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EDWARD MECKA,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION, CIVIL PART
	:	HUDSON COUNTY
vs.	:	DOCKET NO. HUD-L-1961-12
	:	
HUDSON HEALTHCARE INC.	:	
Defendant	:	
	:	OPINION

Decided: May 22, 2012

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

Joseph Maddaloni, Jr., Attorney for Defendant (Trenk, DiPasquale, Della Fera & Sodono, P.C., attorneys)

MARON, LAWRENCE M., J.S.C.

Issue

Plaintiff has filed an Order to Show Cause seeking summary relief and asking the Court to find Hudson Healthcare Inc. a "public agency" as defined by the Open Public Records Act ("OPRA"), N.J.S.A. 47:1 A-1 et seq. Plaintiff also asks that the Court find Hudson Healthcare violated Plaintiff's rights under both the OPRA and common law rights of access. Finally, Plaintiff seeks an order requiring Defendant to provide Plaintiffs requested documents within 7 days of the order. Plaintiff also seeks reasonable attorney's fees and costs.

Background

On July 12, 2006, the Hoboken City Council enacted an ordinance to establish the Hoboken Municipal Hospital Authority under the New Jersey Municipal Housing Authority Law ("Authority Law"), N.J.S.A. 30:9-23.15 et seq. The Hoboken City Council established the Hoboken Municipal Hospital Authority ("HMHA") for the purpose of acquiring St. Mary's Hospital, which is now Hoboken Hospital. The City Council Meeting Minutes reflect that on July 12, 2006, Councilman Ruben Ramos read a letter from then Mayor David Roberts which recognized the passing of the ordinance and also appointed Harvey Holzberg as President and CEO of the hospital facility to be operated by HMHA. Defendant asserts that Holzberg obtained this position because he had been hired as a consultant by the company that owned the hospital prior to the transfer, and was not appointed by the City.

On August 7, 2006, Hudson Healthcare was incorporated as a 501(c)(3) tax-exempt nonprofit corporation with the initial Board of Directors listed as Ronald DiVito, Harvey Holzberg, and Frank R. Ciesla. The by-laws of Hudson Healthcare indicate that the Corporation [page 2] shall be operated "exclusively for the benefit of, to perform the functions of, or to carry out the purposes of, or in accordance with the Municipal Hospital Authority Law. . . . To manage Hoboken University Medical Center. . . ."

On August 9, 2006, the City of Hoboken announced that it was taking the necessary steps to complete the transfer of St. Mary's

Hospital to the City, including the award of certain no-bid contracts. The City awarded one of the contracts for the formation documents for the non-profit entity that would act as the manager of the Hospital under HMHA. Frank Ciesla, Esq., received this contract for "Formation Documents and Interim Legal Counsel to the Acquiring Entity" for no more than \$75,000.00.

On February 1, 2007, HMHA and Hudson Healthcare entered into a Management Agreement. The Management Agreement set forth Hudson Healthcare's rights and responsibilities regarding the Hospital and HMHA. The Agreement delegates all powers, duties and responsibility for day-to-day operation and function of the Hospital to Hudson Healthcare, except for those expressly reserved to HMHA by the Authority Law.

Hudson Healthcare's Certificate of Incorporation was amended in October 2007 to expand the Board to five members, including the Chief Executive Officer, Chief Financial Officer (the Governor's appointee) and two community representatives. The powers of Hudson Healthcare are delegated through the by-laws to the officers and directors, and the Board's powers are exercised by a majority vote that does not include the votes of the CEO and CFO.

Defendant contends that Hudson Healthcare's operations were not funded by taxes from the City of Hoboken or from HMHA. The employees of Hudson Healthcare are not state employees, and are not eligible for any pension plan; Hudson Healthcare employees are separate [page 3]

employees from HMHA. Hudson Healthcare maintained separate bank accounts, has a separate tax identification number, and separate legal counsel.

