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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001590-MR

UNIVERSITY OF LOUISVILLE
FOUNDATION, INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 01-CI-003349

CAPE PUBLICATIONS, INC.,
d/b/a THE COURIER-JOURNAL APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE. The University of Louisville Foundation, Inc., appeals from the Jefferson Circuit Court's determination that it is a public agency for purposes of Kentucky's Open Records Act, KRS 61.870 et seq., as well as the court's determination that the Act's exemptions do not apply. We agree with the trial

[1] Senior Judge Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court that, for purposes of the Open Records Act, the Foundation is a public agency. However, we hold that whether charitable donations of a corporation or private foundation should be exempt from disclosure is an issue of fact that needs to be determined on a case-by-case basis.

We begin with a brief overview of the University of Louisville Foundation, Inc. (hereinafter, "the Foundation"). The Foundation came into being in 1970, during which time the University of Louisville was joining the state system of higher education, ceasing its previous existence as a municipal university. See 1970 Kentucky Acts, Ch. 65; KRS 164.810(1)(a); Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees, Ky. App., 596 S.W.2d 374, 375 (1979). The Foundation was created by the University of Louisville's Board of Trustees (in anticipation of the University joining the state system), as a private nonprofit corporation, the purpose of which was to create an entity to which properties, trusts and other fiduciary creations held by the University of Louisville could be transferred to insure the application of said property to the University and to receive future properties, grants and other funds. Courier-Journal, 596 S.W.2d at 375. The Kentucky Secretary of State issued to the Foundation an authority to do business in the Commonwealth of Kentucky on May 28, 1970. The bill by which the University

could become a state institution, S.B. 117, became effective July 1, 1970. See 1970 Kentucky Acts, Ch. 65.

The Foundation's by-laws provide that "[t]he Corporation shall conduct and carry on its work, not for profit but, exclusively, for the charitable and educational purposes of the UNIVERSITY OF LOUISVILLE". The Foundation's Board of Directors is comprised of eleven members.[2] Five of the members are the president of the University and four trustees of the University. The remaining six, referred to as "At-Large" directors, are "members of the community who are interested in the mission and welfare of the University of Louisville." The Foundation is recognized per KRS 42.540 as a "nonprofit fiduciary holding funds for the benefit of state organization."[3] As of June 30, 2000, the Foundation held assets valued at approximately $543,016,000.

On April 23, 2001, Keith L. Runyon, the Opinion Editor for the Courier-Journal, made a request of the Foundation,

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[2] At oral argument, the Foundation volunteered that, since the filing of this appeal, the composition of the Board has changed.

[3] KRS 42.540, entitled "Annual reports of nonprofit fiduciary holding funds for benefit of state organization" provides, in pertinent part:

Notwithstanding KRS 41.290, every nonprofit fiduciary holding funds for the benefit of any form of state organization, including, but not limited to, . . . University of Louisville . . . shall make a report according to generally accepted accounting principles of all money received and disbursed during each fiscal year . . . showing receipts, expenditures, depositories, rates of interest paid by depositories, investments, and rates of return in investments to the Office of the Controller. These fiduciaries include, but are not limited to, . . . University of Louisville Foundation, Inc. . . .

pursuant to the Open Records Act, KRS 61.870 et seq., seeking the identities of donors and amounts contributed to the University of Louisville's "McConnell Center". The "McConnell Center" is the "McConnell Center for Political Leadership" which was created with the Foundation through a "Charitable Gift Agreement" between Senator Mitch McConnell, the donor, and the Foundation, the donee, in September of 1998. The agreement contained two parts. The first part created the "McConnell Endowed Chair Fund" with a beginning gift of one million dollars on the express condition "that the Foundation will secure a $1 million matching contribution through funds from the Commonwealth of Kentucky". The second part of the agreement created the "McConnell Political Leadership Fund" with assets "with a present market value in excess of $4.7 million". Both the Chair Fund and the Leadership Fund contained provisions for accepting additional funds from the donor or "other" donors. The Foundation rejected the Courier-Journal's open records request, claiming that it was not a public agency and therefore not subject to the Open Records Act.

On May 15, 2001, the Courier-Journal filed suit in Jefferson Circuit Court pursuant to KRS 61.882. Following discovery, the parties filed cross-motions for summary judgment. The trial court granted the Courier-Journal's motion in part, concluding that the Foundation is a public agency under both KRS

61.870(1)(g) and KRS 61.870(1)(j). The trial court found that a genuine issue of material fact existed concerning whether the Foundation was a public agency under KRS 61.870(1)(h). The trial court further concluded that the personal privacy exemption of the Open Records Act, KRS 61.878(1)(a), is inapplicable to donations by corporations and private foundations. The trial court additionally concluded that the exemption of KRS 61.878(1)(c)1. did not apply as well.

