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OF THE COMMITTEE ON OPINIONS

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TINA RENNA,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION, CIVIL PART
	:	UNION COUNTY
vs.	:	DOCKET NO. UNN-L-4071-11
	:	
UNION COUNTY ALLIANCE,	:	
Defendant,	:	
	:	DECISION

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Decided: January 25, 2012

Walter M. Luers, Attorney for Plaintiff (Walter M. Luers, LLC, attorneys)

Kraig M. Dowd, Attorney for Defendant (Weber Dowd Law, LLC, attorneys)

REGINA CAULFIELD, J.S.C.

Plaintiff Tina Renna seeks, through an Order to Show Cause, a determination by this Court that defendant Union County Alliance ("UCA") is a "public agency" under the Open Public Records Act ("OPRA") and is therefore required to provide copies of certain documents plaintiff seeks. In the alternative, plaintiff argues that she is entitled to defendant's records under the common law right of access. Defendant has filed opposition to the Order to Show Cause and asks the Court to dismiss plaintiffs Verified Complaint with prejudice as defendant claims it is not a "public agency" under OPRA and, therefore, is exempt from its record requirements. Because this Court finds that the defendant is not a public agency within the definition of OPRA, and

that defendant's records are not public records under the common law, plaintiff's Complaint will be dismissed.

### **FACTUAL ANALYSIS**

Plaintiff Tina Renna, President of the Union County Watchdog Association, Inc. (UCWA), seeks certain records of defendant Union County Alliance, Inc. (UCA), under the [page 2] Open Public Records Act, N.J.S.A. 47:1A-1.1, et seq. The UCWA is a non-partisan, non-profit organization that, according to plaintiffs certification, "works on behalf of the residents and taxpayers of Union County." The UCWA "monitors the activity of Union County and advocates change to reduce waste, corruption, and incompetence," while striving "to make Union County more transparent by gaining access to public records and being a public resource for such information."

On August 25, 2011, plaintiff submitted an OPRA request to defendant, seeking copies of: (1) bills/receipts relating to the production of *Union County Directions* newsletters, published from January 2010 - present; (2) a copy of each of *Union County Directions* newsletters produced in 2010 and 2011; and, (3) the minutes of the meetings of defendant's Board of Directors for 2010 and 2011. Plaintiff made this request pursuant to both OPRA and the common law right to access. Having received no response within seven days, plaintiff properly viewed her request as denied. N.J.S.A. 47:1A-5(i).

Plaintiff then initiated this action via Verified Complaint and Order to Show Cause.

The defendant ("UCA") is a non-profit organization established under N.J.S.A. 15A:2A and a 501(c)(3) non-profit under the Tax Code. Defendant leases private office space at 1275 Westfield Avenue in Rahway. Defendant's Certificate of Incorporation was filed on February 23, 1994 in the Secretary of State's Office. The initial Board of Trustees, as reflected in the Certificate, was comprised of three people: Kenneth L. Estabrook, Esq., Ann Baran, and Dr. Henry J. Ross. Mr. Estabrook was an attorney in private practice, and his listed address in the Certificate was his law office (Lindabury, McCormick & Estabrook) in Westfield. Dr. Ross is the former president of Kean College, and his Kean College office address is listed in the Certificate. Finally, Ann Baran was the Union County Manager at the time defendant was [page 3] incorporated. In the Certificate, Ms. Baran's address is listed as the Administrative Building on Elizabethtown Plaza in Elizabeth. This motion turns on a determination of the role of Union County in the creation and the ongoing affairs of defendant

The facts behind the formation of defendant are in dispute, and that dispute is pertinent to this motion. It is clear that defendant was incorporated in 1994, and Ann Baran (now deceased) was one of three people on the initial Board of Trustees. Plaintiff contends Baran was

acting in her capacity as the Union County Manager at the time defendant was formed. Defendant contests this, claiming that it was not formed by an act of any entity of the Union County government, or any employee acting in their official capacity. According to defendant, the corporation was formed by citizens. Following Ann Baran's passing in 2006. then-Union County Manager, George W. Devanney, issued a press release through the County that said, in part: "[a]mong her accomplishments. Ann created the Union County Alliance, the County's Long Range Strategic Plan document, and the Children's Immunization Clinic."

