

<p style="text-align: center;">FILED</p> <p style="text-align: center;">FEB 17 2012</p> <p style="text-align: center;">REGINA CAULFIELD, J.S.C.</p>

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY
DOCKET NO. UNN-L-4371-11

JOHN PAFF,

Plaintiff,

v.

NEW JERSEY STATE FIREMEN'S
ASSOCIATION,

Defendant,

CIVIL ACTION

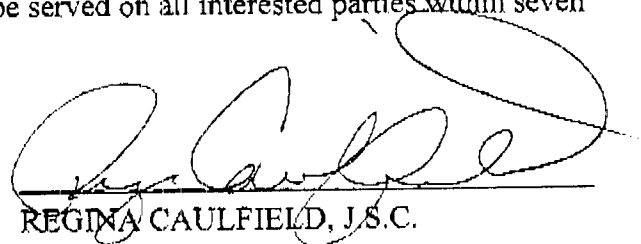
ORDER

THIS MATTER having been presented to the Court by Richard Gutman, Esq., counsel for Plaintiff, John Paff, through Plaintiff's Verified Complaint and Order to Show Cause, and Defendant having filed a Cross-Motion to Discharge Plaintiff's Order to Show Cause and Dismiss his Verified Complaint, and the Court having considered the briefs and other papers submitted, and the oral arguments of counsel,

IT IS, on this 17th day of February, 2012;

ORDERED that the Order to Show Cause is hereby discharged, and Plaintiff's Verified Complaint is hereby dismissed for the reasons set forth in the Court's written decision of February 17, 2012; and it is further

ORDERED that a copy of this Order shall be served on all interested parties within seven days of the date of this Order.



REGINA CAULFIELD, J.S.C.

FILED
FEB 17 2012
REGINA CAULFIELD, J.S.C.

SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION, UNION COUNTY
 DOCKET NO. UNN-L-4371-11

JOHN PAFF,

Plaintiff,

v.

NEW JERSEY STATE FIREMEN'S
 ASSOCIATION,

Defendant,

CIVIL ACTION

DECISION

Plaintiff John Paff, a Life Member of the New Jersey State Firemen's Association ("NJSFA") filed an Order to Show Cause and Verified Complaint on November 22, 2011, asking this Court to find that the NJSFA is a "public agency" under the Open Public Records Act ("OPRA"). Defendant NJSFA denies it is a public agency under OPRA. For the reasons set forth below, this Court finds that defendant is not a public agency under OPRA and, therefore, is not required to provide the records plaintiff has requested.

Plaintiff requested the following documents from defendant on September 23, 2011:

- (1) the records request form that a "public agency" must maintain pursuant to N.J.S.A. 47:1A-5(f);¹
- (2) upon belief that members of the defendant's Executive Committee are eligible for a pension upon serving two terms on the Committee;
 - a) records reflecting the amount and type of pension received by each member of the Executive Committee who served immediately prior to the current members of the committee (pursuant to N.J.S.A. 47:1A-10), and,

¹ The statute requires a public agency that is subject to OPRA to maintain a form which can be provided to members of the public to help those individuals request information from the public agency.

- b) any record establishing the number of years that a member of the Executive Committee must serve in order to be entitled to a pension; and,
- (3) bills for legal services rendered during March 2011 submitted by any and all attorneys and law firms retained by or on behalf of the NJSFA.

Defendant received the above requests on September 26, 2011. Receiving no response, plaintiff's attorney inquired about the status of the requests on October 12, 2011. The next day, defendant informed plaintiff that it did not consider itself a "public agency" so it did not have a request form pursuant to N.J.S.A. 47:1A-5(f). However, because plaintiff was a Life Member of the defendant, plaintiff was provided with some of the information he had requested by defendant – the records establishing the number of years that a member of the Executive Committee must serve to be entitled to a pension and legal services bills for March 2011. Plaintiff was not provided with the OPRA request form or any additional pension information.

In response, plaintiff filed a Complaint which accompanied his Order to Show Cause.

