

**Joint Legislative Committee on Performance
Evaluation and Expenditure Review (PEER)**

Report to
the Mississippi Legislature



An Analysis of the Legal Status of University Foundations, their Oversight, and the Authority of the PEER Committee to Review University Foundations

Because all state universities are supported to some extent by foundations or affiliated organizations, PEER conducted this review to determine their legal status and the degree to which they are overseen by other public entities. PEER also analyzed its authority to review university foundations and affiliated organizations should it choose in the future to do so.

University foundations and affiliated organizations such as alumni associations are not-for-profit corporations, not divisions of the universities they serve. The Board of Trustees of Institutions of Higher Learning's policy requires that these organizations contract with the universities and sets out certain requirements to be included in the contracts. Further, these organizations must also provide certain financial audits and reports and operate within generally accepted accounting principles.

No external governmental agency has authority to oversee all operations of foundations and affiliated organizations. However, since 1993, the Board of Trustees of Institutions of Higher Learning has taken positive steps to oversee such organizations so as to safeguard the integrity of the universities in whose names they operate. PEER believes that the board could refine some of its current policies to provide additional assurances and make incremental improvements in the oversight of the foundations and affiliated organizations.

Since these corporations must enter into contracts with the universities they support, the PEER Committee would have the authority to review the parties' performance of contractual terms, just as the Committee could review the performance of any other independent contractor of a state agency.

July 10, 2007

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms with one Senator and one Representative appointed from each of the U. S. Congressional Districts. Committee officers are elected by the membership with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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July 10, 2007

Honorable Haley Barbour, Governor
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On July 10, 2007, the PEER Committee authorized release of the report entitled **An Analysis of the Legal Status of University Foundations, their Oversight, and the Authority of the PEER Committee to Review University Foundations.**

A handwritten signature in cursive script that reads "Harvey Moss".

Representative Harvey Moss, Chair

This report does not recommend increased funding or additional staff.

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An Analysis of the Legal Status of University Foundations, their Oversight, and the Authority of the PEER Committee to Review University Foundations

Executive Summary

Introduction

In recent months, the PEER Committee has received complaints regarding university foundations and their relationship to the universities they support. Questions regarding the propriety of certain transactions, including the transfer of funds between foundations, have arisen, as well as concerns about overlapping board memberships and questionable contracting practices.

Rather than commence a review of selected or all university foundations, the PEER Committee chose to review the current oversight environment for these foundations, including a determination of the various participants in foundation oversight, and further chose to examine the Committee's legal authority to review foundations should the Committee choose to do so at a future date.

In developing this analysis, PEER limited its scope to Mississippi's university foundations, meaning those organizations affiliated with a Mississippi university that provide general support to the university through fundraising, as well as athletic foundations that provide financial support to the university's athletic programs. Not within the scope of this review are the alumni organizations, although much of what is said in this report could be applied to them.

PEER focused on three broad issues:

- What is the relationship between the universities and their foundations?
- What external oversight exists over the foundations (including a discussion of policy alternatives for oversight)? and,
- What is the PEER Committee's authority to conduct a review of university foundations?

The following three sections of this summary correspond to these questions and provide PEER's answers. The final section provides PEER's recommendations.

The Relationship of the Foundations to the Individual Universities and to the Board of Trustees of Institutions of Higher Learning (IHL)

The relationship of foundations to the universities is one of an independent contractor to its principal. The foundations are not-for-profit corporations, not organizational subdivisions of a university. IHL policy requires that foundations contract with universities and sets out certain requirements to be included in the contracts. Further, foundations must also provide certain financial audits and reports and operate within generally accepted accounting principles as required by IHL policy.

External Oversight of University Foundations

No external governmental agency has authority to oversee all foundation operations. The federal Internal Revenue Service has some oversight authority for the university foundations due to their status as tax-exempt organizations. Regarding state oversight, upon request of the Governor or a legislator, the State Auditor may audit a foundation's use of any state funds provided by the university. The PEER Committee also has oversight of university foundations' contractual relationships with the universities.

State law exempts university foundations from the regulations of the Secretary of State's Office regarding charitable fundraising. Foundations kept independent from a university's control would most likely be shielded from public attempts to review records due to the Mississippi Public Records Act's definition of "public body."

While IHL has recently expanded oversight of university foundations while constructively addressing the issue of their integrity and independence, additional oversight measures could improve and enhance public assurance of institutional integrity. The Board of Trustees of Institutions of Higher Learning could refine its current policy to provide additional assurances that the integrity of foundation operations and fundraising is not compromised. PEER believes that the strengths associated with incremental increases in oversight would outweigh the weaknesses.

PEER's Authority to Review Foundations

MISS. CODE ANN. Section 5-3-51 et seq. gives the PEER Committee authority to review multiple types of entities for multiple purposes, the ultimate goal of which is to effect legislative oversight. Specifically, CODE Section 5-3-57 gives PEER authority to review the contracts of agencies and to review public officers' and employees' functions. Thus PEER has broad statutory authority to review university foundations in the future should the Committee see fit.

Upon the request of a legislator or citizen, the PEER Committee could review the operations of a university foundation to determine whether foundations are in compliance with their contracts and IHL policy, as well as to make policy recommendations on the extent to which oversight could be improved.

Recommendations

1. The Board of Trustees of Institutions of Higher Learning should revise its policies regarding oversight of university foundations to require the following:
 - a prohibition against individuals serving as members on both foundations and affiliated organizations' boards of directors;
 - a prohibition against individuals serving on foundation boards that do business with organizations in which the individual has a material financial interest;
 - that IHL staff be authorized to conduct performance or compliance reviews of any contracts between the universities and their affiliated organizations; and,
 - that each institutional executive officer pre-approve any supplemental or additional compensation provided to any IHL or university employee prior to the award of the compensation. Notice of such approvals should be given to the IHL Board of Trustees upon approval.
2. Prior to conducting any compliance review of university foundation operations, the Legislature

should allow IHL a sufficient period to consider the above recommendations and make corresponding changes in policy.

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An Analysis of the Legal Status of University Foundations, their Oversight, and the Authority of the PEER Committee to Review University Foundations

Introduction

In recent months, the PEER Committee has received complaints regarding university foundations and their relationship to the universities they support. Questions regarding the propriety of certain transactions, including the transfer of funds between foundations, have arisen, as well as concerns about overlapping board memberships and questionable contracting practices.

Rather than commence a review of selected or all university foundations, the PEER Committee chose to review the current oversight environment for these foundations, including a determination of the various participants in foundation oversight, and further chose to examine the Committee's legal authority to review foundations should the Committee choose to do so at a future date.

Authority

In preparing this review, the Committee acted in accordance with MISS. CODE ANN. Section 5-3-51 et seq. (1972).

Scope and Purpose

In developing this analysis, PEER limited its scope to Mississippi's university foundations, meaning those organizations affiliated with a Mississippi

university that provide general support to the university through fundraising, as well as athletic foundations that provide financial support to the university's athletic programs. Not within the scope of this review are the alumni organizations, although much of what is said in this report could be applied to them.

PEER focused on three broad issues:

- What is the relationship between the universities and their foundations?
- What external oversight exists over the foundations (including a discussion of policy alternatives for oversight)? and,
- What is the PEER Committee's authority to conduct a review of university foundations?

Method

In conducting this review, PEER reviewed:

- pertinent provisions of the MISSISSIPPI CONSTITUTION and statutes related to the management of universities, the authority of external oversight organizations, and the Mississippi Public Records Act of 1983;
- case law from other jurisdictions regarding open records litigation involving university foundations;
- past and current policies of the Board of Trustees of Institutions of Higher Learning (IHL) regarding oversight of university foundations;
- past PEER reports dealing with university foundations and other support foundations found in state government; and,
- the Mississippi Attorney General's opinions on points of law relative to agency oversight.

