

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

DANIEL LIBIT,

Plaintiff,

v.

No. D-202-CV-2017-01620

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

Defendants.

**ANSWER TO COMPLAINT UNDER THE NEW MEXICO
INSPECTION OF PUBLIC RECORDS ACT OF DEFENDANT
THE UNIVERSITY OF NEW MEXICO FOUNDATION, INC.**

For its answer to the complaint Defendant The University of New Mexico Foundation, Inc. (“Foundation”):

1. Admits that the Inspection of Public Records Act (“IPRA”) includes the language quoted in the first unnumbered paragraph and that the Foundation is an I.R.C. § 501(C)(3) nonprofit corporation but denies the remaining allegations of the first unnumbered paragraph.
2. Admits that the Foundation declined to provide Plaintiff with certain documents that he has requested because the Foundation is not a public body and does not maintain public records but denies the remaining allegations of the second unnumbered paragraph.
3. Is without sufficient information to form a belief as to the truth of the allegations of paragraph 1 and on that basis denies them.

4. Denies that the Foundation was established by the Board of Regents of the University of New Mexico, plays a public role or is a public body which creates and maintains public records subject to IPRA but admits the remaining allegations of paragraph 2.

5. Denies that the Board of Regents established or controls the Foundation but admits the remaining allegations of paragraph 3.

6. Admits the allegations of paragraphs 4-5.

7. Denies that the Foundation was established by the Board of Regents of the University of New Mexico in 1979 or that it began operations in 1980 but admits the remaining allegations of paragraph 6.

8. Denies that the Foundation is a creature of the University and is substantially controlled by the University but admits the remaining allegations of paragraph 7.

9. Denies that the President of the University plays a leading role in the administration of the Foundation or that the President of the Foundation reports to the President of the University, but admits that the quoted language in paragraph 8 appears in the Restated and Amended Memorandum of Agreement Between the Regents of the University of New Mexico and The University of New Mexico Foundation, Inc. attached to the complaint as Exhibit A (“MOA”), and affirmatively states that the President of the Foundation reports directly to the Executive Committee of the Foundation’s Board of Trustees.

10. Denies that the management of the University’s endowment funds is a government function and denies that the Foundation makes recommendations to the Board of Regents regarding management of the endowment, but admits the remaining allegations of paragraph 9.

11. Admits that the Foundation maintains records of gifts and donations to the University and certain affiliated organizations but denies the remaining allegations of paragraph 10.

12. Denies the allegations of paragraph 11.

13. Denies that the University and the Foundation share the same logo, but admits the remaining allegations of paragraph 12.

14. Admits that the KPMG auditor's report attached as Exhibit C to the complaint includes the quoted language and that the Foundation submits reports to the University on the Foundation's fund-raising activities and investment activities but denies the remaining allegations of paragraph 13, and affirmatively states that the KPMG Auditor's report attached to the complaint as Exhibit C was ordered by the UNM Foundation's Audit Committee, and paid for by the Foundation, and not by the University or the State Auditor.

15. Admits that five members of the Foundation's 84-person staff are employed by the University but denies the allegation of paragraph 14 that this arrangement is a benefit to the Foundation and affirmatively states that the Foundation reimburses the University for the salaries paid to these employees.

16. Admits that the statements quoted in paragraph 15 appear in the MOA and in the Financial Statements attached to the complaint as Exhibit D, but denies the remaining allegations of paragraph 15.

17. Admits that the Foundation is not subject to IPRA and that the quoted language in paragraph 16 appears in a 2015 Columbia Journalism Review article attached to the complaint as Exhibit E, and that similar language once appeared on the UNM Foundation's web site, but denies the remaining allegations of paragraph 16.