At some subsequent date (unclear to this court) Hudson Healthcare asserted that HMHA breached the Management Agreement by failing to release operating funds to Hudson Healthcare¹. On August 1, 2011, Hudson Healthcare filed for bankruptcy under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101, et seq. Hudson Healthcare filed shortly after HMHA's decision to sell the Hospital and its assets to a private company. During the bankruptcy proceedings, depositions were taken and numerous documents exchanged. To protect the interests of HMHA and Hudson Healthcare, the Honorable Donald H. Steckroth, U.S.B.J. (presiding over Hudson Healthcare's liquidation) issued a Protective Order prohibiting disclosure of certain documents and information. Among the discovery in that matter were some documents Plaintiff requests here².

During the process of selling the Hospital, HMHA identified prospective purchasers and determined that HUMC Holdco, LLC ("Holdco") met the qualifications and HMHA entered into an Asset Purchase Agreement with Holdco for the sale of the property. Hudson Healthcare

¹The fact that Hudson Healthcare may receive operating funds from HMHA contradicts Hudson Healthcare's Statement that Hudson Healthcare is not funded by taxes or funds from HMHA. This point should be clarified by the attorneys as it would greatly impact the analysis regarding whether Hudson Healthcare is subject to OPRA.

²Another point that needs clarification is whether the Protective Order remains in effect.

negotiated a separate Asset Purchase Agreement with Holdco for the sale of any assets owned by Hudson Healthcare pertaining to the Hospital. Upon closing on November 4, 2011, Hudson Healthcare ceased all operations. Hudson Healthcare currently has no employees and exists through its five-member Board only. Hudson Healthcare has filed a joint plan of liquidation with the Official Committee of Unsecured Creditors. Upon approval of the liquidation plan, Hudson Healthcare will dissolve entirely, and any assets will be transferred to a liquidating trustee. [Page 4]

On February 24, 2012, Plaintiff submitted a written records request to Hudson Healthcare. Plaintiff requested the resolution that had been passed by the Board of Directors, a list of attendees of the meeting, and meeting minutes. Hudson Healthcare denied the request based on the assertion that Hudson Healthcare is not a "public agency" as defined by OPRA. Hudson Healthcare rejected Plaintiffs request for reconsideration of this decision on March 26, 2012.

Arguments

Plaintiff argues that 1) this action should proceed in a summary manner because the OPRA statute authorizes it and 2) the documents should be disclosed under OPRA because Defendant is a public agency and be documents requested are subject to OPRA.

Defendant opposes. Defendant argues that OPRA does not require Hudson Healthcare to produce documents because 1) Hudson Healthcare is

not a public agency or instrumentality under OPRA; 2) Hudson Municipal Hospital Act and/or the City of Hoboken did not create Hudson Healthcare; 3) neither HMHA nor the City control Hudson Healthcare; and 4) Hudson Healthcare is not an "agency or instrumentality as contemplated by OPRA and/or the Fair Share decision. Further, Defendant argues that the documents sought by Plaintiff are not subject to disclosure pursuant to a Protective Order issued by Judge Steckroth.

Plaintiff submits a reply brief. Plaintiff argues 1) the burden of proof as to whether the non-profit is subject to OPRA should rest with Defendant, and that because a denial of access under the statute places the burden on the Defendant, the same should apply here; 2) Hudson Healthcare is subject to OPRA because of the elements of creation and control that exist; and 3) the Protective Order does not encompass all the documents sought by Plaintiff. Finally, Plaintiff submits that in the event the Court is not persuaded that Hudson Healthcare was founded by Mr. Ciesla at the direction of the City, then Plaintiff requests a deposition of Mr. Ciesla. In the [page 5] alternative, Plaintiff seeks to take the deposition of Mr. Ciesla to clarify whether the contract for "Formation Documents" was directly related to the formation of Hudson Healthcare.

Analysis

The threshold issue in this matter is whether or not Hudson Healthcare can be deemed a "public agency" or "instrumentality" subject

to OPRA. As part of this analysis, the court shall look to the formation of Hudson Healthcare under the Municipal Hospital Authority Act.

