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JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION, CIVIL PART
	:	ATLANTIC COUNTY
vs.	:	DOCKET NO. ATL-L-4089-12
	:	
ATLANTIC CITY ALLIANCE, INC.	:	
Defendant	:	
	:	OPINION

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Decided: November 16, 2012

Walter M. Luers, Esq., Attorney for Plaintiff

Frank L. Corrado, Esq., Attorney for Defendant

JAMES P. SAVIO, J.S.C.

**Nature of Motion and Procedural Background**

This Court is in receipt of the plaintiff John Paff's Notice of Appeal and I write this Memorandum of Decision pursuant to R. 2:5-1(b) - Notice to Trial Judge or Agency<sup>1</sup>. By way of background, Plaintiff filed a Motion for an Order to Show Cause on June 7, 2012. On August 16, 2012 Defendant responded to Plaintiffs Motion and Request for Records. On August 31, 2012 Defendant filed a Reply Letter. This matter was then heard by oral argument before this Court on September 14, 2012 and the Court granted the defendant's application to dismiss the order to show cause for the release of records.

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<sup>1</sup> Within 15 days . . . (of filing the Notice of Appeal). . . the trial judge. . . may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2.

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Seven of Atlantic City's casino licensees incorporated the Atlantic City Alliance, (ACA) a not-for-profit corporation that formed under the New Jersey Nonprofit Corporation Act, and organized under 501(c)(4) of the Internal Revenue Code. Thereafter, on November 2, 2011, the [Page 2] ACA and Casino Redevelopment Authority (CRDA) entered into a "Public-Private Agreement for Marketing Atlantic City" whose purpose was to provide a framework to develop and implement the full-scale broad based marketing program referred to in N.J.S.A. 5:12-221(a)(1).

This Memorandum serves as a supplement to this Court's oral opinion, which was provided to all counsel at the time of oral argument by telephone immediately after oral argument. By way of background, this Court acknowledges that prior to oral argument it had not review the New Jersey Supreme Court Opinion in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), on which Plaintiff's counsel heavily relied. However, this Court informed counsel during oral argument that it would review that particular New Jersey Supreme Court decision and would notify counsel if that ruling would affect the outcome of this Court's decision. After carefully reading the Opinion, the Court concluded that the holding did not alter the decision of the Court that was articulated at oral argument and therefore did not affect the outcome of this Court's ruling.

### **Issues**

The question presented to this Court was whether Atlantic City Alliance, Inc. (ACA) is a "public agency" as defined by the Open Public Records Act ("OPRA").

Plaintiff asserts that because ACA was created and is controlled by public agencies, it should then be considered a public agency within the definition of OPRA, and as such, the public should be entitled access to its records. As evidence of Plaintiff's argument, Plaintiff contends that OPRA expressly requires that "any limitations on the right of access accorded by OPRA shall be construed in favor of the public's right of access. N.J.S.A. 47:1A-1. Further, Plaintiff argues that N.J.S.A. 5:12-221 specifically directed the Casino Reinvestment Development Authority (CRDA) to enter into an "agreement establishing a public-private partnership with a [Page 3] not-for profit corporation compromising a majority of the casino licensees of the State whose investors have invested a minimum of \$1 billion in Atlantic City." As such, Plaintiff contends that the State legislature created the ACA by authorizing the CRDA to enter into an agreement with it and by requiring it to be funded by the casinos. Further, Plaintiff submits that N.J.S.A. 47:1A-1.1 includes within the definition of public agency "any division, board, bureau, office, commission, or other instrumentality." However, Plaintiff alleges that following that phrase is "any independent authority, commission, instrumentality or agency," and the word "independent" should not only apply to authority, but commission, instrumentality or agency. Thus, Plaintiff contends that

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OPRA's definition of "public agency" includes agencies and instrumentalities that are independent, and thus not under the control, of the political subdivisions that created them, including ACA. Lastly, Plaintiff argues that the documents sought by Plaintiff are "government records" within the meaning of OPRA, and as such, are public records because Plaintiff contends that ACA is a "public agency."

Conversely, Defendant asserts that the Court should reject Plaintiffs claim that ACA is a public agency and dismiss Plaintiff's complaint. Specifically, Defendant argues that the state legislature intended ACA to be the "private" component of a "public-private" partnership between casino licensees and the CRDA and that it expressly said so when it created the Atlantic City Tourism District, in legislation enacted with full knowledge of OPRA's requirements. Moreover, Defendant asserts that the ACA's form and function fully comport with its status as a private entity. In addition, Defendant states that OPRA's definition of "public agency" does not include the ACA because the ACA is neither a branch, nor a subdivision, nor an instrumentality of government. As such, Defendant contends that it is a private, casino-run marketing consortium. Further, Defendant submits that the state did not create the ACA, does not control it, [Page 4] fund it and does not participate in the ACA's membership or its governance. Conversely, Defendant states that the ACA's members are exclusively private corporations, it is privately governed and is administered exclusively by a staff of private employees.