Plaintiff seeks relief on the following grounds:

- (1) violation of the requirement in N.J.S.A. 47:1A-5(i) that requires a response to an OPRA request within seven business days. Plaintiff seeks an order that this statute was violated, as well as attorney's fees;
- (2) violation of N.J.S.A. 47:1A-5(f) for failure to maintain an OPRA request form. Plaintiff seeks an order that OPRA was violated, and asks the court to require defendant to adopt a form within 45 days;
- (3) violation of N.J.S.A. 47:1A-5(f), -1.1, for failure to appoint a Custodian under OPRA. Plaintiff seeks an order that the statute was violated and a requirement that defendant appoint a Custodian within 45 days;
- (4) violation of N.J.S.A. 47:1A-10 for wrongful denial of record access. Plaintiff seeks an order declaring defendant to be a "public agency" and that it violated OPRA by denying plaintiff access to the requested pension records. Plaintiff seeks access to the individual pension records (#2(a)) within 45 days; and,

- (5) violation of the common law right to access, as the need of plaintiff and the public for these records outweighs defendant's need for secrecy in the same. Plaintiff seeks an order that the common law was violated and access to the requested records.²

Defendant asserts that plaintiff has offered no factual allegations to support his claim that defendant is a public entity and/or public agency and, therefore, the Court is being asked to render an advisory opinion. The Court rejects this contention and finds that plaintiff has submitted sufficient facts to support his Verified Complaint and Order to Show Cause.

Defendant asks this Court to discharge plaintiff's Order to Show Cause and to dismiss plaintiff's Verified Complaint or, in the alternative, to treat this matter as a Declaratory Judgment Action under N.J.S.A. 2A:16-50, *et seq.* A declaratory judgment action is not precluded by the existence of another appropriate remedy. Vonins, Inc. v. Raff, 101 N.J. Super. 172, 177 (App. Div. 1968); 966 Video, Inc. v. Mayor and Tp. Committee of Hazlet Tp., 299 N.J. Super. 501, 512 (Law Div. 1995). "However, whether a court should grant declaratory relief is ordinarily a matter resting in judicial discretion." Vonins, supra, at 177.

Proceeding by way of an Order to Show Cause is the preferred means by which to dispose of the OPRA action before this Court. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003). In Courier News, the Court discussed the proper procedure for an OPRA action:

This statutory language requires a trial court to proceed under the procedures prescribed in Rule 4:67. R. 4:67-1(a). The action is commenced by order to show cause supported by a verified complaint. R. 4:67-2(a). At the initial hearing, if the court is 'satisfied with the sufficiency of the application, [it] shall order defendant to show cause why final judgment should not be rendered for the relief sought.' *Ibid.* The court must try the case at the return date of the order to show 'or on such short day as it fixes.' R. 4:67-5. The Rule also clearly sets out the procedural framework governing the trial. If no objection is made by any party, or the defendants have defaulted in the action, or the affidavits show palpably that

² Plaintiff also seeks attorney's fees on each of the other four grounds.

there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment.
[Id. at 378-79.]

Treating this matter as a declaratory judgment action would not be appropriate and would be counter to the statutory language of N.J.S.A. 47:1A-6, N.J. Court Rule 4:67-1 and R.4:67-2, and case law. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

While defendant initially claimed that the matter before the court was moot, in that plaintiff had received all of the requested records, defendant acknowledged at oral argument that this was not the case as there are still outstanding records that defendant has not provided to plaintiff.

Lastly, defendant claims that it is not a public agency under OPRA.

In claiming that defendant is a public agency under OPRA, plaintiff analogizes the nineteen municipal fire departments which led to the creation of defendant to the political subdivisions which form the State League of Municipalities ("the League"). On this basis, plaintiff claims that defendant is an instrumentality created by a combination of political subdivisions and, therefore, meets the definition of "public agency" under OPRA. Plaintiff points to the fact that defendant was originally formed in 1879 by nineteen municipal fire departments, as an instrument of these and other municipal fire departments, to ensure that two percent of the state tax on out-of-state fire insurance companies, mandated by N.J.S.A. 17:22-6.59, be given to firefighters in need. Plaintiff asserts that, like the League, defendant is an instrument created by a combination of municipalities. In addition, while plaintiff believes that defendant was formed prior to the 1885 Act, he also claims that defendant's president at the time

orchestrated the passage of the law. Thus, it is plaintiff's position that defendant was created in part by the Legislature in that year, making defendant an instrumentality created by a political subdivision of the State.