The Relationship of the Foundations to the Individual Universities and to the Board of Trustees of Institutions of Higher Learning

This chapter describes the relationship between foundations and the university system in Mississippi and addresses the questions:

- What are foundations? and,
- How are their relationships managed with the universities?

The relationship of foundations to the universities is one of an independent contractor to its principal. The foundations are not-for-profit corporations, not organizational subdivisions of a university. IHL policy requires that foundations contract with universities and sets out certain requirements to be included in the contracts. Further, foundations must also provide certain financial audits and reports and operate within generally accepted accounting principles as required by IHL policy.

Nature of the Foundations

University foundations are not-for-profit corporations and not divisions of the universities.

Most state-supported universities in Mississippi have support foundations, as well as alumni associations, that have been set up as non-profit corporations under the laws of the state of Mississippi, as opposed to being operating divisions or units of a state university. This corporate status provides the foundations with independence from the university's management and control, allowing them to conduct fundraising activities or other activities in support of the university at their discretion.

Their corporate status allows the foundations to conduct fundraising activities or other activities in support of the university at their discretion.

Not-for-profit corporations are organized under the laws of the state of Mississippi. Currently, MISS. CODE ANN. Section 79-11-101 et seq. (1972) establishes procedures for incorporation and sets out the legal duties that are borne by foundations as not-for-profit corporations.

Briefly, these corporations must have a governing board of directors, as do for-profit corporations.

(See MISS. CODE ANN. Section 79-11-231 [1972].) Not-for-profit corporations are non-share corporations, meaning they do not distribute ownership to individuals in the form of shares. While these corporations have no shareholders, they generally have members. Members, as defined in MISS. CODE ANN. Section 79-11-127 (v) (1972), function much like shareholders in that they attend annual meetings and vote on matters placed before them. A critical distinction between not-for-profit corporations and for-profit corporations is the prohibition against making distributions of assets. This means that no dividends may be made to members or others except under limited conditions. (See MISS. CODE ANN. Section 79-11-293 [1972].) This ensures that the assets of the corporation are used entirely to benefit and advance the purposes for which they were created.

Appendix A, page 23, contains a list of the foundations that the Board of Trustees of Institutions of Higher Learning has reported as being affiliated with the state's universities. These foundations carry out a variety of functions, such as general support, athletic support, and alumni activities. While alumni organizations are included in the appendix, this report focuses on foundations that support general and athletic programs of the universities.

The Role of IHL Regarding the Foundations

IHL policy governs the relationship between the universities and their foundations.

Current IHL policy mandates that a contractual relationship be entered into by each university and its supporting foundations.

As noted above, the foundations perform functions for the benefit of the universities, principally in the form of fundraising for university programs and activities. The relationship between the foundations and the Board of Trustees of Institutions of Higher Learning and the individual institutions is governed by IHL policy. This policy details the role of foundations, outlines in brief the responsibilities each has toward the other, and mandates that a contractual relationship be entered into by each university and its supporting foundations. Any discussion of the relationship between universities and their foundations must begin with IHL, the body charged with the responsibility to manage and control the state's universities.

Section 213-A, MISSISSIPPI CONSTITUTION OF 1890, establishes the authority of the Board of Trustees of Institutions of Higher Learning over the state's colleges and universities. This section names the universities and states that these:

. . .and any others which may be organized or established by The State of Mississippi, shall be under the management and control of a board of trustees to be known as the Board of Trustees of State Institutions of Higher Learning. . . .

In furtherance of authority to manage and control the universities, IHL has adopted policies that define the relationships between the universities and their foundations. This process of definition began in September 1993 when IHL adopted its first policy respecting university foundations, Policy 301.0807. Briefly, this policy provided that the individual institutions should:

- provide IHL with audited annual financial statements for the foundations;
- provide IHL with foundation operating budgets;
- provide access to foundation records for IHL internal audit staff to review records of the foundations; and,
- encourage continuing communications between the foundations, the board, and the executive officer of each institution.

Minor changes in policy occurred in 1998, with the next significant changes occurring in 2005. Board Policy 301.0806 extensively revised the board's policy regarding institutional relations with foundations. The 2005 amendments, in general, required that financial statements be prepared in accordance with generally accepted accounting principles and be submitted to the universities to enable them to comply with reporting requirements of the Governmental Accounting Standards Board (GASB).

Of major importance to the management of relations with the foundations are the following provisions added in 2005:

The board's current policy advances the idea that foundations must be independent, yet the university system requires that they act in such a manner as to ensure the integrity of their operations.

- a requirement that the individual institutions enter into operating agreements with foundations that set out the obligations of both the institutions and the foundations;
- a provision stating that IHL has responsibility under Section 213-A of the MISSISSIPPI CONSTITUTION for managing the institutions and that this authority extends control over its agents and agencies in their relationships with foundations; and,
- a requirement for submission of annual reports to IHL showing supplemental personnel compensation submitted to the university.

Major changes also occurred in August 2006, including:

- a requirement that operating agreements be approved by IHL; and,
- extension of the policies to cover other affiliated organizations and athletic foundations.

Of equal importance is the general statement regarding the need to engender and maintain public confidence in the university foundations. On this point, the current policy states:

The Board of Trustees recognizes it cannot and should not have direct control over institutionally affiliated foundations/entities. These foundations/affiliated entities must be governed separately to protect their private, independent status. However, because the Board of Trustees is responsible for ensuring the integrity and reputation of the university system and its institutions and programs, it must be assured that any affiliated entity/foundation will adhere to ethical standards appropriate to such organizations in order to assure the public that it is conducting its mission with honesty and integrity.

Thus board policy respects and advances the idea that foundations must be independent, yet the

university system requires that they act in such a manner as to ensure the integrity of their operations. (See Appendix B, page 24, for a copy of IHL's Policy 301.0806 on university foundation/affiliated entity activities.)

Individual Universities' Oversight Responsibilities for the Foundations

Universities enter into contracts with foundations that establish the duties and responsibilities of the parties.

While IHL is the management and control instrument for the state-supported institutions of higher learning, it has delegated responsibility to each university to enter into operating agreements with affiliated organizations, including foundations. Board Policy 301.0806 specifically requires that the contracts between institutions and foundations address at minimum, the following:

Each institution of The Mississippi State Institutions of Higher Learning and their development foundations, research foundations, athletic foundations, alumni associations and any other similar affiliated entities shall enter into a public, written operating agreement that outlines the relationship between the two entities. This agreement shall be reviewed for approval by the Board of Trustees at least every five (5) years, or whenever the operating agreement is changed, and include:

- The services and benefits the institution and affiliated entity provide each other and any payments made, including whether institutional assets are managed by the affiliated entity;*
- How gifts, grants, and endowments are accepted and accounted for;*
- That gifts made to an institution of The Mississippi State Institutions of Higher Learning be accounted for and ownership maintained by that institution;*

- *That gifts made to an institutionally affiliated entity be accounted for and ownership maintained by that entity;*
- *That the affiliated entity has a conflict-of-interest policy;*
- *That no form of additional compensation for an Institutional Executive Officer will be underwritten or increased by an affiliated foundation/entity without prior approval of the Board of Trustees of State Institutions of Higher Learning. The request for approval shall come through the Commissioner to the IHL Board;*
- *That institutional input will be sought from the Institutional Executive Officer before defining the major needs and priorities for foundation/affiliated entity consideration; and*
- *That other requirements stated or implied by this policy have been followed.*

Contracts between foundations and universities also include provisions authorizing the universities to provide support for the foundation, including staffing and office space.

