



2006 National Conference on Planned Giving

October 11-14, 2006 • Gaylord Opryland™ Resort • Nashville, TN

**Gift Agreements, Donor Privacy and
Professional Advisors: Answering the
Crisis Vital Lessons Learned from a
\$2.4 Million Gift Negotiation**

October 12, 2006

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*Gift Agreements, Donor Privacy and Professional Advisors: Answering the Crisis
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**Presentation of Stephen A. Weldon, J.D.
2006 National Conference on Planned Giving
National Committee on Planned Giving
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A. Our challenging fundraising and donor relations environment

1. The charitable institution's environment has never been more challenging.
 - a. High donor expectations coupled with greater donor and advisor sophistication.
 - b. Low confidence in charities.
 - c. Donors and advisors want more control over the gift.
 - d. Donors and advisors demand even more accountability.
 - e. Understanding the pivotal significance of the donor's "other wealth," privacy, confidentiality, protection of family, wanting to be left alone, etc. This also can be crucial in building the relationship and leading to a quality and expanse of gift that otherwise would not have taken place.
 - f. Expectation that all information is confidential.
2. Anonymous gifts are often lifetime or major gifts, yet litigation now challenges anonymity. This fundamental issue of trust impacts your entire institution: president/chancellor, foundation, donors, volunteer leadership, advancement, faculty and students.
 - a. Donors increasingly seek privacy and expect charities to protect it.
 - b. Freedom of Information Act (FOIA) litigation in various states has sought, or currently seeks, disclosure of the names of anonymous donors to educational institutions, primarily colleges and universities. Studying the impact of these statutes and how educational institutions have addressed them provides guidance for all charitable entities.
 - a. The California Public Records Act, with certain exceptions, generally has the same scope as FOIA statutes in other states. Purpose: FOIA statutes seek to increase freedom of information by giving the public access to information in possession of public agencies. Some key issues: What is a public agency? Exactly what information is subject to disclosure? Is the donor's name exempt under law from disclosure? In weighing the public's need to know against the public's interest in protecting privacy, should the information be disclosed?
 - b. A limited number of states have statutes that range from simply protecting the identity of the donor or parts of records to protecting virtually all records of educational institutions: Arizona, Colorado, Florida, Iowa, Georgia, Louisiana, Minnesota, Nevada, New Jersey and South Carolina. The most extensive statutes are those of Colorado, Iowa and Minnesota. Please see web citations at pages 8-9.
 - c. BEWARE: Even if the statute offers some protection (and they all are different), you still need to take the steps outlined below to ensure donor anonymity and confidentiality, and to not waive or otherwise lose it. For instance, the Nevada FOIA exempts disclosure

of “...the name of any contributor or potential contributor to the university foundation, the amount of his contribution or any information which may reveal or lead to the discovery of his identity...” Nevada Revised Statutes 396.406. Note the type of educational institution this does *not* protect. Additionally, legislatures change statutes.

- d. Cumulatively, cases have required disclosure of thousands of donors’ names, including anonymous donors.
 - 1) Most recent state FOIA litigation: California, Colorado, Iowa and Kentucky.
 - 2) FOIA statutes are very strong, favored by the courts and public.
 - 3) State law controls. It’s vital to understand your state law and its cases *in advance* so your institution can properly address this issue.
 - 4) California State University, Fresno Association, Inc. v. The Superior Court of Fresno County, et. al., 90 Cal. App. 4th 810; 108 Cal Rptr. 2d 870; 2001 Cal App. LEXIS 545 (2001). Why use this case?
 - a) California is a leading jurisdiction nationally, and this opinion also discusses other state cases.
 - b) Critically, it is instructive as to how our institutions might best advise, communicate and negotiate with, and seek to protect, our potential anonymous donors.
 - c) Caveat: It bears repeating: review with legal counsel in detail your particular state FOIA statute and any related case law. Combining your state law analysis with lessons learned from the California case provides the best understanding of how to approach an anonymous gift.