The plaintiff further certifies that defendant was initially funded by a \$25,000 grant from Union County, and another \$25,000 grant from, the New Jersey Department of Higher Education. Thus, according to plaintiff, defendant was funded completely by public monies. Plaintiff also believes that five of the nine current Union County freeholders are members of the UCA Board of Directors, although she admits having difficulty in learning the identities of the board members. Plaintiff also asserts that defendant releases a monthly newsletter entitled Union County Directions, which is about 20 pages in length and, according to her, contains positive stories of Union County government and its elected officials and programs. She maintains that the newsletter is "essentially one long press release for Union

County." This newsletter is also distributed via e-mail, and she claims that defendant has an e-mail list with 75,000 names.[page 4]

Plaintiff also notes that defendant promotes services of Union County via the UCA website. In sum, plaintiff states that "while the ostensible purpose of the UCA is to improve the Union County economy, in fact it is run by Union County politicians and public employees who use it to promote themselves and their activities."

The plaintiff cites Union County Resolutions 2011-26 and 2011 -681 as further proof of the defendant's status as an instrumentality of the Union County government. Resolution 2011-26 authorized the County Manager to contract with UCA for \$322,125 to provide "comprehensive research and communication services" for 2011. Resolution 2011-681 authorized the County Manager to contract with UCA for \$29,960 "for purposes of publicizing, communicating and highlighting the many services provided by the County[.]" Similar Resolutions were passed in 2010 (Resolutions 2010-23 and 2010-692, respectively). The plaintiff also points to an article from Union County LocalSource, dated August 18, 2011. According to that article, Michael Murray is the UCA President, and earns \$115,861/year in that capacity. Plaintiff also states that Murray is on the Union County payroll, earning \$104,000/year, although she does not specify his job title with the County. According to the article, the only other employee of defendant at the time of publication was Michelle Sullivan, who earned

\$50,825/year.<sup>1</sup> Sullivan, according to the article, was the sister-in-law of Union County Freeholder Daniel Sullivan, The article also states that defendant reported expenditures of \$103,315 in 2009 on its tax returns for "conferences, conventions, and meetings," but reduced that figure to \$11,599 after the article's author inquired about the expenses. Upon making that reduction, defendant reimbursed the County \$15,000.

The plaintiffs final argument in support of defendant being a public agency \s the fact [page 5] that for many years meetings were held at Kean University, with Kean being a public entity itself. Further, as previously mentioned. Dr. Henry J. Ross, the former president of Kean, was an original trustee under the Certificate of Incorporation.

To determine the purpose of defendant, it is helpful to look to the Certificate of Incorporation. The section of the Certificate entitled "Purposes of the Corporation" reads as follows:

The Corporation is organized exclusively for, and its activities shall be limited to, charitable, educational, civic, and social purposes, including for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(cX3) of the Internal Revenue Code. More specifically, the purposes for which the Corporation is organized are as follows:

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<sup>1</sup> Michelle Sullivan has passed away since this article was published.

(a) To establish, develop, coordinate and maintain a coalition of business, finance, health, government, labor, housing, transportation, education, cultural and art organizations, existing and to be organized, having a presence in Union County, New Jersey, for the purposes of revitalizing, improving, enhancing, strengthening and maintaining the economy and quality of life in Union County, New Jersey.

(b) To develop and serve as an information clearinghouse and an educational forum for, and to engage in short and long term planning, projects and studies, and conflict resolution, with respect to, health, cultural, social, economic, educational, transportation and political issues, interests and projects of relevance to Union County, New Jersey.

(c) To establish programs and develop resources to secure contributions, gifts, grants, devises or bequests from individuals, foundations, partnerships, associations, governmental bodies or public or private corporations, and to maintain, use and apply the whole or any part of the income therefrom and the principal thereof to support, by donation, loan or otherwise, the efforts of organizations whose purposes and goals are consistent with the purposes of the Corporation In revitalizing, improving, enhancing, strengthening and maintaining the economy and quality of life in Union County, New Jersey [page 6]

The Certificate goes on to limit membership in defendant to "government agencies and authorities, educational institutions, trade, business, and professional leagues, civic and cultural organizations, labor unions, hospitals, religious bodies and the like." Specifically excluded from membership were "individuals or private business

corporations (aside from health care providers).” (Rider No. 1 to Certificate of Incorporation.)