Additionally, contracts between foundations and universities also include provisions authorizing or, in some cases, requiring the universities to provide support for the foundation, including staffing and office space. In some cases, an employee of the university acts as the chief executive officer of the foundation.

External Oversight of University Foundations

No agency of government has day-to-day responsibility for overseeing Mississippi's university foundations. Although the foundations are not entirely bereft of oversight from public or private entities, the Legislature may wish to consider whether additional oversight is needed. This chapter addresses the questions:

- What forms of external oversight exist for university foundations outside of the Board of Trustees of Institutions of Higher Learning and the university environment?
- What are options for increasing oversight of university foundations?

Although the Internal Revenue Service, the State Auditor, and the PEER Committee may exercise oversight of university foundations (i.e., for certain aspects of operations or in certain circumstances), no external governmental agency has authority to oversee all foundation operations. While IHL has recently expanded its oversight of university foundations, the Legislature may wish to institute additional oversight measures to improve and enhance public assurance of institutional integrity.

Limited External Oversight Currently in Place

Federal Oversight

The Internal Revenue Service has some oversight authority for the university foundations due to their status as tax-exempt organizations.

Form 990s, which show the sources and uses of funds of tax-exempt organizations, must be kept on hand at the organization's place of business for review by any person.

For any organization such as a university foundation to be tax-exempt, it must meet criteria found in Internal Revenue Code Section 501 (c). Most educational support foundations will be 501 (c) (3) organizations. Any such organization faces potential oversight and review from the Internal Revenue Service to ensure that the organization is operating within permissible bounds for a tax-exempt organization.

Additionally, tax-exempt organizations must complete an IRS Form 990 that lists sources and

uses of funds. Form 990s are public documents that must be kept on hand at the organization's place of business for review by any person. Such review constitutes a form of oversight.

State Oversight

State Auditor Has Oversight Authority In Some Cases

Upon request of the Governor or a legislator, the State Auditor may audit a foundation's use of any state funds provided by the university. (PEER also has oversight of university foundations' contractual relationships with the universities; see following chapter.)

The State Auditor has authority to review foundations under certain circumstances. MISS. CODE ANN. Section 7-7-211 (m) (1972) provides the following:

Upon written request by the Governor or any member of the State Legislature, the State Auditor may audit any state funds and/or state and federal funds received by any nonprofit corporation incorporated under the laws of this state.

The State Auditor's oversight would be limited to an audit of a foundation's use of funds provided to it by the university and not funds provided by private donors.

As noted above, foundations often receive support and assistance in the form of financial or other assets from the universities they serve. The use of public funds and assets by a foundation would be sufficient to bring foundations within the scope of this provision. It should be noted that such oversight would be limited to an audit of the foundation's use of funds provided to it by the university and not funds provided by private donors.

Additionally, the PEER Committee could exercise oversight authority over the foundations in response to a quorum vote of the committee because of the contractual relationship between the universities and the foundations. This matter is more fully discussed beginning on page 17 of this report.

Charitable Fundraising Regulations Do Not Apply

State law exempts university foundations from regulations of the Secretary of State's Office regarding charitable fundraising.

Most charitable fundraising activities within the state of Mississippi are subject to regulations of the Mississippi Secretary of State's Office. However, university foundations, although active fundraisers, are exempt from charitable fundraising regulations. MISS. CODE ANN. Section 79-11-505 (1972) provides:

(1) The provisions of Sections 79-11-501 through 79-11-529 shall not apply to the following organizations:

(a) All educational institutions that are recognized by the State Board of Education or that are accredited by a regional accrediting association or by an organization affiliated with the National Commission on Accrediting, any foundation having an established identity with any of the aforementioned educational institutions, any other educational institution which makes the solicitation of contributions solely by its student body, alumni, faculty and trustees and their families or a library established under the laws of this state.

Under the terms of this section, charitable solicitation by foundations affiliated with a university is exempt from oversight.

Foundations kept independent from a university's control would most likely be shielded from public attempts to review records due to the Mississippi Public Records Act's definition of "public body."

In many states, citizens' concern over foundation activities has spawned litigation on the part of individuals or the press to obtain financial and operating records of foundations. All arguments, both successful and unsuccessful, have been based on arguments derived from each state's public records law.

At the time of PEER's 1993 report on university foundations, IHL had no formal policy in place to oversee the foundations through any means.

Under those conditions, public oversight through review of records might have been the only way to bring about accountability for foundation activity. In that report, the PEER Committee theorized that foundations might be public bodies for purposes of the Public Records Act because of the support they provide to the universities, shared staffing, use of public funds, fundraising activity, and use of public office space. To solidify the state's position, PEER recommended that the Legislature amend the MISSISSIPPI CODE to include the records of nonprofit organizations such as university foundations within the definition of public records.

In view of increased oversight by IHL since 1993, it might not now be necessary to consider the step of making the records of a private not-for-profit organization available for public inspection.

In view of increased oversight by IHL since 1993 (see discussion on page 5), it might not now be necessary to consider the step of making the records of a private not-for-profit organization available for public inspection. Additionally, after reviewing Mississippi's Public Records Act provisions to determine what approach our courts would take in a suit dealing with a petition for release of foundation records, PEER believes that foundations kept independent from an institution of higher learning's control would most likely be shielded from public attempts to review records due to the act's definition of "public body." For a detailed legal analysis of public records acts in general and case law from other jurisdictions regarding public and citizen oversight of university foundations, see Appendix C, page 28.

Policy Considerations for Increasing Oversight

While IHL has recently expanded oversight of university foundations while constructively addressing the issue of their integrity and independence, additional oversight measures could improve and enhance public assurance of institutional integrity.

PEER's 1993 report *A Management Review of the Institutions of Higher Learning: Commissioner's Office, University Foundations, and Athletic Programs* concluded the following regarding IHL's oversight of university foundations:

The Board of Trustees of the Institutions of Higher Learning fails to manage and control the activities of university officials with regard to university foundations.

In addition, the Committee found:

The IHL Board of Trustees' failure to control university foundations results in a lack of accountability for fundraising activity.

The report included several recommendations to IHL regarding increasing the oversight of the university foundations (see Appendix D, page 37, for a copy of PEER's 1993 recommendations regarding university foundations.)

Since 1993, the steps IHL has taken to provide oversight over the university-affiliated foundations have been extensive and noteworthy.

Since PEER's 1993 report, the Board of Trustees of Institutions of Higher Learning has taken steps to ensure that university foundations are subject to oversight through several mandates in policy, including a requirement that all affiliated foundations enter into contracts with the universities. The policy has evolved to require extensive oversight of foundations and affiliated organizations.

The steps IHL has taken to provide oversight over the university-affiliated foundations have been extensive and noteworthy. PEER notes, however, that concerns that have given rise to this report could be addressed in IHL policy to further enhance confidence of alumni and the public in general.

The Board of Trustees of Institutions of Higher Learning could refine its current policy to provide additional assurances that the integrity of foundation operations and fundraising is not compromised. PEER believes that the strengths associated with incremental increases in oversight would outweigh the weaknesses.

Additional changes could further enhance IHL's goal of ensuring integrity without impairing the foundations' independence.

IHL's policies seek to advance the goal of ensuring both integrity and independence of the university foundations. PEER notes, however, that a few other changes could further enhance the goal of ensuring integrity without impairing independence. Such changes would include:

- *A requirement that to be in a contractual relationship with a university, a foundation or auxiliary organization may not have members who serve on other foundation boards: Independence of foundations is a laudable goal for IHL and its supporting*

organizations. In some cases the independence of a foundation may be compromised if there are interlocking board memberships on other university-related foundations. The danger of this is that one foundation may be called upon to support the interests of another foundation that ultimately might not be in the best interest of the university. Independence of membership would be a safeguard against such potential problems and protect each individual foundation from the influences of other foundations.