18. Denies the allegations of paragraph 17.
19. Denies the allegation that the University, including the Athletics Department, directs the Foundation's fund raising activities, denies that the authority conferred by paragraph 5.1 of the MOA is specifically carried out by the Athletics Department but admits the remaining allegations of paragraph 18 and affirmatively states that ¶ 5.1 of the MOA speaks for itself.
20. Admits that the five identified individuals are included on the Department's "Staff Directory" as shown on the website for the Athletics Department, but denies the remaining allegations of paragraph 19.
21. Denies the allegations of paragraph 20.
22. Admits the allegations of paragraph 21.
23. Denies that the terms of the naming rights agreement were negotiated by the Foundation or by Sandra Liggett, denies that the naming rights agreement was negotiated with input by Robert Frank or Amy Wohlert, but admits the remaining allegations in paragraph 22.
24. Admits the allegations of paragraphs 23-25.
25. Admits that the naming agreement was released by the Foundation on the day that the naming agreement was announced but denies the remaining allegations of paragraph 26.
26. Admits that it was reported that in May of 2016 WisePies might potentially be sold to an out-of-state buyer, is without sufficient information to form a belief as to the truth of the allegation that WisePies Pizza & Salad became financially distressed in 2016 and on that basis denies those allegations, and denies the remaining allegations of paragraph 27.
27. Is without sufficient information to form a belief as to the truth of the allegations of paragraph 28 and on that basis denies them.
28. Denies the allegations of paragraph 29.

29. Admits that the Foundation rejected Plaintiff's document requests because it is not a public body as defined by IPRA but denies the remaining allegations of paragraph 30.

30. Admits the allegations of paragraphs 31-32.

31. Denies that Plaintiff's November 14, 2016 request conformed to the statutory requirements for an IPRA request but admits that the Foundation received the document attached to the Complaint as Exhibit O and admits the remaining allegations of paragraph 33.

32. Denies that IPRA requires the Foundation to have a custodian of public records, as the Foundation is not a public body subject to IPRA, but admits the remaining allegations of paragraph 34.

33. Admits the allegations of paragraphs 35-40.

34. Incorporates by reference the responses to paragraphs 1-40 in response to the allegations of paragraph 41.

35. Denies the allegations of paragraph 42.

36. Admits that the Foundation is not a public body for purposes of NMSA 1978, § 14-2-6(F) but denies the remaining allegations of paragraph 43.

37. Denies the allegations of paragraph 44.

38. Denies that the Foundation is required to have a custodian of public records by NMSA 1978 S 14-2-7, but admits the remaining allegations of paragraph 45.

39. Denies the allegations of paragraphs 46-48.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Foundation is not required to comply with the Inspection of Public Records Act because it is not a “public body” as that term is defined by the Act.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to satisfy the substantive and procedural requirements for a writ of mandamus sufficient to invoke the subject matter jurisdiction of the Court.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to allege sufficient facts to establish that he will suffer irreparable harm if the Court does not enjoin the Foundation to produce the requested documents.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff’s complaint is moot, in whole or in part, because the Foundation has publicly released documents which satisfy Plaintiff’s requests.

SIXTH AFFIRMATIVE DEFENSE

The relief sought by Plaintiff would require disclosure of personal and confidential information in violation of the privacy rights of third parties not named in this action.

SEVENTH AFFIRMATIVE DEFENSE

The complaint fails to name parties who are indispensable to the just determination of this matter.

EIGTH AFFIRMATIVE DEFENSE

The documents which Plaintiff seeks to make public records include trade secrets and other confidential commercial information which are protected by NMSA 1978, § 14-2-1(A)(6).

NINTH AFFIRMATIVE DEFENSE

The documents which Plaintiff seeks to make public records include attorney-client privileged information which is protected by NMSA 1978, § 14-2-1(A)(6).

TENTH AFFIRMATIVE DEFENSE

With the sole exception of the Foundation's annual audit, the Foundation's status as a private, independent, nonprofit corporation which is exempt from IPRA is preserved by operation of NMSA 1978, § 6-5A-1(D).

ELEVENTH AFFIRMATIVE DEFENSE

The records sought by Plaintiff are not public records because they were not created pursuant to a legal mandate by a public officer, employee or agent and because they do not relate to public business.

TWELFTH AFFIRMATIVE DEFENSE

Disclosure of the records sought by Plaintiff would violate the First Amendment rights of non-party donors to remain anonymous.

THIRTEENTH AFFIRMATIVE DEFENSE

Disclosure of the records sought by Plaintiff would violate the free speech and free association rights of non-party donors guaranteed by the United States Constitution and the New Mexico Constitution.

WHEREFORE the Foundation demands that Plaintiff's claims be dismissed with prejudice and requests that the Court award the Foundation its attorney's fees and costs and such other and further relief as the Court deems proper.

Respectfully Submitted,

MONTGOMERY & ANDREWS, P.A.

By: /s/ Randy S. Bartell

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, a true and correct copy of the foregoing pleading was served on the following counsel of record via the Court's Electronic Filing System in accordance with NMRA Rule 1-005.2:

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