The Foundation filed its notice of appeal on July 24, 2002. On July 30, 2002, the trial court entered an order staying its opinion and order until the completion of the appellate process.

On appeal, the Foundation contends that the trial court erred in declaring it to be a public agency for purposes of the Open Records Act. We first address the Foundation's argument that under the doctrine of issue preclusion, per this Court's holding in Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees, Ky. App., 596 S.W.2d 374 (1979), the Courier-Journal should not have been allowed to relitigate the issue of whether the Foundation is a public agency. The Foundation is incorrect. In Courier-Journal, this Court considered whether the Foundation was a public agency as that term was differently defined pursuant to the Open Meetings Act, KRS 61.805, not as defined under the Open Records Act, KRS

61.870. In 1979, when Courier-Journal was decided, the definition of public agency for purposes of the Open Meetings Act, set forth in KRS 61.805(2), was as follows:

> "Public agency" means any state legislative, executive, administrative or advisory board, commission, committee, policy making board of an institution of education or other state agency which is created by or pursuant to statute or executive order (other than judicial or quasijudicial bodies); any county, city, school district, special purpose district boards, public commissions, councils, offices or other municipal corporation or political subdivision of the state; any committee, ad hoc committee, subcommittee, subagency or advisory body of a public agency which is created by or pursuant to statute, executive order, local ordinance or resolution or other legislative act, including but not limited to planning commissions, library or park boards and other boards, commissions and agencies[.][4]

This Court concluded that the Foundation was not a public agency under KRS 61.805, for the following reasons:

> Although the Foundation may well be an advisory board or policy-making board of an institution of education, it was not created by or pursuant to statute or executive order

[4] By contrast, in 1979, the definition of "public agency" for purposes of the Open Records Act, provided by KRS 61.870, read as follows:

"Public agency" means every state or local officer, state department, division, bureau, board, commission and authority; every legislative board, commission, committee and officer; every county and city governing body, council, school district board, special district board, municipal corporation, court or judicial agency, and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof; and any other body which is created by state or local authority in any branch of government or which derives at least twenty-five (25) percent of its funds from state or local authority.

> but, instead, was created by the Board of Trustees. In [KRS 61.805(2)], in order to constitute a subagency or subcommittee or advisory body of a public agency it must be created, according to the statute, by "statute, executive order, local ordinance or resolution or other legislative act. . . ." Appellants argue that the Foundation was created by resolution of the Board of Trustees but the word "resolution" as used in the statute does not mean such a resolution. It is used in conjunction with the word "ordinance" and the phrase "other legislative act." "Resolution" as used in this statute refers to an action of a municipal legislative body . . . It is not intended to include resolutions of another public agency but refers to local ordinances and resolutions used interchangeably.

Courier-Journal, 596 S.W.2d at 375-376. However, Courier-Journal did not consider whether the Foundation was a public agency, as that term was defined in KRS 61.870, for purposes of the Open Records Act. Additionally, the definition of "public agency" in KRS 61.870 has changed since Courier-Journal was decided in 1979. (We further note the Courier-Journal's contention that the Foundation itself has changed since Courier-Journal was decided in 1979. In particular, the Courier-Journal alleges that the Foundation has amended its articles of incorporation since 1979, as well as the fact that the Foundation now receives state funds under the research challenge trust fund ("Bucks for Brains") pursuant to KRS 164.7911, et seq.) Accordingly, we conclude that the identity of issues

requirement is not met, and therefore the doctrine of issue preclusion is inapplicable. See Moore v. Commonwealth, Ky., 954 S.W.2d 317, 319 (1997).

The Foundation also argues that application of the Open Records Act to the Foundation would be an improper retrospective application of the statute. The trial court found that "[t]he immediate case deals with a prospective application of the Open Records Act. The issue is not whether the Foundation had a duty to provide the desired information prior to the enactment of the statute. The issue is whether the Foundation is now a public agency under the statute." We agree. See Courier-Journal, 596 S.W.2d at 375.