There are two separate New Jersey statutes that, together, call for a tax on out-of-state fire insurance companies to be collected by the Insurance Commissioner, with the money collected earmarked for defendant. The money – a 5% tax – is collected by the Department of Banking and Insurance, with 3% going to defendant, and 2% to the State of New Jersey.³ The first such statute is N.J.S.A. 17:22-6.59. It states the following:

The Premiums charged for surplus lines coverages are subject to a premium receipts tax of 5% of all gross premiums less any return premiums charged for such insurance...

The surplus lines agent shall forward to the commissioner together with his quarterly report submitted pursuant to section 24 of P.L. 1960, c.32 (C.17:22-6.58) a check in the amount of the premium receipts tax due for that period made out to "the State of New Jersey," except that where the policies cover fire insurance on property in any municipality or portion of a township, or fire district in this State, which now has or may hereafter have, a duly incorporated firemen's relief association, 3% of the premium receipts tax covering such insurance shall be paid to the treasurer of the New Jersey State Firemen's Association and the remaining 2% of the premium receipts shall be forwarded to the commissioner.

N.J.S.A. 17:22-6.59. Premium receipts tax for surplus lines coverage.

The other pertinent statute is N.J.S.A. 54:18-1. It states:

Each insurer, not organized under the laws of the State of New Jersey, which takes fire insurance risks on property in this State, shall on or before March 1 in each year, for the period during the 12 months ending December 31 of the preceding year, cause to be made to the Treasurer of the New Jersey State Firemen's Association, on behalf of each municipality or fire district in this State, for any property on which the insurer has taken any fire insurance risks situated therein, a true return in writing, verified by the oath of an officer or representative of the insurer, showing the amount of all premiums received by or agreed to be paid to the insurer, for insurance underwritten by that insurer against loss or injury

³ In 2010, the tax produced \$12,626,071.08 for the defendant while \$11,656,339.73 was distributed to local firemen's associations.

by fire upon real or personal property, except automobiles that are not stored for sale, including loss of use thereof in the municipality, or fire district.

N.J.S.A. 54:18-1. Annual report, payments to New Jersey State Firemen's Association; effect of noncompliance.

In arguing that he is entitled to the relief he requests, plaintiff relies on the definition of "public agency" in N.J.S.A. 47:1A-1.1 and on the Court's decision in Fair Share Housing, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011) (hereinafter "Fair Share"). Plaintiff argues that, reading the two together, in light of defendant's history, defendant should be considered a "public agency" under OPRA.

The origins of defendant can be traced back to 1826 when a law was enacted that imposed a two percent tax on out-of-state fire insurance companies. That tax was paid to the State of New Jersey and went into the general treasury. In 1850, some of the money collected via the tax was earmarked for municipal fire departments' charitable, benevolent or disability funds. In 1867, the law was changed to require the tax money received by the Secretary of State to be given to the charitable associations of municipal fire departments for the "benefit of disabled or incapacitated firemen or their families." The Department of Insurance came into being four years later and became responsible for the collection and distribution of the tax money.

In 1879, a law was passed requiring the insurance agents in respective municipalities to pay the two percent tax on foreign fire insurance policies to the treasurer of the benevolent fund of the fire department of the municipality. In that same year, a statewide meeting of fire departments (nineteen were represented) was held for the purpose of creating a state-wide organization to protect the interests of the firefighters and their charitable associations. This meeting was organized after the Newark Fire Department claimed that it was not "getting all the money that was justly due." Concerns were also raised by other municipal departments which

were not receiving any charitable or benevolent funds.

The meeting that was held in 1879 led to annual conventions. Conventions were subsequently held in September of 1880 and 1881, and “annually thereafter.” By 1883, the Association “was becoming more actively engaged in legislative initiatives.”

In 1885, a law was passed codifying the structure, powers, and duties of defendant. According to defendant’s certification, this legislation became the “enabling legislation creating the Local Relief Associations and authorized them to affiliate and create the New Jersey State Firemen’s Association.” At the 1885 Convention, fifty-five local associations were affiliated with the State Association.

