth below:

David H. Urias
Nicholas T. Hart
Freedman, Boyd, Hollander, Goldberg,
Urias & Ward, P.A.
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
Email: dhu@fbdlaw.com
NickH@fbdlaw.com
Attorneys for Plaintiff

Randy S. Bartell
Randi N. Valverde
Montgomery & Andrews, PA
Post Office Box 2307
Santa Fe, NM 87504
Email: rbartell@montand.com
rvalverde@montand.com
Attorneys for The University of New Mexico Foundation, Inc.

Kimberly Bell
Senior Deputy University Counsel
Office of University Counsel
1 University of New Mexico
MSC05 3440
Albuquerque, NM 87131-0001
Email: KiBell@salud.unm.edu
Attorneys for the Board of Regents of the University of New Mexico

PEIFER, HANSON & MULLINS, P.A.

By: /s/ Gregory P. Williams
Gregory P. Williams

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

No. D-202-CV-2017-01620

DANIEL LIBIT,

Plaintiff,

v.

THE UNIVERSITY OF NEW MEXICO
FOUNDATION, INC. and THE BOARD OF
REGENTS OF THE UNIVERSITY OF NEW
MEXICO,

Defendants.

BRIEF OF *AMICI CURIAE*
THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT AND
THE BRECHNER CENTER FOR FREEDOM OF INFORMATION
IN SUPPORT OF PLAINTIFF DANIEL LIBIT’S
MOTION FOR SUMMARY JUDGMENT

Amici Curiae New Mexico Foundation for Open Government (“NMFOG”) and The Brechner Center for Freedom of Information submits their brief in support of Plaintiff Daniel Libit’s Motion for Summary Judgment.

This case involves important issues regarding whether a supposedly private entity that exists only to serve the interests of a public entity is immune from the New Mexico Inspection of Public Records Act (“IPRA”). The significance of these issues prompted NMFOG and the Brechner Center to file this amicus brief. NMFOG is a non-profit, nonpartisan educational organization committed to assisting New Mexico citizens, educators, public officials, media and legal professionals in understanding and exercising their rights under the free-speech provisions of the federal and New Mexico Constitutions, and under state and federal sunshine laws,

EXHIBIT

including IPRA, the New Mexico Open Meetings Act, and the federal Freedom of Information Act. NMFOG regularly helps citizens obtain documents and information from government sources. The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights. NMFOG and the Brechner Center submit this brief to assist the Court in its resolution of the issues presented in this case.¹

I. PUBLIC UNIVERSITY FOUNDATIONS ARE ARMS OF THE STATE PERFORMING A STATE FUNCTION AND SUBJECT TO STATE TRANSPARENCY LAWS, INCLUDING IPRA

Public university foundations are arms of the state performing a state function. Accordingly, a growing number of states with public records statutes analogous to New Mexico's have declared, either by judicial ruling or attorney general's interpretation, that university foundations qualify as public agencies or as custodians of public records.

Illinois, for instance, has determined that university foundations are subject to public records laws. In *Chicago Tribune v. College of Du Page*, 79 N.E.3d 694, 697 (Ill. App. Ct. 2d Dist. 2017), a newspaper sued a community college's nonprofit foundation for refusing to release documents related to a grand jury subpoena that was served on the foundation. Applying Illinois

¹ This brief was not authored in whole or in part by counsel for any party, nor did a party, party counsel, or any other person make a monetary contribution intended to fund the preparation or submission of the brief. This brief is intended to advise the Court on how other courts around the country have resolved similar issues, and to address important policy issues. This brief does not address certain matters briefed thoroughly by the parties, such as the application of NMSA 1978 § 6-5A-1(D) and of *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364.

public records law, the Illinois Court of Appeals recognized that the foundation was carrying out a governmental function in holding and managing college investments. *Id.* at 708. The court noted that, as is the case with the University of New Mexico, the foundation was the conduit through which donations to the university were routed, and if someone tried to send a donation to the college directly, the donor would be directed to the foundation, which removed the foundation from the status of being a mere vendor or service provider. *Id.* at 708.² The court further held that university records do not lose their “public” character just because they happen to be held in the physical custody of a corporate affiliate. *Id.* at 705.³

The same outcome has been reached in cases throughout the country, as courts have recognized that the separation between public universities and their foundations is a matter of form only and not function. *See, e.g., Gannon v. Board of Regents*, 692 N.W.2d 31, 32 (Iowa 2005) (private not-for-profit corporation that managed gifts to the university was subject to Iowa Freedom of Information Act due to its service agreement with university); *Jackson v. Eastern Mich. Univ. Found.*, 544 N.W.2d 737 (Mich. Ct. App. 1996) (state university foundation was a public body under freedom of information act and open meetings act), *State ex. rel. Toledo Blade*

