

The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Alan N. Cote
Supervisor of Records

February 13, 2008
SPR07/310

Ms. Janet Moulding
Director
Forbes Library
20 West Street
Northampton, MA 01060

Dear Ms. Moulding:

This office has received a petition from Mr. Daniel J. Crowley appealing the response of the Forbes Library Board of Trustees (Board) to his November 1, 2007 public records request. See G. L. c. 66, § 10(b) (2006 ed.) (Supervisor of Records has authority to resolve public records appeals); see also 950 C.M.R. 32.08(2) (appeal process). Specifically, Mr. Crowley requested a copy of the Board's March 13, 2007 executive session minutes.

"Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26) (2006 ed.). The statutory exemptions are strictly and narrowly construed. Globe Newspaper Co. v. Dist. Att'y for the Middle Dist., 439 Mass. 374, 380 (2003); Att'y Gen. v. Ass't Comm'r of the Real Prop. Dep't of Boston, 380 Mass. 623, 625 (1980).

In a November 21, 2007 letter, you stated that the Board is not subject to the Open Meeting Law and therefore is not required to respond to such requests. You cited a letter from the Northwestern District Attorney's Office (D.A.'s Office) determining that the characteristics of the Board render it outside the jurisdiction of the Open Meeting Law. While the D.A.'s Office found the Board not to be a governmental body subject to the Open Meeting Law, this office uses a test distinct from the test used by the D.A.'s Office to determine if an entity is subject to the Public Records Law.

To address your claim that the Board is not required to respond to a public records request, this office must analyze the structure and character of the Board by utilizing a five (5) prong test first promulgated by the Supreme Judicial Court of Massachusetts (Court) in Massachusetts Bay Transp. Auth. Retirement Bd. v. State Ethics Comm'n, 414 Mass. 582 (1993) (Board I); see also Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd., 416 Mass. 1007 (1993) (Board II).

The test consists of the following prongs:

- 1) the means by which the entity was created;
- 2) whether or not the entity performs an essentially governmental function;
- 3) whether or not the entity receives or expends public funds;
- 4) the involvement of private interests; and
- 5) the extent of control and supervision exercised by governmental officials, agencies or authorities.

The prongs are cumulative and no one factor is dispositive. Board I at 587. There exists a balancing of the factors in order to determine the status of the entity. Board I at 589.

Creation of the Entity

The first factor to be considered is the means by which the Board was created. The fact that an arm of the government created the entity does not necessarily render it a governmental entity. See Board I at 589-90. Instead, this prong of the inquiry hinges upon the existence of some "legislative underpinning" for the entity in question. Id. at 589. In order to satisfy this first prong, an entity must have been created by the direct result of some legislative or administrative act. See id. at 589-90.

Forbes Library (Library) opened in 1894 as a result of a bequest in the will of Judge Charles E. Forbes. According to the Library's Long Range Plan, drafted in September of 2006, Judge Forbes wished to build a public library for the citizens of Northampton.

As the Library was established through a private individual's will, there is no legislative underpinning for the entity. Therefore, this prong of the test weighs in favor of the Library's status as a private entity.

Governmental Function

The second prong concerns the issue of whether the Library performs some "essentially governmental function." Board I at 590. The Library's purpose, according to its Long Range Plan, is to provide a wide range of information and materials to all of the people of Northampton.

Essential governmental functions are limited to those that have "traditionally [been] the exclusive prerogative of the state." West v. Atkins, 47 U.S. 42, 47 (1974). The United States Supreme Court has found "state action" to exist in cases where private entities are performing functions that have traditionally been the exclusive prerogative of the state. For example, the Supreme Court has found state action to exist where private entities have regulated state primary elections, operated company towns, and maintained detention facilities, but it has not found state

action to exist where private entities have provided education for maladjusted students, managed nursing homes, and operated electrical utilities. Compare, Nixon v. Condon, 286 U.S. 73 (1932) (election), Marsh v. Alabama, 326 U.S. 461 (1946) (company town), West v. Atkins, 47 U.S. 42 (1988) (detention facility), with Rindell-Baker v. Kohn, 457 U.S. 842 (1982) (school for maladjusted students), Blum v. Yaretsky, 457 U.S. 991 (1982) (nursing home), Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (utility).

Although one of the most important functions of the government is educating its citizenry, historically, education has not been the exclusive prerogative of the state. Rindell-Baker v. Kohn, 457 U.S. 842 (1982). While libraries serve a fundamental purpose in educating the community, running a library is not an essential governmental function. Accordingly, this prong favors the Library's status as a private entity.

Receipt and Expenditure of Public Funds

The third factor examines whether the entity receives or expends public funds. According to the Library's Long Range Plan, the Library depends upon the City of Northampton (City) for its operating budget and to maintain the building. Endowment funds and library fundraising supply the Library's materials budget. The current City budget provides approximately \$1 million for the Library's operations for fiscal year 2008. The Library also has received grants from the Massachusetts Board of Library Commissioners (MBLC) through the Massachusetts Public Library Construction Program.

The mere fact that the Library receives money from a public source does not automatically render the entity a public instrumentality subject to the Public Records Law. The receipt of substantial funding from a governmental agency does not necessarily indicate that the entity is a public instrumentality. Board I at 590. The analysis must focus on the use of the public funds received while taking into consideration the private interests involved. Board I at 591.

The public funds made available to the Library, by way of MBLC grants, are earmarked for specific use. The funds received from MBLC are to be used for Library renovations. The Board has no authority to expend the funds otherwise. Nor are there any private individuals who have a meaningful ownership interest in these public funds. Additionally, the Board does not determine the amount of funding received from MBLC.

Given that the Library's entire operating budget comes from public funds, the Library receives and expends governmental grants, and there are no private interests involved in the public funds, this prong favors the Library's status as a public entity for the purposes of the Public Records Law.

Ms. Janet Moulding
Page Four
February 13, 2008

SPR07/310

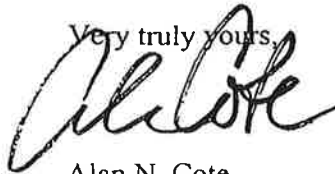
Private Party Involvement, Control and Supervision

The final prong of the inquiry examine the extent of involvement, control and supervision exercised by governmental officials, agencies, or authorities. The Board, and not the Commonwealth, exercises direct control over the Library. The Library is governed by an elected board of trustees, as stipulated in the will of Charles E. Forbes. Trustees serve in a volunteer capacity. They are elected for a four-year term beginning the first Monday in January after the November municipal election, and may be re-elected. While the citizens of Northampton elect the Board, the Board is not controlled in the traditional sense by any outside body. Therefore, the final prong weigh in favor of the Library's status as a private entity.

Conclusion

After carefully weighing all of the above factors, I have determined that the Library and the Board are private entities, not subject to the Public Records Law. There was no legislative underpinning for the entity's creation, as the Library and Board were created by Judge Forbes' bequest. Running a library is not an essentially governmental function, and although the Library receives significant public funding, the Board is ultimately controlled by the private citizen Trustees.

Very truly yours,



Alan N. Cote
Supervisor of Records

cc: Mr. Daniel J. Crowley
Assistant District Attorney Cynthia M. Pepyne