As an example of overlapping memberships, PEER has noted overlap between the membership of the Mississippi State University Foundation and the Bulldog Foundation and the University of Mississippi Athletic Association and the University of Mississippi Foundation.

- *Stronger conflict of interest requirements:* In PEER's 1993 report, a major concern raised was that there was some evidence that foundations did business with entities with which board members had an interest. The report stated:

Foundation boards need the membership of prominent business leaders; however, contracting with businesses in which foundation board members have a significant financial interest does not present an appearance of independence. . . .

While at present, IHL policy requires that each foundation have a conflict of interest policy, the above-described interest might be safeguarded by a strict requirement in IHL policy that no foundation may contract with an entity in which a board member has a material financial interest.

- *IHL's authority to review the performance of contracts between the institutions of higher learning and their affiliated organizations:* Because of the important role that foundations play in the fundraising efforts of universities, this would be beneficial.

- *Institutional executive officer approval of any additional compensation for personnel of the universities, with subsequent notice given to the IHL Board of Trustees:* In the 1993 PEER report, the Committee recommended that the IHL Board pre-approve all supplements and additional compensation for university employees. PEER suggests that allowing the institutional executive officer to approve all supplements, except those provided to him or her, with subsequent notice to the IHL Board, would provide necessary oversight of activities that could have an effect on the fiscal operations of universities and still not impair the independence of the individual foundations.

These suggestions are restated as PEER recommendations on page 22 of this report. All of the suggested additions to policy are consistent with IHL's policy goal of ensuring integrity and honesty in foundation operations.

PEER notes that some might argue that these steps thwart somewhat the independence of the foundations by placing additional operational limitations on them. While it is undoubtedly true that any regulation must strike a balance between protecting the IHL institutional interest in honesty and integrity of operations and foundation independence, it would appear to PEER that none of the above-described measures would impair the foundation's power to govern itself and not be a mere adjunct to the university it supports.

It could be argued that IHL staff access to foundations could have a chilling effect on donors' willingness to give, as access to donor records and possession of these by a public servant could make such documents public records within the meaning of Section 25-61-1 et seq. PEER notes that this could be remedied by:

- promulgation of a policy that prohibits IHL staff who conduct reviews of contracts between the universities and their affiliated organizations from receiving or reviewing any records of the foundation that include the names and amounts of contributions made by foundation donors; or,
- recommending an amendment to CODE Section 25-61-3 to exclude donor records

from the scope of the public records definition.

PEER would suggest that the former is most easily effected and would safeguard the confidentiality of the records.

As noted on page 12, in view of the increased oversight by IHL since 1993, it might not be necessary to consider the step of making the records of a private not-for-profit organization available for public inspection.

PEER's Authority to Review Foundations

In several instances, the PEER Committee has been called upon to review support foundations established to benefit state agencies. Specifically, PEER's 1993 report, *A Management Review of the Institutions of Higher Learning, Commissioner's Office, University Foundations, and Athletic Programs* (Report #294) addressed oversight of university foundations. PEER also reviewed the activities of the Foundation for Public Broadcasting in *An Expenditure Review of the Mississippi Authority for Educational Television and Related Foundations* (Report #300, July 21, 1993) and the Mississippi Community College Foundation in *A Review of the Mississippi Community College Foundation* (Report #333, December 21, 1995).

This chapter addresses the question:

- What is PEER's authority to review entities such as university foundations?

Based on its enabling statute, the PEER Committee has broad authority to review contractual relationships and the functions of public officers and employees, including those of university foundations.

PEER's Enabling Statute

MISS. CODE ANN. Section 5-3-51 et seq. (1972) gives the PEER Committee authority to review multiple types of entities for multiple purposes, the ultimate goal of which is to effect legislative oversight.

Unlike most legislative committees, PEER was created and enabled by the passage of a statute. The Committee's powers are codified in MISS. CODE ANN. Section 5-3-51 et seq. (1972). To justify a PEER review of any entity, there must be some legal authority in these sections or other provisions of general law.

As noted at page 3 of this report, university foundations are not-for-profit corporations established to support universities. As such, they are not agencies of the state of Mississippi. However, several theories support the authority of the PEER Committee to review some aspects of the operations of the foundations.

PEER's Authority: Contract Theory

CODE Section 5-3-57 (b) (1972) gives PEER authority to review the contracts of agencies.

MISS. CODE ANN. Section 5-3-57 (1972), which addresses the powers of the PEER Committee, provides the following, in part:

(b) To conduct, in any manner and at any time deemed appropriate, a review of the budget, files, financial statements, records, documents or other papers, as deemed necessary by the committee, of any agency; to make selected review of any funds expended and programs previously projected by such agency; to investigate any and all salaries, fees, obligations, loans, contracts, or other agreements or other fiscal function or activity of any official or employee thereof (including independent contractors where necessary); and to do any and all things necessary and incidental to the purposes specifically set forth in this section.

PEER would have the authority to audit contracts between a university and a foundation, but that authority would not likely extend to all aspects of foundation operations.

As noted on page 6 of this report, foundations are required to enter into agreements with the individual institutions that are approved by IHL. These agreements set out the duties and responsibilities the parties owe each other. PEER has the statutory authority to audit these contracts.

However, it should be noted that the authority is not likely to extend to all aspects of foundation operations. Consequently, obtaining a list of all foundation donors would not be a likely activity that could be sustained under the authority of Section 5-3-77 (b).

PEER's Authority: Instrumentality Theory

CODE Section 5-3-57 (c) (1972) gives PEER authority to review some instrumentalities of government.

MISS. CODE ANN. Section 5-3-57 (c) (1972) provides the committee with power to investigate the use of

public funds by not only agencies, but also instrumentalities. Specifically, this paragraph provides, in part:

. . .such committee shall also have full and complete authority to investigate all laws administered and enforced by any such offices, departments, agencies, institutions and instrumentalities, and the manner and method of the administration and enforcement of such laws; to investigate any evasion of any state-wide tax, privilege fee or license fee; to investigate all disbursements of public funds by any office, agency, department, institution or instrumentality specified herein; to study the present laws relative to such agencies, offices, departments, institutions and instrumentalities

Clearly, instrumentalities of government fall within the scope of this provision. In recent years, the question of “What is an instrumentality of government?” has been resolved in at least one opinion of the Attorney General.

In 1997, the Attorney General was asked to opine as to whether a planning and development district was an instrumentality of government for purposes of the Tort Claims Act. As an instrumentality of government, a planning and development district would be able to avail itself of the immunities set out in state law for such entities.

The Attorney General noted that to determine whether a not-for-profit entity is an instrumentality of government, it must be determined whether the entity is acting as a means or agency of the state. This requires an inquiry as to whether the entity is carrying out functions that are private or public in character. PEER notes that this test is consistent with the generally accepted test for determining what an instrumentality is. The general definition of an instrumentality of the state is that it is an extension of a larger body or an agency thereof--a means to an end. (See *Department of State Civil Service v. Housing Authority of East Baton Rouge*, 673 So 2d. 726 (La. App., 1996) citing CJS definitions of the terms *instrument* and *instrumentality*.)

In reviewing the character of planning and development districts, the Attorney General opined that for purposes of the Tort Claims Act, not-for-profit planning and development districts are not instrumentalities of the state. While subsequently in 2003, the Attorney General determined that planning and development districts were in fact either public entities or instrumentalities of the state subject to state audit, it would appear that the test for determining their status is the same as it has been.

Because foundations are not-for-profit corporations separate from the individual institutions and IHL policy requires that IHL employees may not hold voting positions on a foundation board, it would be difficult to argue that a foundation is an instrument or instrumentality of a university because of the mandated separation between governance of the foundations and the institutions. With this mandate of separation come separate governing bodies that have the power to make decisions independent of the other. This would definitely work against a position that a foundation is a means or agency of a university, as the university cannot direct or command that activities of the foundation.