We therefore turn to the Foundation's contention that the trial court erred in finding it to be a public agency under Kentucky's Open Records Act. The Open Records Act, KRS 61.870, et seq., provides for the inspection of records of public agencies. "The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest." KRS 61.871. The Open Records Act focuses on the citizens' right to be informed as to what their government is doing. Zink v. Commonwealth, Ky. App., 902 S.W.2d 825, 829 (1994). "[I]nspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure

provides impetus for an agency steadfastly to pursue the public good." Zink, 902 S.W.2d at 829, quoting Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., Ky., 826 S.W.2d 324, 328 (1992).

In Frankfort Publishing Co., Inc. v. Kentucky State University Foundation, Inc., Ky., 834 S.W.2d 681 (1992), the Kentucky Supreme Court considered whether the Kentucky State University (KSU) Foundation was a public agency for purposes of the Open Records Act. The KSU Foundation, similar to the University of Louisville Foundation, is a nonprofit corporation, "the purpose of which is to receive funds, gifts, grants, devises and bequests and apply them for the benefit of Kentucky State University or its students, faculty, staff or agents." Frankfort Publishing, at 681. (As is the University of Louisville Foundation, the KSU Foundation is also recognized as a nonprofit fiduciary holding funds for the benefit of a state organization, per KRS 42.540.) The KSU Foundation maintained offices on the campus, used the services of university personnel, and its by-laws required its board to be the same as the Board of Regents of the University. See Frankfort Publishing, at 683 (Lambert, J. concurring).

In 1992, when Frankfort Publishing was decided, "public agency" for purposes of the Open Records Act was defined by KRS 61.870(1) as follows:

> "Public agency" means every state or local officer, state department, division, bureau, board, commission and authority; every legislative board, commission, committee and officer; every county and city governing body, council, school district board, special district board, municipal corporation, court or judicial agency, and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof; and any other body which is created by state or local authority in any branch of government or which derives at least twenty-five (25) percent of its funds from state or local authority. (Emphasis added).

The Court of Appeals initially held, based on the placement of punctuation, that the phrase "or agency thereof" modified only the clause immediately preceding it (beginning with "every county and city governing body") and that because the KSU Foundation was not an agency of any of the entities in the preceding clause, it was not covered by the statute. Frankfort Publishing, at 682. The Supreme Court reversed, stating:

> The reasoning used by the Court of Appeals, based on the placement of punctuation, produces a result which is inconsistent with the clear legislative intent. The phrase "or agency thereof," as used in the statute, is an all-encompassing one intended to define as a public agency, any agency of a governmental unit listed prior to the phrase in the entire subsection.
>
> It is erroneous to conclude that the legislature intended by punctuation or arrangement of the language in the statute to exclude from the definition of public

> agency, the agencies or instrumentalities of state departments, divisions, bureaus, legislative boards, commissions, and the governing board of a public university. There is no reasonable basis for excluding from the definition of a public agency the board and its interlocking foundation.
>
> Kentucky Tax Commission v. Sandman, 300 Ky. 426, 189 S.W.2d 407 (1945), noted:
>
> > It is elementary that each section of a legislative act should be read in light of the act as a whole; with a view to making it harmonize, if possible, with the entire act, and with each section and provision thereof, as well as with the expressed legislative intent and policy.
>
> An interpretation of K.R.S. 61.870(1), which does not include the Foundation as a public agency, is clearly inconsistent with the natural and harmonious reading of K.R.S. 61.870 considering the overall purpose of the Kentucky Open Records law. The obvious purpose of the Open Records law is to make available for public inspection, all records in the custody of public agencies by whatever label they have at the moment.
>
> . . . .
>
> Although K.R.S. 61.870(1) may be somewhat inartfully drawn, it is the holding of this Court that the phrase "or agency thereof" is applicable to all units of government listed before it in the same subsection. It is the clear intent of the law to make public the records of all units of government by whatever title for public inspection.

Frankfort Publishing, 834 S.W.2d at 682-683 (emphasis added).

Under Frankfort Publishing, we believe the University of Louisville Foundation would be considered a public agency, as was the similar KSU Foundation. However, subsequent to the Frankfort Publishing decision, the definition of public agency per KRS 61.870 was modified, effective July 14, 1992. KRS 61.870 presently provides as follows:

> (1) "Public agency" means:
>
> (a) Every state or local government officer;
>
> (b) Every state or local government department, division, bureau, board, commission, and authority;
>
> (c) Every state or local legislative board, commission, committee, and officer;
>
> (d) Every county and city governing body, council, school district board, special district board, and municipal corporation;
>
> (e) Every state or local court or judicial agency;
>
> (f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
>
> (g) Any body created by state or local authority in any branch of government;
>
> (h) Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;
>
> (i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g),

(h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

(j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and

(k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection [.]