The plaintiff does not contest that defendant was created for the purposes set forth in its Certificate of Incorporation.

The defendant contests some of the facts set forth by plaintiff, while providing clarification to some of the other facts asserted. Most of these disputes are addressed in the certification of Mauro Checchio, the current Chairman of the UCA. The first, and perhaps most important, clarification made by defendant is that when it was formed in 1994, it was not created by an act of the Union County government (i.e. the Freeholders), nor was it created by any Union County employee acting in their official capacity. Defendant does not dispute that Baran was a driving force behind its creation, and was one of the three original trustees, but defendant also points out that there were eighteen members of the Board of Directors in 1994, the year it was incorporated.

Currently, according to defendant, there are no fewer than twenty-five members of the Board of Directors. Further, no outside entity has the power to appoint someone to the Board of Directors. Instead, it is the Board alone that has the ability to appoint new members. Defendant does, however, permit the ex-officio seating upon its Board of Directors of the current County Manager and County Board of Chosen Freeholder Chairperson.

The defendant maintains that the County has no control over its operations; the Alliance [Page 7] can be dissolved only by a vote of 3/4ths of the Board of Directors, and not by any act of Union County government, and, if defendant ceases to exist, the assets of defendant must go exclusively to a charitable, educational, or scientific entity under § 501(c) of the Tax Code. Further, defendant claims it is under no current or future obligation to have property or assets transferred to or from Union County.

Checchio further points out that defendant is responsible for the entire cost of the projects, activities, and mailings it undertakes and that it does not utilize Union County facilities, equipment, or vehicles. While defendant has been awarded contracts by Union County, Checchio maintains that, in the past defendant has accepted as little as \$2,000 in contracts in one year from the County and was still able to maintain its operations. In 2011, Checchio claims that defendant obtained its revenues from contracts with Union County, advertising in "Directions." and billable graphic design, marketing, website services and similar work. Checchio also notes that defendant has never brought legal action on behalf of any government entity.

The defendant also refutes plaintiffs claim that Murray and Sullivan were simultaneously on the payroll of defendant and Union County. According to defendant, Murray and Sullivan were the Alliance's only employees at the time this action commenced. Defendant

claims that Murray, who serves as the Executive Director, is not a Union County employee. Further, defendant claims that Sullivan, who had worked for defendant for ten years before recently passing away, was not a County employee. Finally, as a general matter, defendant notes that it has never attempted to enroll an employee in the Public Employees' Retirement System. ("PERS").

The defendant urges this Court to consider the previous decision by the New Jersey Government Records Council in the matter of Renna v, Union, County Alliance. GRC Complaint [page 8] No. 2006-73, which concluded that defendant is not a public agency and, therefore not subject to OPRA. The GRC is the agency statutorily charged with the responsibility to hear and render decisions on citizen challenges to OPRA complaints under N.J.S.A. 47:1 A-6. et seq. Our Courts have consistently accorded "substantial deference to the interpretation of the agency charged with enforcing an act." Merin v. Maglaki. 126 N.J. 430, 436-37 (1992). However, as defendant acknowledges, the opinion of the GRC is not binding on this Court under N.J.S.A. 47:1A-7(g), which states "[the [C]ouncil shall not have jurisdiction over the Judicial" branch of government.

The Court notes that plaintiff submitted an additional certification on January 12, 2012, six days following oral argument Defendant objects to this late submission under N.J. Court Rules 1:6-5 and 1:6-6. Defendant further opposes plaintiff's late submission due

to the expiration of the briefing schedule set forth in the Order to Show Cause filed on October 26, 2011. This Court granted the parties' request to modify the original briefing schedule. This schedule permitted defendant to file opposition papers by November 21, 2011, and plaintiff to file a reply to said opposition by November 29, 2011. The original Order to Show Cause and this Court did not allow for late submissions. Therefore, plaintiff's Certification dated January 11, 2012 and attachments will not be considered.