PEER's Authority to Review Functions of Public Officers and Employees

CODE Section 5-3-57 (1972) gives PEER authority to review public officers' and employees' functions.

PEER would have the authority to review any activities of any public employee who performs activities for the benefit of a foundation.

As noted above, MISS. CODE ANN. Section 5-3-57 (1972) authorizes the PEER Committee to review the functions of public officers and employees. To this end, the committee would have the authority to review any activities of any public employee who performs activities for the benefit of a foundation. This authority would be limited to the review of the activities of the employee or officer but could reveal the amount of service a public employee provides to a university foundation, that employee's responsibilities to the foundation, and compensation that employee receives by virtue of service for the foundation.

Basis for Future PEER Reviews of University Foundations

Based on the general broad authority to review contractual relationships and the functions of public officers and employees given by CODE Section 5-3-51 et seq. (1972), PEER has authority to review university foundations in the future should the Committee see fit.

In the current environment wherein IHL requires foundations to enter into contracts with universities, PEER's authority under CODE Section 5-3-57 (b) (1972) to review the agreements of agencies, including independent contractors, would be sufficient authority to review the all parties' adherence to the responsibilities set out in the contract. This, coupled with a review of financial statements and annual reports required by IHL policy, as well as a review of IRS Form 990s, should provide the committee with any information necessary to determine the degree of support provided to each university by its foundation.

Upon the request of a legislator or citizen, the PEER Committee could review the operations of a university foundation to determine whether foundations are in compliance with their contracts and IHL policy, as well as to make policy recommendations on the extent to which oversight could be improved.

As noted at page 6 of this report, IHL now takes a more active role in university foundation oversight than it did several years ago. Regular reports must be made to IHL on foundation operations, audits must be conducted, and generally accepted accounting practices must be used. Also, foundations must enter into contracts with universities to set out clearly the duties and responsibilities that the institutions and their foundations owe to each other.

These are matters the PEER Committee could review individually to determine whether the current oversight structure has been effective in ensuring that foundations are both independent and managed with integrity. Such reviews could be commenced upon the receipt of a complaint reviewed and approved by the PEER Committee.

Recommendations

1. The Board of Trustees of Institutions of Higher Learning should revise its policies regarding oversight of university foundations to require the following:
 - a prohibition against individuals serving as members on both foundations and affiliated organizations' boards of directors;
 - a prohibition against individuals serving on foundation boards that do business with organizations in which the individual has a material financial interest;
 - that IHL staff be authorized to conduct performance or compliance reviews of any contracts between the universities and their affiliated organizations; and,
 - that each institutional executive officer pre-approve any supplemental or additional compensation provided to any IHL or university employee prior to the award of the compensation. Notice of such approvals should be given to the IHL Board of Trustees upon approval.
2. Prior to conducting any compliance review of university foundation operations, the Legislature should allow IHL a sufficient period to consider the above recommendations and make corresponding changes in policy.

Appendix A: Foundations and Alumni Associations Affiliated with Mississippi's State Universities, as of May 2007

Alcorn State University

Alcorn State University Alumni Association
Alcorn State University Foundation, Inc.

Delta State University

Delta State University Foundation

Jackson State University

Jackson State University National Alumni Association
Jackson State University Foundation, Inc.

Mississippi State University

Mississippi State University Alumni, Incorporated
The Bulldog Foundation, Inc.
The Bulldog Club
Mississippi State University Foundation, Inc.

Mississippi University for Women

Mississippi University for Women Alumni Association
Mississippi University for Women Foundation, Inc.

Mississippi Valley State University

Mississippi Valley State University Foundation, Inc.
Mississippi Valley State University Alumni Association

University of Mississippi

Alumni Association of the University of Mississippi
UMAA Foundation
The University of Mississippi Foundation
University of Mississippi Research Foundation

University of Mississippi Medical Center

University of Mississippi Medical Center Research Foundation

University of Southern Mississippi

University of Southern Mississippi Foundation
University of Southern Mississippi Research Foundation
University of Southern Mississippi Athletic Foundation, Inc.
University of Southern Mississippi Alumni Association

SOURCE: IHL.

Appendix B: IHL's Policy 301.0806 (Amended Through August 16, 2006) on

UNIVERSITY FOUNDATION/AFFILIATED ENTITY ACTIVITIES

Purpose of Foundations and Similar University Affiliated Entities:

The requirements of this policy are to apply to all university development foundations, research foundations, athletic foundations, alumni associations and all other similar entities affiliated with any of our eight state universities. The Board of Trustees recognizes the role university foundations and other similar affiliated entities throughout the nation have in providing additional financial support for their institutions so they can achieve a level of excellence not possible through state funding and tuition alone. The Board of Trustees recognizes and appreciates the contributions made to higher education by such foundations and similar entities affiliated with the institutions of The Mississippi State Institutions of Higher Learning, and that their goal is not to replace necessary support from the state. The Board of Trustees acknowledges that the private, independent nature of foundations and similar affiliated entities provides flexibility to the institutions of The Mississippi State Institutions of Higher Learning in fiscal management and responsiveness.

The purpose of foundations and other entities affiliated with institutions of The Mississippi State Institutions of Higher Learning is to engage in raising funds and other activities consistent with the mission and priorities of the institutions. These entities are expected to have mission statements relevant to this purpose and to adopt policies, plans, and budgets to achieve their missions. Each institutionally affiliated entity is authorized to accept gifts, restricted and unrestricted, on behalf of that institution. The institution agrees, through its chief executive officer, to keep the foundation/affiliated entity apprised of its needs and priorities; the foundation/affiliated entity agrees to consider and communicate to the institution its ability and plans to fund those needs and priorities and accept or solicit gifts that are consistent with the institution's mission, goals, or objectives.

Public Confidence:

The Board of Trustees recognizes it cannot and should not have direct control over institutionally affiliated foundations/entities. These foundations/affiliated entities must be governed separately to protect their private, independent status. However, because the Board of Trustees is responsible for ensuring the integrity and reputation of the university system and its institutions and programs, it must be assured that any affiliated entity/foundation will adhere to ethical standards appropriate to such organizations in order to assure the public that it is conducting its mission with honesty and integrity.

SOURCE: IHL.

Therefore, each Institutional Executive Officer should ensure that the university development foundations, research foundations, athletic foundations, alumni associations and any other similarly affiliated entities ascribe to the following requirements in order to enhance public confidence in the foundation/entity:

- Compliance with state and federal law applicable to such organizations;
- Maintenance of financial and accounting records in accordance with Generally Accepted Accounting Principles. These records shall be audited annually by a Certified Public Accounting firm and the records shall be maintained separately from the records of the affiliated institution;
- Submission of the annual audited financial statements by each November 1 [to allow compliance with Governmental Accounting Standards Board (GASB) 39] along with a list of foundation/entity officers, directors, or trustees, through their institution's chief executive officer, to the Commissioner of Higher Education;
- Submission of an annual report providing a detailed list of supplemental compensation which was submitted to the university for the purpose of providing additional compensation to administrators, faculty, athletic staff, and other employees;
- No form of compensation may be paid or provided to an Institutional Executive Officer by any university foundation or affiliated entity without prior approval of the Board of Trustees of State Institutions of Higher Learning. The request for approval shall come through the Commissioner to the IHL Board; and
- Encourage formal communications between members of the Board of Trustees and directors of the various foundations/entities, to include periodic meetings between Board members, the Chief Executive Officer of the Foundations'/entities' Board of Directors, the Commissioner and the Institutional Executive Officers.