In the present case, the trial court found the University of Louisville Foundation to be a public agency under KRS 61.870(g) and (j).

KRS 61.870(j) includes as a public agency, any agency which is "established, created, and controlled" by a public agency as defined in the statute. The Foundation was established and created by the members of the Board of Trustees of the University of Louisville, acting in their official capacities. It is undisputed that the University of Louisville is a public agency. The Foundation argues, however, that it was not created by a public agency because it was created before the University of Louisville became a state institution. We first note that a similar argument was advanced by the Foundation and rejected by this Court in Courier-Journal and Louisville Times

Co. v. University of Louisville Board of Trustees, Ky. App., 596 S.W.2d 374 (1979). In Courier-Journal we deemed it of no consequence, in determining the status of the Foundation at that time, whether or not the University of Louisville was a "public agency" at the time the Foundation was created. Rather, we held that we "must look to that definition as it now applies". Id. at 375. Further, while it is true that at the time of the Foundation's creation, the University was not part of the state system, the University was at the time a municipal university. See, 1970 Kentucky Acts, Ch. 65. Even though a municipal university is not a state institution, we believe the University, as a municipal university, was a public agency for purposes of the present Open Records Act. KRS 61.870(1)(f). See Courier-Journal, 596 S.W.2d at 375.

Having concluded the Foundation was "established" and "created" by the University of Louisville, the issue therefore becomes, is the Foundation "controlled" by the University of Louisville? Among the arguments advanced by the Courier-Journal is that the Foundation is controlled by the University because through control of the election of "At-Large" directors, the University has perpetual control of the Foundation. The Foundation counters that the University does not control its actions because the majority of its Board of Directors are "At-

Large" directors, who are not affiliated with the University. In Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46, 51 (2003), our Supreme Court rejected the argument that an entity's ability to "vote in" some of the members of the board of directors of another entity constituted "control" sufficient to establish an agency relationship. The Phelps Court rejected the argument that the Louisville Water Company (LWC) was "controlled" by the City of Louisville (and therefore was an agent of the City) because the mayor appoints four of the six members of the LWC's Board. "This relationship alone, does not make the LWC an agent of the City of Louisville." Id. at 51. Similarly, even if we were to accept the Courier-Journal's argument that the University controlled the election of the At-Large directors, under Phelps this would not amount to "control" of the Foundation.

Phelps also disposes of the Foundation's attempt to distinguish itself from the very similar Kentucky State University Foundation which was held to be a public agency in Frankfort Publishing. The Foundation argues that the trial court ignored the "fundamental structural differences between the University of Louisville Foundation, which has a majority of independent directors, and the KSU Foundation, which had no independent directors." Again, under Phelps, the selection of

the directors in itself does not amount to "control", hence this difference in the composition of the boards of the two foundations does not distinguish Frankfort Publishing from the present case.

However, we agree with the Courier-Journal and the trial court that the University of Louisville does, in fact, control the Foundation. Among its findings, the trial court found "[i]t is undisputed that the University receives money from the state through the 'Bucks for Brains' program under KRS 164.791(1)[sic].[5] It is further undisputed that the University receives its money from this program through its agent, the Foundation. If the Foundation were not the University's agent, it could not legally receive the 'Bucks for Brains' money."

The Courier-Journal seized on this argument on appeal. We agree this is a valid point. KRS 164.7911(1) creates a Strategic Investment and Incentive Funding Program in the Council on Postsecondary Education. Section 2 of this statute provides for funding by the General Assembly to "institutions, systems, agencies, and programs of postsecondary education". KRS 164.001(16) defines a "Postsecondary education system" as including the University of Louisville, but does not mention the Foundation. Therefore, the Foundation and the University are acting as one and the same.

[5] KRS 164.7911.

It is noteworthy, as the Courier-Journal points out, that for purposes of soliciting contributions, the University and the Foundation also act as one and the same. All contributions, whether payable to the Foundation or the University, are turned over to the Foundation. The University web page states the Foundation oversees funds donated to the University. The trial court found that "[t]he University's own financial statements indicate that the Foundation acts as custodian and administrator for the University of funds derived from gifts and other sources, subject to the review and direction of the University." The trial court's finding should be considered with KRS 164.830(1)(d) which defines the powers of the Board of Trustees of the University of Louisville. Those powers include the requirement that the Board of Trustees receive, retain, and administer "on behalf of the university, subject to the conditions attached, all revenues accruing from endowments, appropriations, allotments, grants or bequests, and all types of property." KRS 164.830(1)(d). Again, the Foundation and the University are acting as one and the same.