The 1885 law contained a number of provisions that established both local associations and the statewide association. For example, Section 1 of the law authorized the fire chief, president, board, and members of municipal and volunteer fire departments to form local fireman’s relief associations. Membership would include all officers and members of those departments. Section 3 of the law provided that any pre-existing relief organization would be reorganized and reincorporated under the 1885 Act. Sections 4 and 5 limited each municipality to one local association. The purpose of the local relief corporations, according to Section 23, was to establish, provide for and maintain a fund for the relief, support, or burial of indigent exempt firemen and their families and for indigent firemen injured or killed while doing public fire duty and their families. Section 29 states that no local firemen’s relief association would receive any of the relief funds unless it complied with the requirements of the Act.

There were additional provisions in the 1885 law that called for the establishment of the New Jersey State Firemen’s Association. Section 24 authorized the local relief associations to organize and conduct a New Jersey State Firemen’s Association, which would be the only state firemen’s relief association. Defendant was to have the same powers as the local relief

associations, except it could not distribute relief funds to indigent or disabled firemen. In addition, the expenses of defendant would be borne by all of the local associations.⁴ Section 25 required the local board of representatives to choose four delegates to defendant, with one of the four being the fire chief.

The current version of the 1885 Act, governing both the statewide and local firemen relief associations, is found in N.J.S.A. 43:17-1 – 43:17-47. The law itself notes that the statewide association was originally formed in 1885.⁵ Defendant is currently comprised of 538 local associations (there are 566 municipalities in New Jersey). There are over 76,000 career and volunteer firefighters eligible for potential disbursements from defendant. Defendant's employees are not members of the Public Employees' Retirement System ("PERS").

The threshold question for this Court is whether defendant is a "public agency" under OPRA. The New Jersey Open Public Records Act is codified in N.J.S.A. 47:1A-1.1, et seq. The Act mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). "The purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.' " Mason v. City of Hoboken, 196 N.J. 51, 65 (2008); (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374

⁴ The current law reads, in part: "The expense of maintaining the New Jersey State Firemen's Association shall be borne equally by all of the local firemen's relief associations in accordance with the rules and regulations adopted by the New Jersey State Firemen's Association." N.J.S.A. 43:17-41.

⁵ N.J.S.A. 43:17-41 ("The [NJSFA] organized pursuant to an act entitled "An act concerning firemen's relief associations," approved March twenty-fifth, one thousand eight hundred and eight-five (L.1885, c. 122, p. 144), and the amendments thereof and supplements thereto, is continued as heretofore, and there shall not be more than one such State association.").

N.J. Super. 312, 329 (Law Div. 2004)); Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005). The New Jersey Supreme Court recently stated that “[t]hose who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions.” Fair Share, supra at 502. The burden of proof in showing that a denial of access was justified rests solely with the party that holds the records. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009).

The first subsection of the OPRA statute sets forth the following:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

N.J.S.A. 47:1A-1. Legislative findings.

The defendant will only be required to provide plaintiff with the requested documents if it is found to be a “public agency.” That term is also defined in the statute:

“Public agency” or “agency” means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office,

commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

N.J.S.A. 47:1A-1.1. Definitions.

As previously stated, plaintiff asked for defendant's OPRA form, which a public agency" must maintain under N.J.S.A. 47:1A-5(f).⁶ Plaintiff also seeks additional information regarding the pension plans of defendant's Executive Committee pursuant to N.J.S.A. 47:1A-10, which states:

the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

As plaintiff claims that the Fair Share decision leads to the conclusion that defendant is a public agency under OPRA, a careful analysis of that case is required by this Court.

⁶ N.J.S.A. 47:1A-5(f). ("The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought...")

Fair Share Housing, Inc. is a non-profit group that advocates for the enforcement of the *Mount Laurel* doctrine. Fair Share, supra, at 489. In Fair Share, an advocacy group made an OPRA request to the New Jersey State League of Municipalities (hereinafter “the League”),⁷ The League denied Fair Share the requested documents, and asserted that it was not a “public agency” that must comply with OPRA. Fair Share filed a verified complaint in lieu of prerogative writs in Superior Court, alleging that the League was in violation of OPRA and the common law right of access. Fair Share, 207 N.J. 489, 497. Fair Share sought “[a] declaration that the League is a ‘public agency’ as the term is defined by *N.J.S.A. 47:1A-1.1* and is subject to [OPRA] and the common law right [of access].” Ibid. Eleven days later, Fair Share supplemented its complaint with an order to show cause, seeking the same relief. Ibid. Although the trial and appellate courts denied Fair Share’s request, the Supreme Court ruled that the League is a public agency that must comply with OPRA. Id. at 493.