### **LEGAL ANALYSIS**

#### **1. The OPRA Statute**

The plaintiff initially seeks a determination that, pursuant to the Uniform Declaratory Judgment Act, N.J.S.A. 2A:16-50, et seq., Defendant is a public agency under OPRA and violated OPRA or the common law right of access by failing to provide the requested documents. 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 [page 9] Tp. Committee of Hazlet Tp.*, 299 N.J. Super. 501, 512 (Law Div. 1995). "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 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).

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 [page 10] 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 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 Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011). 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 public policy of the State as determined by the Legislature:

government records shall be readily accessible for  
inspection, copying, or examination by the citizens

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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; [page 11]

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.47:1 A-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.

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,

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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.

This provision of the statute has been analyzed in two recent New Jersey Supreme Court cases - The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., supra [hereinafter, "Lafayette Yard"] and Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, supra [hereinafter, "Fair Share"]. The facts and findings of the two recent Supreme Court cases are detailed below as they are instructive to this Court.

## **II. Fair Share**

Decided in August of 2011, Fair Share involved a request for records from the New Jersey State League of Municipalities ("the League"). The question before the Court was whether the League is a "public agency" that possesses "government records" within the [page 12] meaning of OPRA. *Id.* at 493, The League is a nonprofit, unincorporated association created pursuant to explicit statutory authority.<sup>2</sup> *Id.* at 492. The League has a governing board consisting of

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<sup>2</sup> N.J.S.A. 40:48-22 explicitly states: "[a]ny municipality, by resolution of its governing body, may join with any other municipality  
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various elected municipal officials, with a budget partly financed through public funds. Id. at 493. Employees of the League are members of the Public Employees' Retirement System (PERS), Id. Part of the League's mission is to "lobby for beneficial legislation and to file lawsuits furthering the interests of municipalities as a whole." Id.

The Court noted that sixteen percent of the League's budget is comprised of taxpayer public funds in the form of membership fees from each municipality, while about fifty percent of the budget is raised at a yearly convention. More telling, however, was the fact that the League lobbied on behalf of cities, and instituted lawsuits in furtherance of its lobbying efforts. In fact, the underlying case arose from the League opposing proposed COAH regulations. Id. at 495.

The Court also found the League to be a clear case of an entity coming into existence as a result of the deliberate actions taken by a public entity. The court noted that "[t]he League is controlled by elected or appointed officials from the very municipalities it represents. The 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.' Thus, it is clear that the

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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."

League is an 'instrumentality' of a 'combination of political subdivisions.'" Id, at 504 (citing N.J.S.A, 47:1 A-1.1). Thus, the Court found that the League fell within the definition of "public agency" under N.J.S.A. 47:1A-1.1. Id. at 507. [page 13]

### **III. Lafayette Yard**

The Times of Trenton Publishing Corp v. Lafayette Yard Community Development Corp.. supra, involved a private, nonprofit corporation that was established solely "to assist the City of Trenton. . . , the Trenton Parking Authority and the State of New Jersey to provide for the redevelopment of a 3.1 acre site known as the Lafayette Yard property located in the City, . . . [and to] consist of a hotel, conference center, and parking facility." Id. at 522. Although Lafayette Yard was formed as a nonprofit corporation under N.J.S.A. 15A:3-1, it operated under certain constraints set forth in an IRS Revenue Ruling and Revenue Procedure, which allowed the corporation to issue tax-exempt bonds because the IRS determined the debt to have been "issued on behalf of the state or a political subdivision." Lafayette Yard, at 523.