B. FOIA statutes can critically impact *both* public and private charities

1. FOIA statutes have an expansive reach that could encompass “private charities” of virtually all types. Examples:
 - a. Charitable, tax-exempt foundation working with public universities or other public institutions.
 - b. Private charity partners with public entity or public funding. For instance, a private charity, the anonymous donor and a government entity enter into an agreement to combine government research and anonymous gift funds.
2. The adverse impact of FOIA litigation on charities is immense.
 - a. Iowa cases required disclosure of names, including anonymous donors. California—under its particular facts—required disclosure of anonymous licensees of a sports arena. The University of Louisville Foundation case, which held that generally disclosure was not required, has been appealed to its Supreme Court.
 - b. Even if there is no lawsuit, there often is major adverse publicity for the charity and donor, impacting current and potential donors. Loss of trust and goodwill can last for years, permeating your entire institutional image. Possible adverse impact(s) on volunteer leadership.

- c. Significant loss of staff time and distraction from fundraising and other work throughout the institution. High legal and other costs.

C. This challenge presents us with a unique and powerful opportunity

Whether or not you have a gift subject to FOIA, strongly consider using the recommendations and ideas in this paper to identify, discuss and negotiate key gift issues that are involved with all types of gifts. In doing so, you simultaneously accomplish three major objectives:

1. Negotiation crafts a better gift product (and possibly a higher gift amount).
2. Maximize protection of the donor's anonymity.
3. Attention to detail is powerful cultivation of both the donor and her professional advisor.

D. It's crucial to take an institutional, not just development, approach

1. Requires the team effort of administration, advancement, foundation, faculty and staff.
2. Designation of one or more persons to plan, coordinate, execute and be ultimately responsible for instituting and maintaining protection.

E. The California Case—Using it as a key guide in our gift negotiations and drafting

1. **Is this decision bad for fundraising?** While CSU Fresno case required the disclosure of anonymous donors, it actually is a gift planner's drafting ally in maximizing the anonymity protection for the donor. Critically, it gives us guidance on how to best bolster the donor's reasonable expectation of privacy, which, in most states, is weighed by the court against the public's right to know to determine if disclosure will be ordered. Hence, while it is never good to have legal precedent potentially adverse to your interest, it is critical to analyze the case to determine (1) its specific facts, (2) how your facts differ, (3) the holding(s) and rationale(s) of the court and (4) what you can do in the future to minimize the impact of that decision in your gift negotiations and document drafting. Remember to carefully review your state's particular public disclosure law and cases to determine how your state courts have handled these often subtle but vital issues. The CSU Fresno case is also instructive because it refers to decisions in other states, giving a fairly broad perspective.

2. Factors in the court decision

- a. ***Facts of the case.*** In a nutshell, after making gifts to the university's affiliated auxiliary nonprofit corporation (hereafter "foundation") to build the Save Mart Center, some donors purchased licenses to use luxury suites in the facility. The Center, a new athletic and cultural center was constructed with almost entirely private funds on the California State University Fresno campus. McClatchy Newspapers filed a FOIA lawsuit to compel CSU Fresno and its foundation to disclose the license agreements.
- b. ***The Court's decision and rationale—the litmus test of the donor's reasonable expectation of privacy.*** First, the court did *not* find that the other party to the agreement, namely the university's foundation, was a public agency. Nonetheless, in an example of how a private institution can be swept into a FOIA records case, it held that fundraising officers of CSU Fresno—clearly a public agency subject to disclosure—knew the donor identity and other license information. As such, all of that information, unless outweighed by the donor's reasonable expectation of privacy, had to be disclosed.

CSU Fresno, in addressing the donors' reasonable expectation of privacy, argued that a good number of donors had asked for and been promised anonymity, that release of this information could adversely impact donor privacy, and that the information could hurt fundraising. The court replied that there was nothing in the license agreements discussing anonymity. Given these documents, by their own wording, addressed all aspects of the transaction, evidence outside of these documents was not allowed. (*Id.* at 834-835).

