

STATE OF VERMONT

**SUPERIOR COURT
Washington Unit**

**CIVIL DIVISION
Docket No. 703-12-16 Wncv**

**JEJU SOLIDARITY FOR PARTICIPATORY
SELF-GOVERNMENT AND
ENVIRONMENTAL PRESERVATION
Plaintiff**

v.

**THE TRUSTEES OF ST. JOHNSBURY ACADEMY
and KINGDOM DEVELOPMENT COMPANY, INC.
Defendant**

**DECISION
Defendants' Motion to Dismiss and Motion to Strike**

Plaintiff Jeju Solidarity for Participatory Self-Government and Environmental Preservation, a South Korean entity, is attempting to require Defendants The Trustees of St. Johnsbury Academy and Kingdom Development Company, Inc. (KDC) to produce certain records and make certain representations. To this end, Plaintiff has filed a petition under Vermont's Access to Public Records Act, 1 V.S.A. §§ 315–320. The Academy and KDC seek dismissal arguing that (1) JeJu has no cause of action under the Act because it is not a citizen of Vermont, (2) Jeju has failed to exhaust administrative remedies, (3) neither the Academy nor KDC are public agencies subject to the Act, (4) and Jeju does not seek public records in any event.

Jeju alleges that the Academy, a non-profit private school, and KDC, a for-profit corporation it majority owns, have collaborated with certain quasi-governmental and other South Korean entities to establish a school to be known as St. Johnsbury Academy–Jeju in Jeju Island, South Korea. In this action, Jeju evidently seeks to obtain information about those plans.

The most fundamental of the issues is whether Defendants are public agencies subject to the Access to Public Records Act. The Act applies to “public agencies” and “public records.” A “public agency” is “any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or . . . any political subdivision of the State.” 1 V.S.A. § 317(a)(2). A “public record” is “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.” *Id.* § 317(b).

Neither the Academy nor KDC are public agencies in any obvious way. Similarly, the records Jeju seeks are not public records in any obvious way.

In the complaint, JeJu alleges, “KDC is a subsidiary or alter ego of [the Academy] and

both are public agencies as an independent school with a license to issue Vermont high school diplomas.” Complaint ¶ 28. Simply having a “license to issue Vermont high school diplomas” does not *ipso facto* make an entity a public agency under 1 V.S.A. § 317(a)(2). If it did, every private high school in Vermont would be subject to the Act.

In a prior case, this court analyzed in detail the concept of “functional equivalence,” which in limited circumstances may demonstrate that certain private entities that conduct the business of government may become subject to the Act. *Prison Legal News v. Corrections Corporation of America*, No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Ct. Jan. 10, 2014), available at <https://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2014-5-30-31.pdf>. The court more recently applied the functional equivalence analysis in *Whitaker v. Vermont Information Technology Leaders, Inc.*, No. 781-12-15 Wncv (Vt. Super. Ct. Oct. 28, 2016), available at <https://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2017-2-8-1.pdf>.

No allegations in the complaint in this case even remotely show that the Academy—much less KDC—might possibly be the functional equivalent of a public agency for purposes of the Act. Rule 8 requires only a “short and plain statement of the claim,” but it must be one that shows that “the pleader is entitled to relief.” *In re Waitsfield-Fayston Tel. Co., Inc.*, 2007 VT 55, ¶ 12, 182 Vt. 79 (“A pleading is sufficient under the rule if it gives fair notice of the claim *and the grounds upon which it rests.*” (citations omitted; emphasis added)). Jeju’s complaint does not.

After Defendants’ filed their reply brief, Jeju filed an “opposition to reply memorandum” without seeking leave to do so. In it, Jeju for the first time provides a short argument about functional equivalence. Defendants then filed a motion to strike or, alternatively, for leave to respond.

The motion to strike is granted. The civil rules do not permit further argumentation following the reply brief absent leave of the court, which Jeju did not seek. This is especially so where, as here, a party raises a new issue for the first time. Even if Jeju’s filing were permitted, however, it would not change the outcome. Jeju’s short argument on functional equivalence cannot and does not ameliorate its failure to include pertinent allegations in the complaint.

It is unnecessary to address the other grounds raised by Defendants in support of dismissal.

ORDER

For the foregoing reasons, Defendants’ motion to dismiss and motion to strike are granted.

Dated at Montpelier, Vermont this ____ day of March 2017.

Mary Miles Teachout
Superior Judge