Municipal Hospital Authority

New Jersey's Municipal Hospital Authority Law, N.J.S.A. 30:9-23.15 et seq., ("Authority Law") authorizes cities to acquire existing urban hospitals and to operate them. An authority enacted pursuant to the Authority Law is identified as an "agency and instrumentality" of a city. N.J.S.A. 30:9-23.18(a). The Authority Law states that the authority "shall exercise its powers and duties to manage and operate a hospital owned by it through a contract or contracts with a manager . . . provided, however, that the primary responsibility of operating the hospital shall remain that of the authority." N.J.S.A. 30:9-23.20(a).

In the instant matter, although some duties of the authority are contracted out, the authority itself does reserve rights and responsibilities as enumerated by the statute. Those are 1) independent access to books and records of the hospital at all times; 2) the Governor of New Jersey shall appoint an individual to serve on the board of directors during the term of the contract; 3) the authority shall have final determination regarding acquisition and disposition of assets; 4) approval of the individuals that the manager proposes as chief executive officer and chief financial officer; 5) adoption of a management plan for the hospital and monitoring of financial

activities; and 6) approval of manager's annual operating budget.

N.J.S.A. 30:9-23.20(c), N.J.S.A. 30:9-23.20(d), N.J.S.A. 30:9-23.20(e).

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OPRA

The Open Public Record Act requires the disclosure of government records. The purpose of OPRA, N.J.S.A. 47:1A-1, is to "make identifiable [non-exempt] government records readily accessible for inspection, copying or examination." *MAG Entertainment L.L.C. v. Division of Alcoholic Beverage Control*, 375 N.J. Super 534, 546 (App. Div. 2005). Under the Act, all government records are public unless subject to a listed exception. N.J.S.A. 47:1A-1. The statute defines "government records" broadly to include all documents or other materials, information, or data that may have been made or received by the government in its official business. N.J.S.A. 47:1 A-1.1. The types of documents exempt from production include a range of subject matters, such as constituent correspondence to legislators, materials concerning government security, documentation of criminal investigations, or sexual harassment complaints filed by public employees. N.J.S.A. 47:1A-1.1.

A party who is denied access to government records that do not qualify under an exception is entitled to institute it proceeding against the public entity to challenge denial of access. N.J.S.A.

47:1A-6. The public agency bears the burden of proving denial of access is authorized by law. Id.

When making an OPRA request, a party must specifically define the document being requested rather than make a blanket request for all of a public agency's documents. *Bent v. Township of Stafford Police Department* 381 N.J. Super. 30, 27 (App. Div. 2005). The court in *Bent* stated that a proper OPRA request must describe the specifically requested documents with "reasonable clarity". Id. New Jersey courts have also stressed the fact that OPRA requests should not be used as a means of requiring government officials to "identify and siphon useful information". See *MAG Entertainment. LLC v. Division of Alcoholic Beverage [page 7] Control*, 375 N.J. Super. 534, 540 (App. Div. 2005). Additionally, an OPRA request is improper if it requires information to be "analyzed, collated, and compiled by the responding government entity". Id. at 549. The purpose of OPRA is to make existing records accessible rather than to require government officials to conduct research and create documents. Id at 546.

Public agencies are subject to the statute. OPRA defines "public agency" as

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.***

(emphasis added), N.J.S.A. 47:1A-1.1.

Two cases discuss whether a non-profit organization may be subject to OPRA. In *The Times of Trenton Publishing Co. v. Lafayette Yard Community Development Corp.*, 183 N.J. 519 (2005), the New Jersey Supreme Court found that a private, non-profit entity was subject to the requirements of OPRA. In that case, the Lafayette Yard Development Corporation denied requests under the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, and the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, asserting that it was not subject to the statute. Citizens of the City incorporated the private, non-profit entity to assist the City with a redevelopment plan. Lafayette Yard Community Development Corp. 183 N.J. at 522. The Mayor and the City [page 8] Council had absolute control over membership of the Board of the organization, and the organization could not have been created without the approval of the Mayor and City Council. *Id.* at 535. The court reasoned that to find the organization exempt would be to "reach a result that subverts the broad reading of OPRA as intended by (he

Legislature." Id. Therefore, the court found Lafayette Yard subject to OPRA.

Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities. 207 N.J. 489 (2011) also addressed a non-profit corporation subject to OPRA. In that case, the Defendant was League of Municipalities, created by a "combination of political subdivisions," and was controlled by elected or appointed officials from the various municipalities. Id. at 504. The purpose of the League was to advance the interests of various municipalities, conduct educational programs for municipal officials, and initiate litigation to benefit the municipalities.

In Fair Share Housing, the court applied the principals of statutory construction and legislative intent and analyzed the word "instrumentality" as included in OPRA's definition of 'public agency.' Id. at 25. Giving the word its generally accepted meaning, the court found instrumentality to mean a "thing used to achieve an end or purpose," or a "means or agency through which a function of another entity is accomplished, such as a branch of a governing body." Id. (citing Black's Law Dictionary, 814 (8th ed. 2004)). The court found that the Defendant League of Municipalities was achieving an end and providing a function on behalf of every one of New Jersey's municipalities. Id. at 504. Further, the court found The League, controlled by elected or appointed officials from municipalities and

requiring representation by executive authority, to be an instrumentality subject to OPRA. Id. at 505. The court in Fair Share Housing ruled consistently with earlier opinions in determining that a non-profit [page 9] corporation (or instrumentality) created by a public subdivision would be a "public agency " for purposes of OPRA. Fair Share Housing v. League of Municipalities, 207 N.J. 489, 507 (citing Lafayette Yard. 183 N.J. at 535-536). The court found that the "creation test" is what controls an analysis of whether an entity is a public agency. Id.

In the matter presently before this Court, the City of Hoboken, through an ordinance, created Hoboken Municipal Hospital Authority. Under the New Jersey Municipal Hospital Authority Law. N.J.S.A. 30:9-23.18, HMHA is an "agency and instrumentality" of the City of Hoboken. The Authority Law also provides that HMHA may exercise its powers to "manage and operate a hospital owned by it through a contract or contracts with a manager." N.J.S.A. 30:9-23.20(a). The court accepts Defendant's argument that because the Authority Law does not expressly provide that a manager is a public agency or instrumentality, the Legislature did not intend for the managers to be considered public agencies. Defendant Hudson Healthcare is an independent managing entity that operates pursuant to an agreement with the authority established under the Authority Law, HMHA. However, just because Hudson Healthcare is not explicitly classified as a public agency, it does not mean that

the entity is necessarily exempt from OPRA. Whether or not Hudson Healthcare, which is technically incorporated as a private, non-profit corporation, is subject to OPRA, will depend on a "creation test" analysis. Fair Share Housing Center. Inc. v. League of Municipalities, 207 N.J. 489, 507.

The creation of Hudson Healthcare is unique. The relevant facts are that on August 7, 2006, Hudson Healthcare was incorporated by Mr. Ciesla, a private citizen, naming Mr. Holzberg and Mr. Ciesla members of the board of directors. Two days later, on August 9, 2006. the City hired Mr. Ciesla as a "consultant" for "formation documents" and legal assistance on behalf of the City pertaining to the transfer of the hospital. In February 2007, Hudson Healthcare, [page 10] which had been created by Mr. Ciesla, entered into a management contract with HMHA pursuant to the Authority Law for the operation of the hospital. Later, in October 2007, Mr. Holzberg became President and CEO of Hudson Healthcare.

The fact that Mr. Holzberg, who was at one point the President and CEO of the hospital by a private contract, later became President and CEO of Hudson Healthcare does not seem to be related to the creation of Hudson Healthcare. On the other hand, the overlap between Mr. Ciesla's legal work for the City relating to the hospital transfer and his concurrent act of incorporating Hudson Healthcare raises questions. In the opposition papers, even Defendant concedes some connection between

Hudson Healthcare, HMHA, and the City of Hoboken. In Lafayette Yard, the court reasoned that the development committee could not have been created without approval of the Mayor and City Council. Lafayette Yard, supra. This was essential to the court's determination that the non-profit corporation was subject to OPRA. Id. at 507.