² *Amici* visited a number of pages on the University of New Mexico website and went through the process of trying to remit a donation, and in each instance were re-rerouted to the Foundation’s website, www.unmfund.org. *See*, for example, the instructions that the University provides as to how to send a donation to the Honors College, <https://honors.unm.edu/donate/index.html>, which result in a redirect to a [unmfund.org](http://www.unmfund.org) page maintained by the Foundation. Similarly, clicking the invitation to “Donate Today” on the UNM health center’s website, <https://hsc.unm.edu/health/ways-to-give/>, directs the would-be giver to a [unmfund.org](http://www.unmfund.org) remittance page. The same is true of the UNM law school alumni giving page, <http://lawschool.unm.edu/alumni/index.html>. On none of these University pages is the benefactor encouraged to “donate to a separate organization distinct from the University.”

³ It is worth noting that foundations and other “direct support organizations” affiliated with public universities readily embrace their status as governmental entities when doing so affords them benefits, including the benefit of immunity from tort claims that extends only to state agencies or actors. *See, e.g., Plancher v. UCF Athletics Ass’n, Inc.*, 175 So.3d 724 (Fla. 2015) (granting summary judgment to public university’s athletic association in claim brought by heirs of deceased college athlete, on the basis of sovereign immunity, which extends not just to state agencies but to corporations that act primarily or exclusively as an instrumentality of the state); *Autry v. Western Ky. Univ.*, 219 S.W.3d 713 (Ky. App. 2004) (granting immunity to privately incorporated university foundation that owned and managed dorm buildings in wrongful-death lawsuit by family of murdered dorm resident).

Co. v. Univ. of Toledo Found., 602 N.E.2d 1159 (Ohio 1992) (nonprofit corporation that solicited and received donations for public university was a public office subject to public records disclosure, including donor names); *Weston v. Carolina Research and Dev. Found.*, 401 S.E.2d 161 (S.C. 1991) (holding that private foundations that receive public funds are subject to the state freedom of information act), *Calif. State Univ., Fresno v. McClatchy Co.*, 90 Cal.Rptr.2d 870 (Cal. Ct. App. 2001) (holding that documents revealing identities of donors were public records). *See also* N.D. A.G. Opin. 2014-O-04 (April 24, 2014) (opining that Dickinson State University’s foundation is a “public entity” because it performs governmental services on behalf of a state agency and directing the foundation to fulfill a freedom-of-information request for its CEO’s email correspondence).

While foundations commonly argue that they need confidentiality to avoid compromising donors’ privacy, that argument is readily disproven in two respects. First, universities and their foundations are only too happy to publicize the names of donors – even chiseling their names into the edifices of buildings – when disclosure serves their objectives. They cannot be heard to argue that disclosure is appropriate only where the information flatters the university and not where the information might be disadvantageous. Open-government laws do not allow agencies to release only those documents that they regard as strategically helpful, for obvious reasons. Second, legislators are free to fashion a narrow exemption for donor anonymity where anonymity is regarded as overridingly necessary, but Plaintiff Libit’s requests do not seek to unmask anonymous donors, and the Foundation certainly does not need a blanket exemption from disclosing each-and-every document. Certainly, there is no evidence that the foundations in California, Pennsylvania or any other state subject to open-government laws have ceased being able to effectively fundraise because their records are accessible. Foundations across

California, for instance, are reporting record donations, so it manifestly does not handicap these institutions to make their operations transparent. *See, e.g.*, University of California-Davis news release, “UC Davis Announces Another Record-Breaking Fundraising Year,” July 25, 2017, *available at* <https://www.ucdavis.edu/news/uc-davis-announces-another-record-breaking-fundraising-year/>; University of California-Berkeley news release, “Campus sets new records for fundraising,” July 14, 2016, *available at* <http://news.berkeley.edu/2016/07/14/campus-sets-new-records-for-fundraising/>.

The rationale for recognizing that state open-records statutes apply to university-created foundations was well-presented by the Kentucky Supreme Court in a case brought by a news organization against the University of Louisville Foundation:

As a public institution that receives taxpayer dollars, the public certainly has an interest in the operation and administration of the University.... The Foundation’s stated goal is to advance the charitable and educational purposes of the University of Louisville. To this end, it solicits, receives, and spends money and other assets on behalf of the University. The public’s legitimate interest in the University’s operations then logically extends to the operations of the Foundation.