The relationship between the institutions of The Mississippi State Institutions of Higher Learning and the foundations/entities supporting those institutions must be based on a recognition of and respect for the private and independent nature of the foundations/entities. Transactions between an institution and its foundation/affiliated entity must be consistent with the foundation's/affiliated entity's mission to assist and benefit the institution and must also be consistent with the institution's obligation to hold, manage, and use public property and resources to benefit the public interest. To ensure that the relationship is clearly defined, each institution shall consummate a formal written operating agreement with its affiliated foundations/entities.

Therefore, each university must enter into an operating agreement with its development foundation(s), research foundation(s), athletic foundation(s), alumni association(s) and any other similar university affiliated entities. To ensure the independence of the affiliated entities, no employee of The Mississippi State Institutions of Higher Learning shall hold a voting position on an institutionally affiliated entity board. The Board of Trustees may allow exceptions to this restriction if needed to comply with NCAA requirements or other purposes. Senior administrators of the institution should only participate on the affiliated entity's board in an ex-officio capacity.

Operating Agreement:

Each institution of The Mississippi State Institutions of Higher Learning and their development foundations, research foundations, athletic foundations, alumni associations and any other similar affiliated entities shall enter into a public, written operating agreement that outlines the relationship between the two entities. This agreement shall be reviewed for approval by the Board of Trustees at least every five (5) years, or whenever the operating agreement is changed, and include:

- The services and benefits the institution and affiliated entity provide each other and any payments made, including whether institutional assets are managed by the affiliated entity;
- How gifts, grants, and endowments are accepted and accounted for;
- That gifts made to an institution of The Mississippi State Institutions of Higher Learning be accounted for and ownership maintained by that institution; that gifts made to an institutionally affiliated entity be accounted for and ownership maintained by that entity;
- That the affiliated entity has a conflict-of-interest policy;
- That no form of additional compensation for an Institutional Executive Officer will be underwritten or increased by an affiliated foundation/entity without prior approval of the Board of Trustees of State Institutions of Higher Learning. The request for approval shall come through the Commissioner to the IHL Board;
- That institutional input will be sought from the Institutional Executive Officer before defining the major needs and priorities for foundation/affiliated entity consideration; and
- That other requirements stated or implied by this policy have been followed.

Board of Trustees' Authority:

As provided in Miss. Const. Art. 8, Section 213-A, the Board of Trustees has authority over the institutions of The Mississippi State Institutions of Higher Learning. Under such authority, the Board of Trustees has responsibility for ensuring the public interest is served by any individual or organization established to support an institution of The Mississippi State Institutions of Higher Learning. While the Board of Trustees cannot control or direct individuals or private organizations, it has the full authority to control the activities of its agents and agencies in their relationships with such individuals or organizations. Such control extends to the regulation of participation in those organizations and the use of a name, logo, or other insignia identified with the institutions of The Mississippi State Institutions of Higher Learning.

(BT Minutes, 9/93; 1/98; 3/2005; 8/2006)

Appendix C: Case Law Addressing Public or Citizen Oversight of Private University Foundations

Perhaps owing to the growth in fundraising by university foundations, the past two decades have seen growth in citizen- or press-inspired litigation directed at obtaining access to foundation records. Many other states have experienced cases in which petitioners have argued that university foundations are public bodies or public entities for purposes of their open records acts.

While the precise wording of any state's public records act is critical to private petitioners' chances of obtaining access to foundation records, the following discussion is illustrative of the ways petitioners attempt to bring their requests within the scope of their state's public records acts.

Public Records Acts in General

During the 1970s, many states enacted laws that created a public right to obtain information and records held by public agencies. Variouslly dubbed Open Records Acts, Public Records Acts, or Freedom of Information Acts, these acts set out not only the records covered, but also more critically to the issue discussed herein, define public entities or bodies.

Because university foundations are generally private corporations, court decisions addressing public access to foundation records require the courts to inquire as to whether the Legislature's purpose was to allow broad inquiry into organizations that, while not administered by a governmental unit, are nonetheless closely involved in the operations of government.

Theories of Exclusion

Many state courts have held that records of foundations are not subject to review under public records laws.

History and Precedent in the Absence of Specific Statutory Authority

Most recently in *State University v. Superior Court*, 180 Cal. Rptr. 2d. 870 (Cal. App, 5th. Dist, 2001), the California Court of Appeals concluded that a foundation created to support California State University-Fresno was not within the scope of the state's public records act. Using traditional approaches to statutory construction, the court noted that the California Public Records Act embraces state agencies. State agencies include "every state office, officer, department, division, bureau, board, and commission, or other state body or agency." See *State University*, supra at 883.

In applying the plain meaning test to the term "other agency," the court reasoned that a not-for-profit corporation could not be considered an "other agency," as a foundation is a non-governmental entity. This decision appears to be based on considerable evidence that the foundation fits within the legal definition of an auxiliary organization under California statutes. Such organizations are created to provide assistance to public universities, but have generally been deemed by courts to be separate and distinct from the agencies they support. See *State University v. Superior Court*, supra at 811, and 883.

Statutory Tests

In *State Board of Accounts v. Indiana University Foundation*, 647 NE 2d 342 (Ind. App, 1995), the Indiana Court of Appeals ruled that foundation records were not public records subject to inspection by petitioners or the state Board of Examiners.

In this case, the foundation sought a declaratory judgment that the foundation was a not-for-profit corporation not subject to audits from the Board of Examiners, and also not subject to the state's open records law. Earlier the state's Attorney General had opined that the foundation was subject to the Board of Examiners' scrutiny and that its records

were public records. The Attorney General's theory was that the foundation is a public office under the board's jurisdiction.

The Indiana appellate court rejected the contention that the board had jurisdiction over the foundation. Under Indiana law, a public office must hold or keep public funds for or on behalf of the state. The following points were critical to the court's decision:

- The court concluded that the foundation does not receive public funds. Case law from Indiana supported the proposition that private gifts made to universities are private, not public, funds. The basis of this conclusion is that the universities were established with legislative contemplation that some private funds would come into the possession of the university. See *Board* at 350 and 351.
- The case law decisions serving as the basis for the court's conclusion had been rendered prior to the time several CODE provisions regarding the private nature of contributions to trusts were reenacted. Consequently, the reenactment of substantially the same provisions manifests a legislative intent to incorporate the judicial interpretations accorded to these provisions of law. See *Board* at 351.
- The foundation does not receive funds for the benefit of the state, as the university is not acting on behalf of the state when it receives private funds. See *Board* at 351.
- Additionally, the foundation is not a public entity merely because it receives some funds from the university on a fee for services basis. To be a public entity, the entity must be maintained at public expense.
- For the same reasons, the foundation is not a public agency for purposes of the state's public records law. See *Board* at 354.

In *4-H Road Community Association v. West Virginia University Foundation Inc.*, 388 SE 2d 308 (W. Va., 1989) the West Virginia Supreme Court addressed the issue of whether the university foundation was subject to the state's Freedom of Information Act.

The conclusion was that this act did not extend to the foundation's files. In this case, the petitioner sought information regarding the foundation's coal leases. The court affirmed the trial court's denial of relief.

The West Virginia Supreme Court determined that the foundation was a not-for-profit corporation chartered under state law. To be a public body under the Freedom of Information Act, the entity must be one of several enumerated specifically or be created by state or local authority or be funded primarily by state or local authority.

The court concluded that private citizens established the corporation rather than governmental bodies and that it did not receive public funding but relied on contributions sent to it by donors.

The court distinguished this decision from an earlier decision in *Queen v. West Virginia Hospitals Inc.*, 365 SE 2d 378 (W. Va., 1988). In *Queen*, the court ruled that West Virginia Hospitals, Inc., was subject to the provisions of FOIA requiring disclosure because it was created under the expressed authority of a statute and that it had been reliant on support from state government in the form of staffing, property, and other assets.