The Corporation was run by seven uncompensated trustees, Id at 523. Five of the trustees were selected by the Mayor of Trenton and two by the City Council. Id. These trustees could be removed by either a majority vote of the Board or a majority vote of the City Council with the Mayor's approval. Id. Any amendments to the Corporation's

Bylaws had to be approved by the Mayor. Id. In the event the debt issued by the Corporation was retired, or if the Corporation dissolved, the Corporation was required to convey its assets to the City. Id

The City had passed a resolution transferring the property to the Corporation for one dollar. Id. at 524. Thereafter, the City utilized New Jersey's Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73, to designate the City as the "Agency" and Lafayette Yard as the "Redeveloper" Id. As part of the arrangement to buy the subject property for \$1, Lafayette Yard agreed to issue bonds to raise money for the project. Id. The Resolution that authorized this arrangement stated that the Corporation was formed "in order to enable the Corporation to issue the Bonds, the Secured Subordinated Loans and the Unsecured Loans with interest that is [page 14] exempt from federal income taxation." Id. at 525. The City further agreed "to accept full legal title to the Project financed by [Lafayette Yard] upon payment of the Bonds, the Subordinate Loans and the Unsecured Loans, and any related amounts required in connection with the payment or defeasance thereof." Id. at 525. The City further guaranteed unconditionally the punctual payment of the principal and interest on the Bonds. Id.

The controversy in the case arose when the Times of Trenton was not permitted to attend various board meetings of the Corporation, and was further denied access to the minutes of those meetings. Id. at 521-22. The Times sought relief under both OPRA and the Open Public

Meetings Act. Lafayette Yard argued that it was incorporated by "public-spirited citizens" to assist the City in the redevelopment, and not by the City. Id. at 535. The Court rejected that argument, stating that "to accept {that argument] without further discussion would be to elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the Legislature. Suffice it to say that the Mayor and City Council have absolute control over the membership of the Board of Lafayette Yard and that the Corporation would only have been 'created' with their approval." Id. The Court thus found that the Corporation was subject to OPRA because it is an "instrumentality or agency created by a political subdivision " Id. at 534.

Therefore, it is clear that the key test for the applicability of OPRA is whether the entity was formed by a political subdivision or combination of political subdivisions. It can further be gleaned from both Fair Share and Lafayette Yard that important factors to be considered in this determination include how an entity was formed (i.e. by explicit statutory authorization, with limitations as to its functions), whether employees are enrolled in PERS, whether the corporation lobbies on behalf of the government and/or files lawsuits to represent the interests of the government, whether the corporation is funded by taxpayer funds, how assets of the corporation [page 15] are distributed in the event of dissolution (and whether the

corporation is holding property on behalf of a political subdivision or entity), whether the government has control over who is appointed to the Board of Directors and, in general, the influence the government has over the corporation (i.e. no bylaws can be approved without the approval of the mayor). While plaintiff alleges that defendant has engaged in various public functions over the years, such a finding is not important under the OPRA analysis as set forth in Lafayette Yard and Fair Share.<sup>3</sup>

#### **IV. OPRA Analysis**

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<sup>3</sup> Plaintiff points to the following "public functions": (1) the UCA designed the website for public agencies; (2) the UCA has conducted public health assessments; (3) the newsletters published by the UCA on placed on the Union County website; (4) the UCA prepares market initiatives for the Union County Improvement Authority; and, (5) the UCA prepared an emergency preparedness guide for a division of Union County. The Fair Share Court distinguished the Open Public Meetings Act from the Open Public Records Act by noting that OPRA, unlike the Meetings Act, "does not set forth a governmental-function test - that is, it does not suggest that the 'instrumentality' must perform additional governmental task, such as trash collection." Fair Share, at 504. The Court held: "The language defining a 'public body' under OPMA and the language defining; 'public agency' under OPRA are distinctly different. The definition of 'public agency' is far more encompassing and specifically lacks a governmental-function test. See N.J.S.A. 47:1 A-1.1. The more sweeping language of "public agency" interdicts creative efforts that might thwart the public's efforts to access governmental records. For example, under OPRA, a political subdivision or combination of subdivisions that created a nonprofit corporation for the purpose of warehousing documents, otherwise subject to disclosure, would be an 'instrumentality' and therefore a 'public agency,' even though it does not perform any traditional governmental function." Id. at 505.

This case, similar to Fair Share and Lafayette Yard, turns on the meaning of "public agency" under N.J.S.A. 47:1A-1.1. The definition of public agency under the statute includes, "any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions."