- c. ***The Critical Importance of a Public Facility.*** Even if CSU Fresno had indicated in the license agreements that the fee was conditioned on anonymity, the court clearly wanted these documents disclosed. This discussion was key in distinguishing our Reading Center case facts from those of CSU Fresno. The Court found that the Save Mart Center was a public facility on public property, and, accordingly, its business and other activity was of significant public concern. Among other matters, the public needed to know whether the licensee fee was a fair and reasonable payment for the use of public property and whether there might have been favoritism shown in allowing these benefits. (*Id.* at 834)
- d. ***Not A "Traditional" Gift.*** Critically, the Court emphasized that the license agreement was a commercial, not private, transaction distinguishing this from what it called an unconditional donation: "The agreements contain only basic contractual terms relating to the business of a public facility. In addition, this case is distinguishable from one in which individuals or companies donate unconditionally to the University in the traditional sense. The purchase of the luxury suites is more akin to a commercial transaction." (*Id.* at 834)

F. Practice Pointers—Using the California case to maximize protection of anonymity

1. **No certain protection.** The California case—while not a "traditional gift"—is nonetheless invaluable in providing guidance to *maximize the protection for anonymity*.
2. **Action to take right now, before an anonymous donor issue is raised.**
 - a. **Discuss the issue and determine state law.** Meet with colleagues to discuss anonymity, FOIA litigation and the steps you will take to institute the suggestions in this checklist. Work with your legal counsel. Use an employee confidentiality agreement.
 - b. **Define anonymity.** Understand your state law and its limitations on what you can promise. Anonymity protection is always limited.
 - c. **How are you communicating?** What you tell the public—by words, websites, written materials, press releases, etc.—about anonymous gifts needs to be very carefully considered. For instance, does your website make a promise you cannot keep? Carefully review all forms of communications you employ. While it is beyond the scope of this presentation, conduct an in-depth analysis of the charity's, and, if applicable, its charitable foundation's policies and procedures as to what information you disclose and what is not made public. Two excellent examples of how university foundations communicate to the public are the University of Colorado Foundation (<http://www.cufund.org/opennessandprivacy.php>) and the Iowa State University Foundation (<http://www.foundation.iastate.edu/policy/>).

3. Action when working with a potential donor.

- a. **Do I ask about anonymity and, if so, when?** Donors often wait until the end to ask for anonymity, which can present serious problems. Explore confidentiality and the possibility of anonymity early on.
- b. **Who is the “donor” and who should be anonymous?** It is vital to understand the players, relationships and their concerns. Should there be anonymity for the donor advised fund? For the professional advisor(s)?
- c. **Immediately establish walls to protect anonymity.** Determine precisely who must know, meet with them and inform them in writing of strict confidentiality. Never use the donor’s name in any communication, written, electronic or verbal; instead, develop a letter or other moniker that is used at all times. Email and other electronic communication are not secure and often vulnerable to FOIA requests. Ideally, maintain the wall between your university or college and its charitable foundation. Walls must be maintained in perpetuity, through all personnel changes.
- d. **Protect all information—written, electronic, notes, etc.** Ensure that your database coordinator has set procedures for anonymous donors. Segregate the file in a locked file solely for anonymous donors, place prominent “Anonymous Donor” warnings on the file and on the gift agreement, and list the responsible gift officer and the names of any other persons who have access to the file; strictly enforce these restrictions. Meet with all colleagues, including dean(s) and faculty, and ensure that administrative assistants and others are only involved if absolutely necessary.
- e. **Use legal counsel from the beginning. Don’t put it off.** Negotiating an anonymous gift under any state law is complex. Retain first-rate legal counsel experienced in charitable law, and call your attorney when the possibility of anonymity is first raised. Work with counsel in the drafting process. A well-prepared and advised gift officer will impress the donor and advisor, which smoothes the gift negotiation process while cultivating these two very important individuals for the best gift.
- f. **Work closely with the donor’s professional advisor.** Helping the donor’s attorney (or other professional advisor) by demonstrating how you will maintain “control” is crucial. Your detailed and thoughtful work with the attorney will build a special level of trust and demonstrate competence that is ideal cultivation. If you work with a team of donor professional advisors, determine who the lead advisor is and try to work through that person so the team is coordinated and informed by that professional, not you. Be aware of other significant matters which anonymity often raises: problems with children, family and business issues, handling of publicity, etc. These must be taken into account in your work to protect both the donor and your institution’s interest in the gift.
- g. **Always, always draft a gift agreement.** This agreement, should you face a FOIA request or litigation is your single strongest ally, and it is in the best interests of both donor and charity to negotiate one. For smaller, less complicated anonymous gifts, a confirmation letter to the donor may suffice. Among other issues you identify based on the facts of your case, ensure you address the following in the agreement:
 - 1) Demonstrate this is a true gift. As appropriate, state this is a true charitable gift with no receipt of benefits (such as a the right to purchase athletic tickets, etc.). Does the gift involve public land or facility? Explain the importance of the gift to the charity