Theories of Inclusion

A growing number of jurisdictions have held that foundations are subject to some form of scrutiny by individuals seeking disclosure of records on sources and uses of funds. These cases, like those discussed above, hinge almost exclusively on the specific language of the state's public records acts.

Specific Statutory Language Authorizing Review

Most recently in *Gannon v. Board of Regents*, 692 NW 2d. 31 (Iowa, 2005), the Iowa Supreme Court reversed a lower court's decision granting trustees' motion for summary judgment against plaintiffs who sought access through mandamus to Iowa State University foundation records.

In so reversing, the Iowa Supreme Court held that the foundation was carrying out a governmental function when performing foundation activities. The function was solicitation of funds for the

benefit of the university. The narrow holding of this case was that under Iowa Code Section 22.2 (2), a governmental entity might not avoid the freedom of information provisions by contracting out a function to a private organization. Consequently, the foundation's functions as provided under its service agreement with the university were public functions subject to the disclosure provisions of the Iowa Freedom of Information Act.

Liberal Construction of Public Records Acts

Many decisions cite a legislative policy favoring the liberal construction of public records laws. The liberal construction is to favor disclosure of information that is beneficial to persons needing to understand the operations of government.

Taking a somewhat expansive view of what it means to be carrying out a governmental function, the Ohio Supreme Court in *State ex rel Toledo Blade Company v. the University of Toledo Foundation*, 602 NE 2d 1159 (Ohio, 1992) found the University of Toledo Foundation to be public office for purposes of the state's public records act. The Ohio's Public Records Act includes within its definition of a public office any entity established by the laws of the state that exercises any function of government.

Critical to the court's decision were the following:

- For many years, the foundation's predecessor organizations were housed rent-free on campus and the current foundation's employees participate in the state retirement system; and,
- The foundation is the fundraising arm of the university. This function is described as an indispensable function of an institution of higher learning.

Perhaps the most expansive reading of a public records act provision as it related to foundations can be found in *Frankfurt Publishing Co. v. Kentucky State University Foundation Inc.*, 834 SW 2d 681 (Ky., 1992). In *Frankfurt Publishing*, the Kentucky Supreme Court was faced with an issue of whether the Kentucky public records laws' reach included university foundations. The court concluded that it did, thereby reversing the lower

court's decision denying a newspaper's suit for a declaratory judgment.

The Kentucky Supreme Court reviewed the definition of an "agency." The statute included in its definition of "agency" a listing of offices and departments and a clause stating that "agency" also included any agency of the enumerated departments. A major weakness in this decision is that the majority establishes no tests for determining what makes an entity like the foundation an agency of the Kentucky State University. See *Frankfurt Publishing* supra at 683, Spain, J, dissenting.

One justice separately concurring noted that the foundation utilized office space and staff of the university and included in its membership all members of the board of regents. This provided the foundation with sufficient contacts to the university to be an agency of the university. See *Frankfurt Publishing*, supra at 683, Lambert, J concurring.

At odds with the above-styled case is *Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees*, 596 SW 2d. 374 (Ky. App, 1979). In *Courier-Journal*, the Kentucky Court of Appeals reversed a trial court's decision holding that the University of Louisville Foundation was a private corporation and therefore not subject to the state's Open Records Law. In so ruling, the trial court denied the *Courier-Journal* suit to obtain access to records of meetings of the foundation's board of trustees.

The Court of Appeals affirmed the trial court's conclusion that the foundation is a private rather than public body, but concluded that because a quorum of the university's trustees served as members of the foundation board, the trustees were engaged in a meeting under the state's open meetings laws and could not bar the plaintiff's staff from such meetings. The court remanded the case to the trial court for further proceedings on the issue of the issuing of an injunction requiring the opening of foundation meetings whenever a quorum of the university's trustees is present.

Close Relations or Affiliation with a Public Agency or Body

Some cases have found that a private foundation or corporation may become a public body or entity

based on its close contacts with a public agency or body. While not dealing with foundations specifically, in *Queen v. West Virginia Hospitals Inc.*, 365 SE 2d 375 (W. Va., 1987), the West Virginia Supreme Court ruled that a private corporation that administered the West Virginia Hospital was subject to the state's Freedom of Information Act provisions. In so ruling, the court found compelling the following:

- West Virginia's Freedom of Information Act applies to public bodies. Besides specific enumerated components of government found in the definition, the term "public body" also included bodies created by state or local authority or one that is primarily funded by the state or local authority.
- The West Virginia Hospital, while managed by a not-for-profit corporation, was once a state asset and the corporation to which it was transferred was specifically enabled by a general law that authorized the transfer of the hospital.

In *State ex rel Guste v. Nicholls State Federation*, infra, the Louisiana Supreme Court directed the disclosure of certain records pertinent to the use of public funds by a private foundation. Critical to that holding was a conclusion that a private organization, the Nicholls State Federation, was a public body for purposes of the state's public records laws. The court concluded that the long-time housing of the federation campus and the use of university staff and assets made the federation a public body under the provision of Louisiana law that includes not-for-profit and quasi-governmental bodies that carry out governmental functions within the meaning of the term "public body." The federation had passed funds to the university foundation, a not-for-profit corporation.

Receipt of Public Funds

A few cases finding that public records laws apply to foundations hinge on the foundation's receipt of public funds.

In *Jackson v. Eastern Michigan University Foundation Inc.*, 544 NW 2d 737 (Mich. App, 1996), the Michigan Court of Appeals reversed a trial court's order denying the plaintiff access to certain records and meetings of the Eastern Michigan

University Foundation. In so reversing, the court concluded that the foundation was a public body within the meaning of the state's Freedom of Information Act, because during the period for which records were requested, the foundation received most of its funding from public sources. Michigan's FOIA defines entities that are primarily funded through public funds as public bodies. Regarding Open Meetings, the court concluded that because the foundation is responsible for managing the university's endowment, it is carrying out a proprietary function of government as contemplated and included within the definition of a public body in Michigan's Open Meetings Act.

Similarly, in *State ex rel Guste v. Nicholls State Foundation*, 564 So 2d 682 (La, 1990), the Louisiana Supreme Court reversed and remanded a lower court's opinion denying the Louisiana Inspector General access to certain records of the Nicholls State Foundation. The records were pertinent to the foundation's use of certain public funds (student assessments) that had been charged to students and transferred to the foundation through the Nicholls State University Federation, the school's alumni association. While never reaching the issue of whether the foundation was a public body, the court concluded that the state had a right to inspect records of the uses of public funds transferred to the foundation to carry out activities of benefit to the university.

On remand, the Louisiana Court of Appeals for the First Circuit ruled that the records to be reviewed must be limited to the records of funds deposited to the foundation's presidential development fund, the account at the Nicholls State Foundation into which public funds were placed, and not records of all foundation activities. (See 592 So. 2d, 419 (La. App., 1st Cir 1992.)

Analysis of Case Law and the Mississippi Public Records Act of 1983

Clearly the states wherein some access to foundation records has been allowed have generally broad definitions of a public body or agency. Many use tests that derive a foundation's public body status from the public funding it receives or from a determination that the body was either created by another public body or is closely affiliated with such a body.

In reviewing Mississippi's Public Records Act provisions to determine what approach our courts would take in a suit dealing with a petition for release of foundation records, PEER believes that foundations kept independent from an institution of higher learning's control would most likely be shielded from public attempts to review records.

PEER notes the provisions of MISS. CODE ANN. Section 25-61-3 (1972) defining "public body" provide:

"Public body" shall mean any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation and any other entity created by the Constitution or by law, executive order, ordinance or resolution. Within the meaning of this chapter, the term "entity" shall not be construed to include individuals employed by a public body or any appointed or elected public official.