In Fair Share, the Court determined that the League of Municipalities is controlled by elected or appointed officials from the 566 municipalities it represents. *Id.* at 504. Further, the League was created by these municipalities - a combination of political subdivisions of the State. *Id.* And, in Lafayette Yard, the Court found that a private, nonprofit corporation, created to provide assistance to the City of Trenton and the Trenton Parking Authority, was both a "public [page 16] body" and a "public agency" for OPRA purposes. Although created by a group of citizens, the Court found that Lafayette Yard was under the control of the Mayor and City Council which, in large part, controlled the appointments to the governing board of the corporation. The Court in Lafayette Yard further determined that the corporation could only have been created with the approval of the Mayor and Council. *Id.*

The information submitted to this Court shows the following: the defendant was not formed by any act of Union County government; no political subdivision has the power to appoint or remove members of defendant's Board of Directors; the defendant has never filed a lawsuit

on behalf of Union County or any public entity; the defendant does not utilize any public property in its operations; the defendant has no current or future obligation to provide Union County with property and, in fact, in the event of dissolution, the Certificate of Incorporation bars defendant's assets from being transferred to the County; and, no employees of defendant are registered for PERS or have ever sought to be so registered.

As previously noted, defendant was created by three individuals, only one (Ann Baran) being connected to government or to a political subdivision, that being the Union County Board of Chosen Freeholders through her position as County Manager. Further, while the Executive Committee did include several County employees, including County Manager Baran, its 11 member Blue Ribbon Advisory Committee included only one County employee - the County Prosecutor. Further, it is worth noting that in Rider No. 1 of defendant's Certificate of Incorporation, the following language appears: "Membership (in the Alliance) is limited to government agencies and authorities, educational institutions, trade, business and professional leagues, civic and cultural organizations, labor unions, hospitals, religious bodies and the like. No individuals or private business corporations (aside from health care providers) may become [page 17] members. The Alliance represents a joining together of these organizations who operate in or near Union County, New Jersey, in order to achieve the purposes of the

Alliance." Thus, based on its membership requirements, it appears that no "political subdivision" can become a member. This is obviously far different than the makeup of the New Jersey League of Municipalities.

In addition, while County Manager Ann Baran may have helped create the defendant, that is a far cry from creation by the Union County Board of Chosen Freeholders, clearly a political subdivision under N.J.S.A. 47:1A-1.1. Further, there is no evidence submitted by plaintiff that the defendant is controlled by the Freeholders as was the situation in Lafayette Yard where the Mayor and City Counsel in Trenton had absolute control over the Board of a private, nonprofit corporation. There was no information submitted to this Court showing that the Freeholders control appointments to defendant's Board of Directors or have any involvement in appointing its President.

Regardless of the fact that Union County Manager Ann Baran was involved in the creation of defendant, and that officials in Union County government may be able to exert some influence over defendant (especially considering the ex-officio seating of the Union County Manager and Union County Freeholder Chairman on the UCA Board of Directors), such influence should not be conflated with creation and control.

Regarding the source of defendant's budget, plaintiff claims that defendant is funded by the County of Union and that, in effect, the County controls defendant's purse strings. Defendant does not appear

to dispute plaintiffs claim that the UCA started in 1994 with a \$25,000 grant from the County and another \$25,000 grant from the New Jersey Department of Higher Education. It also appears undisputed that at times the defendant has accepted over \$300,000 in one year in contracts from Union County, while in other years that figure is as low [page 18] as \$2,000. However, plaintiff has failed to demonstrate to this court that defendant would cease to exist without the County's support. If that were the case, it would make defendant the type of "creative effort that might thwart the public's efforts to access governmental records" that the Court in Fair Snare warned about. Fair Share, supra, at 505. While it receives funding from Union County in the form of contracts, defendant is certainly not the only agency with whom the County contracts, and defendant does derive some of its revenue from other sources.

Thus, defendant is not an "instrumentality or agency . . . created by a political subdivision" under N.J.S.A. 47:1 A-1.1, nor is it controlled by one.

#### **V. Common Law Analysis**

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.  
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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

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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 Union County Alliance 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, plaintiffs record request pursuant to the Order to Show Cause filed on October 27, 2011 is denied and her verified complaint is dismissed with prejudice.

Dated: January 25, 2012                    /s/ Regina Caulfield, J.S.C.