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Defendant further provides that no government official or representative has any role in screening, selecting or appointing ACA board members or employees. Their funding comes solely from the pro-rata corporate contributions. Although Defendant submits that the ACA receives CRDA's recommendations, the ACA alone administers and decides how to spend those private funds.

This Court, after reviewing counsels' briefs, finds that the answer whether Plaintiff is entitled to the subject documents falls into two separate questions. First, this Court has analyzed N.J.S.A 47:1A-1.1 to determine if OPRA's definition of public agency complies with the form and function of the ACA, and two, this Court has reviewed N.J.S.A. 5:12-221(a), which directs CRDA to enter into a "public-private partnership" with a not-for profit corporation. Lastly, this Court has reviewed all relevant case law, including the New Jersey Supreme Court's decision in Fair Share Housing Center.

### **Discussion**

As indicated at the time of oral argument, the Court had carefully reviewed Chief Justice Poritz's opinion in Trenton Times<sup>2</sup>. The Court was extremely cognizant of the facts related to the relationship between Lafayette Yards and the City of Trenton resulting in the determination by the Supreme Court that:

"This case is about whether a redeveloper such as Lafayette Yard, controlled in large measure by a

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<sup>2</sup> Times of Trenton v Lafayette Yard, 183 N.J. 519 (2005).

municipality and supported by the municipality's taxing power, performs a 'governmental function' under OPMA such that the 'rights, [Page 5] duties, obligations, privileges, benefits, or other legal relations of any person" are affected." Trenton Times supra. 183 N.J. at 532.

Prior to oral argument, the Court carefully reviewed Judge Skillman's Opinion in Fair Share v. N.J. League of Muns., 413 N.J. Super. 423 (App. Div. 2010). Judge Skillman concluded that the League of Municipalities was not a governmental entity created by two or more municipalities to perform a governmental function. Fair Share supra. 413 N.J. Super. at 430. The Appellate Division concluded that its opinion in Fair Share ". . . is consistent with Lafayette Yard because ". . . unlike the nonprofit corporation involved in Lafayette Yard which was established and controlled by a municipality to provide a vital public service ordinarily performed directly by the affected municipality. . . the League does not provide any governmental service ordinarily provided by a municipality or group of municipalities." Fair Share supra., 413 N.J. Super. at 431-432.

The Court, in preparing for oral argument, made a mistake that should not have been made by a first year law student. After reading Judge Skillman's opinion in Fair Share, the Court neglected to shepardize the decision. At oral argument, the court learned from the discussion with counsel that the Appellate Division decision in Fair Share had been overruled by the Supreme Court. When the Court learned that the Appellate Court Opinion in Fair Share was overruled by the

Supreme Court, the Court suspected that the holding in Trenton Times and the holding in the Appellate Division Opinion in Fair Share was not disturbed by the Supreme Court but that the Supreme Court analyzed the facts in Fair Share and applying the holding in Trenton Times concluded that the league is subject to OPRA because it was a public agency or public body given the facts as described in the judicial opinions. In reading Judge Albin's Opinion for the Supreme Court, Judge Albin cited the definition of "public agency" in N.J.S.A. 47:1A-1.1 [Page 6] and concluded that the league fits "squarely" within the statutory definition of a public agency. Fair Share supra, 207 N.J. at 503.

The Supreme Court held that "under OPMA, if an entity meets the definition of a 'public body' defined by N.J.S.A. 10:4-8(a). . . it is subject to OPRA citing Lafayette Yard. "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 functions test." Fair Share supra. 207 N.J. at 505.

This Court, after carefully reviewing the Supreme Court Opinion in Fair Share concluded that the facts of the case do not support a conclusion that ACA is either a public body or a public agency and therefore granted the defendant's application Immediately after reading Judge Albin's Opinion, the Court telephoned both plaintiff's counsel and defense counsel and advised the attorneys that a review of the Supreme Court Opinion in Fair Share did not alter the Court's decision

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and provided each attorney with a citation to the specific pages of the Supreme Court Opinion that the Court felt were relevant to the conclusion.

/s/ James P. Savio, J.S.C.