See Cape Publications, Inc. v. Univ. of Louisville Found., Inc., 260 S.W.3d 818, 822-23 (Ky. 2008) (holding that Kentucky open-records act applied even to foundation records disclosing names of certain donors).

This rationale applies with equal force in New Mexico, where (according to its most recent publicly available tax return) the Foundation manages more than \$206 million on behalf of the University. How that money is managed is manifestly the public’s business, and to interpret the Inspection of Public Records Act in an unnaturally narrow way to preclude access to these records would greatly disserve the public’s need for transparency and accountability.

II. ACCESS TO INFORMATION ABOUT UNIVERSITY AUXILIARY AFFILIATES IS ESSENTIAL FOR CIVIC WATCHDOG JOURNALISM.

University foundations at public institutions control many tens of billions of dollars of money that, for all intents and purposes, is “university money” dedicated to fulfilling university purposes. *See* Kaitlin Mulhare, “The Wealthiest U.S. Universities Got \$26 Billion Richer Last Year,” *Time*, Jan. 25, 2018 (reporting that 97 universities or university systems have endowment funds exceeding \$1 billion in value and that the median endowment size is \$128 million).

Foundations such as the University of New Mexico’s hold themselves out to the public as being part of the host institution – they solicit donations “for” the university, not “for a nonprofit corporation that may decide to spend it to benefit the university” – and they operate functionally as an extension of their institutions, enjoying special preferred status (such as the use of university marks and logos) that would not be afforded to other corporate entities.

Raising money to sustain the operations of a university is a core governmental function. It is increasingly accepted that attracting grants and donations is the single most important and time-consuming job of the university president. *See* Melissa Ezarik, “The President's Role in Fundraising,” *University Business*, April 27, 2012 (quoting estimates that university presidents can spend as much as 70 percent of their time on fundraising). A 2013 survey of 142 public university presidents found that, by their own estimate, they spent an average of 6.7 workdays per month on fundraising and 3.85 workdays per month traveling for fundraising. *See* Robert L. Jackson, “The Prioritization of and Time Spent on Fundraising Duties by Public Comprehensive University Presidents,” *Int’l J. of Leadership & Change*, Vol. 1: Iss. 1, Art. 9 (May 2013). It is not possible to transform the character of this core governmental function into a private function simply by tasking it off to a nonprofit entity of the agency’s own creation. This is an “open government shell game” in which the Court should not participate.

Some of the most pressing and high-profile issues in American public life today involve higher-education institutions. Sexual assault on college campuses is a high-priority national concern that has attracted White House-level attention. Juliet Eilperin, “Biden and Obama rewrite the rulebook on college sexual assaults,” *The Washington Post*, July 3, 2016. Fraternities across the country are under criminal investigation, and their members facing prosecution, for the deaths of student pledges. Karl Etters, “Nine face hazing charges in death of Florida State pledge,” *USA Today*, Jan. 16, 2018; Matthew Haag, “10 Additional Penn State Students Charged in Hazing Death of Pledge,” *The New York Times*, Nov. 13, 2017. If the Court decides that a university may “spin off” a core institutional function and evade public accountability merely by creating a private shell corporation, there is nothing to stop the University of New Mexico or any public university from incorporating Campus Policing, Inc., or Campus Fraternity Oversight, Inc., and throwing a cloak of secrecy over governmental activities. This cannot be the law.

Because there is not genuinely any separation between foundations and their host universities, ethically dubious behavior at a foundation often ensnares the host institution as well. Using public records that are accessible under Michigan’s equivalent to IPRA, the *Detroit Free-Press* recently reported on what gives the appearance of a “pay to play” system at the University of Michigan’s \$11 billion endowment fund, where the foundation has placed billions with money management firms run by executives who have made large donations to the university or served on the foundation’s board. See Matthew Dolan & David Jesse, “University of Michigan pours billions into funds run by contributors’ firms,” *Detroit Free Press*, Feb. 1, 2018. The disclosures prompted an outcry from student leaders across the campus, who signed a joint statement declaring that the foundation’s investment practices “eroded our trust” in the university. See Matthew Dolan & David Jesse, “University of Michigan students: Be more transparent about

endowment investments,” *Detroit Free Press*, Feb. 15, 2018. Thus, if citizens are to be assured that universities operate in an honest and above-board manner, they need access not just to the universities’ public records but to their foundations’ records as well.