The League is a nonprofit, unincorporated association created pursuant to statutory authority in 1915. Id. at 493-94. The current version of the 1915 Act is set forth in N.J.S.A. 40:48-22.⁸ Id. at 494. The League represents all 566 municipalities in New Jersey. Id. at 492. Further, “[t]he League’s governing board consists of various elected municipal officials, its budget is partly financed through public funds, and its employees are members of the Public

⁷ By way of background, COAH had proposed new regulations, which would establish obligations on municipalities to provide affordable housing. The League filed comments with COAH, opposing the proposed regulations. Thereafter, Fair Share filed an OPRA request, seeking: (1) any studies, correspondence, or other public records generated by the League regarding the COAH regulations; (2) letters and emails sent or received by the League to COAH during the negotiations; and, (3) all documents provided to certain named League committees. Fair Share, 207 N.J. 489, 496.

⁸ Any municipality, by resolution of its governing body, may join with any other municipality or municipalities in the formation of an organization of municipalities, for the purpose of securing concerted action in behalf of such measures as the organization shall determine to be in the common interest of the organizing municipalities. The organization may meet at such times and places as it may determine for the discussion of measures deemed to affect the welfare of the several municipalities members thereof; maintain an office, in charge of a secretary or other officer or agent appointed by the organization; circulate literature and information among the municipal officers of this state, and may generally take such action as the organization in meeting shall determine to be wise in support of such measures as it deems to be in the interest of the several municipalities members thereof. N.J.S.A. 40:48-22.

Employees' Retirement System." Id. at 492-93. The mission of the League is, in part, "to lobby for beneficial legislation and to file lawsuits furthering the interests of municipalities as a whole." Id. at 493. The League's members include over 13,000 elected and appointed municipal officials, including 560 mayors. Id. at 494. The League's officers consist of three mayors and one municipal council member. Ibid. As for finances, 16% of the League's budget is comprised of "taxpayer public funds" in the form of membership fees from each municipality. Id. at 495. More than one-half of the League's annual income is raised at a yearly convention. Ibid. The League's executive director describes the League as "a lobbying organization for local government interests as a whole in New Jersey," with its officials testifying at legislative hearings. Ibid. The League publishes a magazine and conducts educational programs for local government officials. Ibid. The League also institutes legal actions for the purpose of advancing the interests of its member municipalities. Ibid.

Citing the language in the OPRA statute defining "public agency," the New Jersey Supreme Court found that the League must comply with the terms of OPRA as it is an "instrumentality ... created by ... political subdivisions." Id. at 493. In its analysis, the Court recognized that the case turned on the definition of "public agency." Id. at 503.

The Court first noted that the definition of "public agency" is "broadly written so that a wide variety of entities fall within the compass of that term." Ibid. The Court found that the League was an "instrumentality created by a combination of political subdivisions." Noting that "instrumentality" was not defined, the Court stated:

OPRA does not define 'instrumentality.' We therefore will give the words its 'generally accepted meaning.' *See N.J.S.A. 1:1-1.* Instrumentality is variously defined as "[a] thing used to achieve an end or purpose" and, alternatively, as '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.' *Black's Law Dictionary* 814 (8th ed. 2004). Here, the League is achieving an end and providing a function on behalf of all 566 of New Jersey's municipalities. It is 'securing concerted action in behalf of ...

the common interest of the organizing municipalities' – that is, the municipalities that established and presently support the League. *See N.J.S.A. 40:48-22*. The maxim that there is strength in numbers comes into play here. Through the pooling of financial contributions and personnel, the League – in a more efficient and cost-effective way – can do for all municipalities what no one municipality can do for itself. The League lobbies the Legislature, and its officials testify before legislative committees to advance the interests of municipalities. It conducts educational programs for municipal officials. It also brings lawsuits that will benefit all municipalities.

[Id. at 503-04.]

The Court was further persuaded by the fact that the League is “controlled by elected or appointed officials from the very municipalities it represents.” Id. at 504. The Court noted that, “[t]he League’s constitution provides that, generally, ‘each member municipality shall act and be represented by its Mayor or other chief executive authority, or his nominee.’”⁹ Ibid. The Court found the League to be an ‘instrumentality of a combination of political subdivisions’ and that these subdivisions – the municipalities of the State – ‘created’ the League. Ibid.