Here, the details of the creation of Hudson Healthcare are not fully known. If the City in fact contracted legal work for the transfer of the hospital and that work resulted in the creation of Hudson Healthcare, then Mr. Ciesla may have been acting as an agent of the City, which would influence this Court's analysis. Hudson Healthcare was created two days prior to the award of Mr. Ciesla's contract, but the work paid for by Hoboken for "Formation Documents" seemingly resulted in the management contract between Hudson Healthcare and HMHA.

The Plaintiff asserts that the language of N.J.S.A. 47:1A-1.1 ("any independent State authority, commission, instrumentality or agency") includes an independent instrumentality such as Hudson Healthcare. In Fair Share Housing, the court found the League of Municipalities was clearly a combination of political subdivisions, composed of elected and appointed officials, and existed solely to advance the interest of municipalities. Fair Share Housing, supra. In that case, [page 11] the court looked to the membership and purpose of the League of Municipalities when finding that the organization was subject to OPRA. The membership of Hudson Healthcare can be described

as a hybrid. Of the five (5) members of the board, only the Chief Financial Officer is appointed by the Governor of New Jersey. Defendant maintains that Hudson Healthcare is an entirely independent agency without assistance from taxpayers, whose employees do not benefit from public pension programs, and with separate legal counsel. However, the parties seemingly dispute whether any funding from HMHA is used for the operation costs of Hudson Healthcare, and the parties agree that HMHA retains a great deal of control over Hudson Healthcare's operations.

Hudson Healthcare was created two days prior to the City of Hoboken's award to Mr. Ciesla, but it is unclear whether Hudson Healthcare would have been created absent any influence or direction by the City.

Fees

OPRA provides for attorney's fees and civil penalties in certain circumstances. N.J.S.A. 47:1A-6 states, "If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requester who prevails in any proceeding shall be entitled to a reasonable attorney's fee." Civil penalties are appropriate when an official "knowingly and willfully" violates OPRA. N.J.S.A. 47:1A-1.1. At this time, the court has yet to determine whether Hudson Healthcare is subject to OPRA. As such, any discussion of fees pursuant to the statute is premature.

Summary Manner

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R. 4:67-1(a) governs actions commenced by an Order to Show Cause and Verified Complaint. "Without question, proceedings under OPRA are to be commenced in a 'summary [page 12] or expedited manner '" N.J.S.A. 17:1 A-6; *MAG Entertainment LLC v. ABC*, 375 N.J. Super. 534, 550 (2005) (citing *Hartz Mountain*, 369 N.J. Super, at 185, 848 A.2d 793). Summary actions do not permit the record to be supplemented by extensive discovery. *Id.* Protracted discovery is not suitable or permissible, absent a legitimate need, in matters that are inherently summary by nature. *Id.* at 552. However, R. 4:67-5 provides that for good cause shown, the court may order an action proceed in a plenary manner.

In this matter, Plaintiff has raised the issue of taking the deposition of Mr. Ciesla to examine the relationship between the funds paid to Hudson Healthcare by the City and the creation of Hudson Healthcare. Given the facts presented, the court finds good cause to examine whether or not Hudson Healthcare is a non-profit created by a private citizen that does contract work for the HMHA, or whether Hudson Healthcare was created by a private citizen at the direction of and with payment by the City. This is a genuine issue and the court may hear evidence on this matter prior to final judgment. R. 4:67-5.

Conclusion

Therefore, based on the foregoing, the order to show cause is denied. It is ordered that deposition of Mr. Ciesla is to be conducted

to further examine the relationship between Hudson Healthcare, HMHA and the City of Hoboken. It is further ordered that the deposition shall take place within 21 days of this order, and pursuant to R. 4:67-1(a), the court shall set a short date for trial.