We opine that the Foundation and the University acting as one and the same amounts to "control". Having concluded the Foundation was established and created, and is controlled, by the University of Louisville, we conclude the trial court

correctly found the Foundation to be a public agency under KRS 61.870(1)(j).

Additionally, a telling argument for holding the Foundation is a public agency is the language of the Supreme Court in Frankfort Publishing, 834 S.W.2d at 682, that "[t]here is no reasonable basis for excluding from the definition of a public agency the board and its interlocking foundation." The Court explained:

> An interpretation of K.R.S. 61.870(1), which does not include the [KSU] Foundation as a public agency, is clearly inconsistent with the natural and harmonious reading of K.R.S. 61.870 considering the overall purpose of the Kentucky Open Records law. The obvious purpose of the Open Records law is to make available for public inspection, all records in the custody of public agencies by whatever label they have at the moment.

Id.

The University of Louisville Foundation is very similar to the KSU Foundation, except for the composition of the Board of Directors. However, under Phelps, this distinction is insignificant. Under the former language of KRS 61.870, the KSU Foundation was determined to be an "agency thereof" of Kentucky State University. This "agency thereof" language was replaced, in part, with the "established, created, and controlled by a public agency" language at issue in the present case. We believe this modification of KRS 61.870 would have no effect on

the holding in Frankfort Publishing. We believe the expressed intent of the Supreme Court would be to hold the University of Louisville Foundation a public agency for purposes of the Open Records Act.

As previously stated, the trial court also found the Foundation to be a public agency under KRS 61.870(1)(g). Having concluded that the Foundation is a public agency under KRS 61.870(1)(j), the issue of whether the Foundation is a public agency under KRS 61.870(1)(g) is rendered moot.

The next issue is whether the trial court erred in holding that, as a matter of law, the privacy exemption in KRS 61.878(1)(a) of the Open Records Act can never apply to charitable donations by corporations and private foundations. KRS 61.872(1) mandates that public records shall be open for inspection "except as otherwise provided by KRS 61.870 to 61.884." KRS 61.878(1)(a) exempts from disclosure, "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The trial court concluded that a plain reading of KRS 61.878(1)(a) indicates the legislature was only interested in protecting the "unwarranted invasion of personal privacy" and therefore neither corporations nor private foundations had an exercisable privacy interest in their charitable donations.

The issue is not that simple. Although KRS 61.871 states that the exceptions shall be strictly construed, and KRS 61.882(3) puts the burden on the agency to prove the exception, there may be an expectation of personal privacy for some corporations or private foundations. This is an issue of fact that needs to be determined on an individual, or case-by-case basis. As our Supreme Court explained in Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co., Ky., 826 S.W.2d 324, 327 (1992), the language of KRS 61.878(1)(a):

> First [] reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny . . . Second, the statute exhibits a general bias favoring disclosure. An agency which would withhold records bears the burden of proving their exempt status. KRS 61.882(3). The Act's "basic policy" is to afford free and open examination of public records, and all exceptions must be strictly construed. [Citation omitted.] Third, given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is "clearly unwarranted" is intrinsically situational,

> and can only be determined within a specific context.

Some gifts may be conditional and disclosure may revoke the gifts. Unless more is known about the individual gifts, we cannot agree with a blanket exclusion of corporations and private foundations from the personal privacy exception to the Open Records Act. Therefore, it will be necessary to remand this part of the judgment to the circuit court for a determination as to each corporation or private foundation that made a gift.

The trial court also considered the exemption of KRS 61.878(1)(c)1.[6] which excludes from inspection "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records".

Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195 (1997), discussed the confidential or proprietary records that are exempt from disclosure. Although the Court recognized the exceptions should be "strictly construed", it went on to add:

[6] The trial court referred to this section as KRS 61.878(c), rather than KRS 61.878(c)1.

> [I]t may be more important to accord protection to some documents than to others, access to some documents may be more meaningful than access to others for those who wish to consider intervening. But if it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure to those who are not parties to the proceeding.

Hughes, 952 S.W.2d at 199. As with the first exception discussed above, KRS 61.878(1)(a), we believe there is an issue of fact which will need to be decided on a case-by-case basis. Therefore, it will be necessary to remand this part of the judgment to the circuit court for a consideration of each corporation or private foundation that made a gift.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed in part (as to its determination that the Foundation is a public agency), reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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