Finally, the Court also recognized that a New Jersey statute authorizes the formation of the League:

It is also clear that a ‘combination of political subdivisions’ – the municipalities of this State – ‘created’ the League. *See N.J.S.A. 47:1A-1.1; accord Lafayette Yard, supra, 183 N.J. at 535*. The League came into being the same year, 1915, that the predecessor to *N.J.S.A. 40:48-22* was enacted. *See L. 1915, c. 163*. *N.J.S.A. 40:48-22* allows for the formation of the League. With that statutory authorization, the member municipalities created the League by forming a nonprofit, unincorporated association and drafting a constitution that would govern the organization.

[Ibid.]

There are significant differences between the League of Municipalities and defendant. While the Court in Fair Share recognized that the League was authorized by the Legislature in 1915, similar to the way defendant was authorized in 1855, it was a combination of political subdivisions – the municipalities of the State – which created the League. Id. at 504. Defendant,

⁹ An important distinction: the municipal fire departments that comprise defendant are represented by four people, including the fire chief. None of those four people, however, is an official elected by the voting public.

on the other hand, was created not by municipalities but by municipal fire departments. Municipalities are political subdivisions but the same cannot be said of fire departments. Also, while the League is comprised of more than 13,000 elected and appointed officials, including 560 mayors, defendant's membership includes firefighters, whether employees of their respective municipalities or volunteers, who are obviously not elected by the public. Certainly a fire chief may be appointed by, for example, a mayor or governing body of a municipality, but such a process is a non-political one. And fire departments are typically maintained by municipalities. But, defendant is not "controlled by elected or appointed officials." Ibid.

The Court in Fair Share pointed out that 16% of the League's budget comes from taxpayer funds in the form of membership fees. Defendant does receive money from the State but the source of this financing is not from the public, but rather from a tax levied on out-of-state fire insurance companies. While it can then be said that the government is involved in controlling defendant through the disbursement of funds, such control is far different than that exercised over the League by its members who not only represent political subdivisions – municipalities – but were elected by the voting public. Further, neither party in this case has argued that defendant conducts programs for government officials, institutes legal actions to advance the interests of its members, testifies before the Legislature, or is engaged in lobbying efforts, all activities recognized by the Fair Share Court as governmental functions. Id. at 503-04.

The League's constitution provides that each member municipality is represented by its mayor or other chief executive authority, or his nominee. Id. at 504. Thus, there is a direct link between each member municipality – a political subdivision of the State – and the League itself. Under the terms of the 1885 law, each municipal fire department is governed by a board of representatives which consists of the president, the fire chief, and three elected representatives from within the department. The board selects four delegates to defendant, with one being the

fire chief. Thus, while the voting public elects those who become members of the League of Municipalities, the selection of delegates to defendant is not connected to the political process.

Plaintiff claims that the legislation of 1885 created an organizational structure for the payment of the two percent tax to needy firefighters and authorized local fire departments to form municipal firemen's relief associations which were then authorized to form the State Firemen's Association. Plaintiff argues that the practical effect of the 1885 law was to mandate the creation of defendant because the municipal fire departments had previously failed to do so. Thus, it is plaintiff's position that defendant, in part, was created by the Legislature and, therefore, qualifies as a "public agency" under OPRA, even though the Legislature only "authorized" defendant in 1885.

But plaintiff also claims that defendant existed before the 1885 legislation. Further, plaintiff contends that "because the municipal firemen's relief associations...were created by the municipal fire departments, the municipal fire departments indirectly created the 1885 State Firemen's Association." Plaintiff is clearly trying to squeeze defendant into the definition of "public agency" under OPRA. But municipal fire departments, whatever their role in forming defendant, whether direct or indirect, and regardless of the role the Legislature played in 1885, are still not political subdivisions or instrumentalities of same under the law. (See History of Association, submitted by plaintiff, dated February 2007, and attached as Exhibits 14a – 23a of his Certification dated November 14, 2011. Chapter One, "Beginnings," states the following: "The official records of the New Jersey Firemen's Association contain the original Notice of the organizational meeting in Newark, New Jersey, forwarded by the Board of Representatives of the Newark Fire Department. (#1) The Notice called for a meeting of the fire departments in the state and invited delegates from each to attend a meeting on May 22, 1879 in the City of Newark...The name adopted at this First Convention was the 'Firemen's Association of the State

of New Jersey.’ Chapter Two, “Moving Ahead” states: “By 1883 the State Officers were forging the State Association into an effective statewide organization.”)