and community. Be sure you are factually correct; a relatively small error can be used by opposing legal counsel to undermine the authority of the agreement.

- 2) Discuss anonymity. Carefully draft both the terms and conditions of anonymity and also expressly state the fact that the gift is conditioned on anonymity. If you have a FOIA request or go to trial, your case will be built around that gift agreement. The Fresno licensee agreement did not discuss anonymity or confidentiality; thus, given the written agreement, is generally deemed to contain all terms and conditions, the court barred evidence of statements of university personnel that confidentiality and anonymity had been requested.
 - 3) Understand the factors behind the donor's reasonable expectation of privacy. This is a paramount donor and advisor concern. Do you discuss this in the agreement? Do you memorialize it in notes or a confirmation letter to the advisor? Critically, in California, as in many other states, the courts will not order disclosure where the donor's reasonable expectation of privacy outweighs the public's need to know. Your job is to build the case to show your donor's privacy prevails.
 - 4) Contingencies. What if the donor later wishes to remove anonymity? Can the donor who does so later have naming rights and/or other special recognition?
 - 5) Redacted agreement. If agreeable with donor's counsel, prepare a redacted agreement; that is, remove the names of all anonymous persons and any other identifying information in the gift agreement. Have an express agreement with donor's advisor as to how and when this is to be used. This document can be invaluable in discouraging a lawsuit in that it provides all of the information about the gift other than the identity of the donor and information which could lead to the identity of the donor. It also shows potential opposing legal counsel that you have thoroughly addressed the donor's reasonable expectation of privacy.
- h. **Publicity.** Discuss any publicity in advance with the donor and her advisor. Should there be no publicity? I customarily provide the donor's advisor with a draft of the press release(s) for her review. Discuss future publicity and recognition.
 - i. **Stewardship in perpetuity.** Ensure that in all aspects of the handling of the file, gift agreement and database that the protection of anonymity continues successfully through personnel and organizational changes. The loss of anonymity 10 or 50 years after the gift is made can be just as serious as if lost at the time of the gift—if not more so.

Conclusion

Using the lessons learned from the California case and the law and cases of your particular state, together with these suggested guidelines, your institutional team can maximize the crucial protection they give to donor anonymity. This thoughtful and detailed work leads to a closer working relationship with both donor and professional advisor, which not only cultivates and then stewards the current gift, but can lead to future referrals and gifts as well.