Compared with other states, with the possible exception of California, this definition of a public body is extremely narrow. Only enumerated entities, or those that are created by enumerated entities through official action--e.g., the passage of a statute, an ordinance, a resolution, or executive order--qualify as public bodies. Unlike other states, the broader language embracing entities created by another public body or funded with public funds is not included in this section. Consequently, PEER believes that independent foundations would not be subject to scrutiny under the public records act.

It should be noted that if a foundation were so closely tied to an institution of higher learning (e.g., executive management provided by the university and IHL employees' service on foundation boards), it is possible that a petitioner could successfully argue that a foundation is a component of the university and not an independent body.

SOURCE: PEER analysis of relevant case law.

Appendix D: Recommendations Regarding University Foundations from PEER's 1993 Report *A Management Review of the Institutions of Higher Learning: Commissioner's Office, University Foundations, and Athletic Programs*

1. The Mississippi Legislature should amend MISS. CODE ANN. Section 25-61-3 to include the records of nonprofit organizations such as university foundations within the definition of public records. The law should only apply to nonprofit corporations whose name or communications with contributors refers to a connection with a public university or other public body. Such nonprofit corporations should be permitted to exclude the names and addresses of contributors from public disclosure.

Public university foundations in Mississippi share identities with their respective institutions, receive substantial funding from universities, are managed by university employees, are located on university campuses and, most importantly, have been delegated full fundraising authority by the respective universities. Such foundations may already be subject to Mississippi's open records laws, including donor names. PEER's recommendation, if implemented, would serve to protect donor identities if university officials so desired.

2. The IHL Board of Trustees should establish policies to govern relationships between public universities and nonprofit corporations (foundations) that universities have designated as their respective fundraising agents. Such policies should include requirements that:
 - each university request authorization to designate a fundraising entity other than the university after presenting details of such proposed relationship, including university funding, staffing and fundraising goals;
 - each university and related foundation annually report the following information, at a minimum, to the IHL Board of Trustees in a standard format

(to insure that all report the same information):

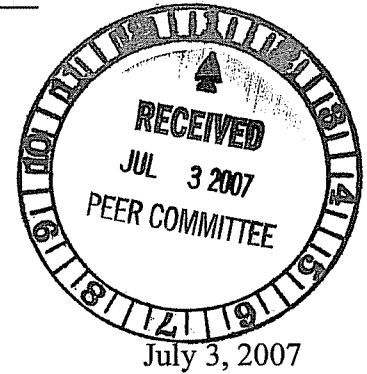
- total foundation revenues and expenditures in detail, including fund balances;
 - unrestricted revenues and expenditures in detail, including fund balances;
 - amount of funds transferred to the university during the year;
 - average annual return on foundation investments; and,
 - amount of university-provided support (funding, staff, facilities, etc.);
- each foundation provide IHL central office staff complete access to foundation records and staff so that periodic performance reviews can be performed if necessary;
 - university foundations fully comply with Internal Revenue Service laws and regulations for filing information returns (Form 990), for full disclosure to donors when contributions may not be fully deductible (due to the provision of preferred seating), and all other relevant laws and regulations;
 - prohibit IHL board members, central office staff or university staff from receiving any gratuity from public university foundations (any official travel required of such persons should be funded from their respective travel budgets); and,
 - prohibition of a public university from associating with a foundation that maintains business relationships with entities with which any foundation board member has a material financial interest.

3. The IHL Board of Trustees should establish policies to prohibit IHL central office staff and university staff from receiving additional compensation from foundations or other entities for duties already performed under an employment contract with the IHL Board of Trustees. If a university foundation or other entity desires to provide funds for additional compensation and the IHL board concurs that the amount of compensation is appropriate, the board could allow an institution to receive such funds and authorize payment of the additional compensation as a part of its contract with the respective employees. Under such arrangements, the IHL board would retain full control of compensation provided to its employees for duties performed subject to contractual agreements between the board and its employees.
4. The PEER Committee intends to conduct a follow-up review and report to the 1994 Legislature as to whether the IHL Board of Trustees has implemented policies regarding relationships between universities and their foundations. If the IHL Board of Trustees has not taken such action, the PEER Committee will recommend that the 1994 Legislature amend MISS. CODE ANN. Section 37-101-15 to require the IHL board to maintain oversight over public universities' foundation relationships through the establishment of such policies.

SOURCE: Selected recommendations from PEER report #294, March 12, 1993.



INSTITUTIONS OF HIGHER LEARNING



Office of Commissioner

Mr. Ted Booth
Joint Committee on Performance Evaluation and Expenditure Review
Woolfolk Building, Suite 301-A
501 North West Street
Jackson, MS 39201

Re: IHL Response to PEER Report on PEER's Analysis of the Legal Status of University Foundations, Their Oversight, and the Authority of the PEER Committee to Review University Foundations

Dear Mr. Booth:

I am writing on behalf of the Board of Trustees of State Institutions of Higher Learning (IHL) to confirm that the Commissioner of Higher Education and I have read the initial draft PEER report referenced above at your office in the Woolfolk Building. Following our review of the initial draft PEER report, and following subsequent conversations between you and me regarding proposed recommendations by PEER as part of the final report, it is my understanding that the PEER recommendations to be made in the final report are, in essence, as follows:

The IHL Board should revise its policies regarding oversight of university foundations to require the following:

1. A prohibition against any individual serving as a member of the board of directors of more than one foundation/affiliated entity associated with the same university;
2. A prohibition against individuals serving on foundation/affiliated entity boards that do business with organizations in which the individual has a material financial interest;
3. That IHL staff should have the authority to review the performance of a university and its affiliated entity as to their compliance with the applicable affiliation/operational agreement; In reviewing the parties' compliance with the applicable affiliation/operational agreement, IHL staff should not have access to donor lists or donor records; and
4. In addition to requiring prior IHL Board approval of any institutional executive officer (IEO) supplemental or additional compensation, IHL policies should require that, before any other university employee receives additional or supplemental compensation, the IEO must pre-approve same, and then report the approval to the IHL Board.

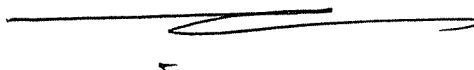
Mr. Ted Booth
July 3, 2007
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I greatly appreciate your review and consideration of the various concerns, comments and suggestions that I emailed you following my review of the initial proposed draft report on this matter. Even so, I would like to reiterate the following IHL concerns:

1. Before prohibiting individuals from serving on multiple boards of directors of entities/foundations affiliated with one university, I suggest that IHL and/or PEER review the various conflict of interests policies of the affiliated entities, which are already required by IHL Board Policy 301.0806, to make sure that such a prohibition is not unnecessary and overreaching;
2. Before prohibiting individuals from serving on foundation/affiliated entity boards that do business with organizations in which the individual has a material financial interest, I would, again, suggest that IHL and/or PEER review the various conflict of interests policies of the affiliated entities, which are already required by IHL Board Policy 301.0806, to make sure that such a prohibition is not overreaching and unnecessary;
3. Some of the universities have expressed concerns about the "silo" effect that would be created if individuals were prohibited from serving on multiple university affiliated entity boards; and,
4. Miss. Code Ann. §79-11-269 (1972), as amended, provides the legal requirements concerning conflict of interests policies for non-profit corporations in our state. As long as the university affiliated entity's conflicts policies comply with state law, the IHL Board should refrain from imposing additional, unnecessary restrictions on the private entities, which could potentially jeopardize the 501(c) (3) status of the entities.

Your consideration of these issues is greatly appreciated.

Sincerely, J



N. Van Gillespie
Special Assistant Attorney General

NVG/ped
cc: Dr. Thomas C. Meredith

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