As stated, this case must be governed by the definition of “public agency” under OPRA. The language of N.J.S.A. 47:1A-1.1 does not set forth a governmental-function test in that it does not suggest that the “instrumentality” perform a traditional governmental task such as trash collection. Id. at 504. Instead, “the more sweeping language of ‘public agency’ interdicts creative efforts that might thwart the public’s efforts to access governmental records.” Id. at 505. The Court in Fair Share provided an example of a political subdivision or combination of subdivisions creating a nonprofit corporation for the purpose of warehousing documents that would otherwise be subject to disclosure under OPRA. Ibid. Such a corporation would be an “instrumentality” and therefore a “public agency” under OPRA “even though it does not perform any traditional governmental function.” Ibid. The critical words used by the Court in this analysis are “political subdivision or combination of subdivisions.” In the present case, defendant was not created or formed by a political subdivision or combination of same. Thus, defendant is not an “instrumentality...created by...political subdivisions” and, therefore, does not meet the definition of “public agency” under OPRA. N.J.S.A. 47:1A-1.1; Fair Share, supra, at 493; See The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., supra, at 535, where the Court determined that a private, nonprofit corporation was a “public agency” under OPRA as it was **created** with the approval of the Mayor and City Council in Trenton which also **controlled** the membership of its board of directors (emphasis added).

For the foregoing reasons, this Court finds that defendant is not “an independent authority, commission, instrumentality, or agency created by a political subdivision or combination of political subdivisions” and, therefore, is not a “public agency” under OPRA. N.J.S.A. 47:1A-1.1.

The plaintiff also claims the right to defendant's records under the common law right of access. OPRA does not limit the common law right of access to government records. Mason v. City of Hoboken, supra. The provisions in OPRA explicitly retaining the common law right of access imposes a duty upon the judiciary to apply the common law standards and to make an independent assessment as to whether disclosure is warranted. Bergen County, supra, at 520.

In Nero v. Hyland, 76 N.J. 213 (1978), the New Jersey Supreme Court, for the first time, "articulated with particularity the legal principles comprising the common law right of access in the context of a citizen's petition for access to public records." Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 509-10 (App. Div.), certif. denied, 182 N.J. 143 (2004). Thus, a public record under the common law is:

one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are...that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it[.]

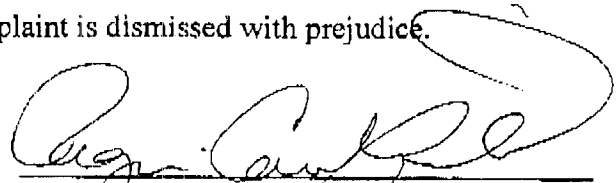
[Nero v. Hyland, supra, at 221-22.]

The common law definition of a "public record" is broader than the statutory definition of "government record" under OPRA. Mason v. City of Hoboken, supra, at 67; Bergen County, supra, at 509-10. However, to access this broader class of documents, the requestor must make a greater showing than that required under OPRA: (1) "the person seeking access must 'establish an interest in the subject matter of the material' "; and (2) "the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.' " Mason v. City of Hoboken, supra, at 67-68; Keddie v. Rutgers, 148 N.J. 36, 49 (1997); Bergen County, supra, at 519. This Court finds that the records sought by plaintiff are not required by law to be kept or necessary to be kept in the discharge of any duty imposed by law. In addition, the records are not directed by

law to serve as a memorial and evidence of something written, said or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. Bergen County, supra, at 517-18. The records are also not “ ‘created by, or at the behest of, public officers in the exercise of a public function.’ ” Keddie v. Rutgers, supra, at 50.

CONCLUSION

It is the decision of this Court that defendant NJSFA is not a public agency under the Open Public Records Act and, therefore, not subject to its records requirements. Further, this Court finds that the records requested are not “public records” under the common law right of access. Therefore, plaintiff’s requests pursuant to the Order to Show Cause filed on November 22, 2011 is denied and his verified complaint is dismissed with prejudice.



REGINA CAULFIELD, J.S.C.

DATED: February 17, 2012