Citations and notes

Recent cases

California. California State University, Fresno Association, Inc. v. The Superior Court of Fresno County, et. al., 90 Cal. App. 4th 810; 108 Cal Rptr. 2d 870; 2001 Cal App. LEXIS 545; 155 Ed. Law Rep. 664; 00 Cal. Daily Op. Serv. 6026; 2001 Daily Journal D.A.R. 7395 (2001). Please note: Unfortunately, this case is only provided on the web through subscription services such as Lexis and Westlaw.

Colorado. The pending action in the trial court was resolved by the University of Colorado Foundation and others coming together to draft and pass the statutory exemption which is cited below under the section addressing states with statutory exemptions.

Iowa. The Iowa Supreme Court case of February 4, 2005, the link to which is given below, preceded the passing of the statutory exemption which is cited below under the section addressing states with statutory exemptions:

http://www.judicial.state.ia.us/supreme_court/recent_opinions/20050204/03-1658.asp

Kentucky. The most recent Kentucky cases are as follows:

KY Court of Appeals, May 20, 2005

<http://162.114.92.72/COA/2003-CA-002040.pdf>

KY Court of Appeals, November 21, 2003

<http://162.114.92.72/COA/2002-CA-001590.pdf>

The following Kentucky Attorney General Opinions reflect the nuances of practically addressing the court rulings, including the finding that corporations cannot have the same level of privacy expectation as individuals:

KY AG Opinion--Individuals:

<http://ag.ky.gov/NR/rdonlyres/9AF75BB5-D208-4E04-B281-33D749BB622F/0/05ORD104.htm>

KY AG Opinion--Corporate:

<http://ag.ky.gov/NR/rdonlyres/7BBA30A2-6C97-4C7B-AAE7-9879B7059842/0/04ORD197.htm>

States with statutory exemptions in public disclosure statutes involving donors and/or gift records of varying types of educational institutions

Arizona. Arizona Revised Statutes, Title 15, Chap. 13, Art 2, Sec. 15-1640

<http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/15/01640.htm&Title=15&DocType=ARS>

Colorado. Colorado Revised Statutes 24-72-202:

http://www.state.co.us/gov_dir/leg_dir/olls/sl2005a/sl_151.htm

Florida. Florida Statutes, Title XLVIII, Chapter 1004, Sec. 1004.28:

http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch1004/SEC28.HTM&Title=->2006->Ch1004->Section%2028#1004.28

Georgia. Official Code of Georgia Annotated, Code Section 50-18-72:

http://www.legis.state.ga.us/legis/2005_06/pdf/hb340.pdf#search=%22Official%20Code%20of%20Georgia%20Annotated%2C%20HB%20340%22

Iowa. Iowa Statutes HF 2706, Section 22.7, Subsection 52:

http://www.case.org/files/AffiliatedFoundations/PDF/Iowa_HF_2706.pdf#search=%22iowa%20statutes%20hf%202706%20section%2022.7%2C%20Subsection%2052%22

Louisiana. Louisiana Revised Statutes of 1950, Title 39, Part XIV, Section 366.1 et. seq.:

<http://www.legis.state.la.us/billdata/streamdocument.asp?did=319025#search=%22Louisiana%20Revised%20Statutes%20of%201950%2C%20Title%2039%2C%20Part%20XIV%2C%20Section%20366.1%20%22>

Minnesota. Minnesota Statutes 2005, Chapter 13, Section 13.792:

<http://www.revisor.leg.state.mn.us/stats/13/792.html>

Nevada. Nevada Revised Statutes, Chapter 396, NRS 396.405:

<http://www.leg.state.nv.us/NRS/NRS-396.html>

New Jersey. New Jersey Statutes, Chapter 404, C.47:1A-1.1:

http://www.njleg.state.nj.us/2000/Bills/PL01/404_.HTM

South Carolina. South Carolina Code of Laws, Title 30, Section 30-4-10 et. seq.:

<http://www.schouse.org/code/t30c004.htm>

This document does not constitute legal or other advice. Please consult with your professional advisor regarding your particular circumstances and questions.

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