In an illustrative case, journalists from the *Pocono Record* were forced to file suit against Pennsylvania’s East Stroudsburg University Foundation to obtain access to records comparable to those sought here, in their attempt to inform the public about a scandal that resulted in the ouster of the foundation’s chief fundraiser, Isaac Sanders. *East Stroudsburg University Foundation v. Office of Open Records*, 995 A. 2d 496 (Pa. Commw. 2010). After winning that legal challenge, the journalists used foundation records to expose irregularities in the way the university doled out scholarship money, and raised questions about whether the former director misused foundation money to cultivate inappropriate personal relationships with students, over which he and the university were later sued. See Dan Berrett, “ESU Foundation records may hold clues to Sanders scandal,” *Pocono Record*, June 30, 2013.

The East Stroudsburg story is illustrative for a different reason as well: Once the journalists obtained access to the foundation’s records, they learned that the university itself was on the hook to guarantee a \$15 million loan that the state advanced to the foundation to cover the ballooning costs of a science building toward which the foundation was raising money. See *id.* They also learned that the state of Pennsylvania may have been misled into extending that loan by deceptive assurances given by the foundation and the university about their fundraising capability. See *id.* In other words, the interests of the taxpayers were directly at stake because of the special quasi-governmental status that university foundations enjoy, enabling them to take advantage of state financing benefits, and the public’s interests could be protected only by making the foundation’s records accessible. As reporter Dan Berrett explained in detailing the

history of the scandal: “When people refuse to speak out, public records often become the only way to expose the truth. In the ongoing case of Isaac Sanders, many people have declined to speak publicly. Public documents have proven to be a lifeline in our efforts(.)” *Id.*

While East Stroudsburg provides an unusually vivid illustration of the effective public oversight that is possible only with access to foundation records, other examples abound. A student editor at Texas A&M University won a national investigative-reporting award by analyzing records of his university’s endowment investments to show how frequently the university invested donors’ money in companies implicated in human-rights abuses in the developing world. *See* Spencer Davis, “The bottom line first: Without a social policy, A&M is invested in companies of unclear character,” *The Battalion*, Nov. 12, 2015; University of Georgia news release, *Investigative series examining Texas A&M’s investments wins 2016 Holland Award*, July 26, 2016, *available at* <http://grady.uga.edu/investigative-series-examining-texas-ams-investments-wins-2016-holland-award/>. In California, reporting by the *Santa Rosa Press Democrat* prompted an investigation by the state Attorney General into the Sonoma State University Foundation, after a series of stories disclosed that the SSU Foundation made unorthodox personal loans to clients of a foundation board member, and loaned the board member himself \$1.25 million, which he was unable to fully repay. Nathan Halverson, “Attorney General auditing SSU loans to Carinalli,” *Santa Rosa Press-Democrat*, July 29, 2009.

As these stories exemplify, the operations of foundations are so intertwined with those of the universities they serve that it is not possible for the public to effectively evaluate the performance of the university and its administrators without knowing what is being done on the other side of the curtain where the money is raised.

CONCLUSION

For the foregoing reasons, Plaintiff Libit's motion for summary judgment should be granted and the Court should order disclosure of the records requested pursuant to IPRA.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By: /s/ Gregory P. Williams
Charles R. Peifer
Gregory P. Williams
Post Office Box 25245
Albuquerque, NM 87125-5245
Tel: 505-247-4800
Email: cpeifer@peiferlaw.com
gwilliams@peiferlaw.com

We hereby certify that on the * day of * the foregoing was filed and served electronically and emailed to counsel as more specifically set forth below:

David H. Urias
Nicholas T. Hart
Freedman, Boyd, Hollander, Goldberg,
Urias & Ward, P.A.
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
Email: dhu@fbdlaw.com
NickH@fbdlaw.com
Attorneys for Plaintiff

Randy S. Bartell
Randi N. Valverde
Montgomery & Andrews, PA
Post Office Box 2307
Santa Fe, NM 87504
Email: rbartell@montand.com
rvalverde@montand.com
Attorneys for The University of New Mexico Foundation, Inc.

Kimberly Bell
Senior Deputy University Counsel
Office of University Counsel
1 University of New Mexico
MSC05 3440
Albuquerque, NM 87131-0001
Email: KiBell@salud.unm.edu
Attorneys for the Board of Regents of the University of New Mexico

PEIFER, HANSON & MULLINS, P.A.

By: /s/ Gregory P. Williams
Gregory P. Williams