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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1123-12T4

JOHN PAFF,

Plaintiff-Appellant,

v.

ATLANTIC CITY ALLIANCE, INC.,

Defendant-Respondent.

___

Argued August 21, 2013 – Decided August 27, 2013

Before Judges Waugh and Haas.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-004089-12.

Walter M. Luers argued the cause for appellant.

Frank L. Corrado argued the cause for respondent (Barry, Corrado & Grassi, P.C., attorneys; Mr. Corrado, on the brief).

PER CURIAM

Plaintiff John Paff appeals from a September 25, 2012 decision of the Law Division that dismissed his claim that defendant Atlantic City Alliance, Inc. (ACA) is a "public agency" subject to the provisions of the Open Public Records Act

(OPRA), N.J.S.A. 47:1A-1 to -13 and the common law right of access to public records.[1] We affirm.

In 2011, the Legislature enacted, and the Governor signed, L. 2011, c. 18, now codified as N.J.S.A. 5:12-218 to -233. The purpose of the legislation was to revive and enhance Atlantic City's tourism and gaming industries through the creation of the Atlantic City Tourism District. N.J.S.A. 5:12-219a(1). The District would be managed by the Casino Reinvestment Development Authority (CRDA). N.J.S.A. 5:12-219b.

Of particular significance to the present appeal, N.J.S.A. 5:12-221a(1) states, in pertinent part, that "[a]fter the creation of the tourism district[,]" CRDA "shall enter into an agreement establishing a public-private partnership with a not-for-profit corporation comprising a majority of the casino licensees of this State whose investors have invested a minimum of $1 billion in Atlantic City." The purpose of this partnership "shall be to undertake a full scale, broad-based, five-year, marketing program" to promote Atlantic City tourism and the gaming industry. Ibid.

Significantly, N.J.S.A. 5:12-221a(1) did not require the casinos to form such a corporation and provided for an

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[1] On November 21, 2012, the judge filed a written amplification of his findings of fact and conclusions of law pursuant to Rule 2:5-1(b).

alternative mechanism to achieve the legislative goal of promoting tourism and gaming if the casinos did not wish to participate.[2] However, if a corporation was formed, it could enter into an agreement to work with CRDA to "develop a brand identity for Atlantic City and the tourism district that can be effectively and widely communicated." Ibid. The corporation would "submit its plans for the marking program" to CRDA "for recommendations." Ibid.

The partnership agreement between CRDA and the corporation would be for a term of five years, which could be extended for an additional term "as determined by" CRDA. Ibid. The agreement would require "the corporation, or the casino licensees which shall comprise its membership, [to] make a contribution of $5,000,000 prior to 2012 toward the formation of the corporation and the marketing plan, or for the support and furtherance of the tourism district . . . ." Ibid. Each casino member of the corporation would contribute to this fund in proportion to its prior year's gross revenue. Ibid. Beginning in 2012, all casino licensees, whether or not a non-profit corporation was formed, were required to contribute $30,000,000

[2] If the casinos did not form a not-for-profit corporation as envisioned by the statute, N.J.S.A. 5:12-221a(5)b provided that CRDA would enter into an agreement with the Convention Center Division created by N.J.S.A. 5:12-226b(1) to develop and implement the program.

each year "in proportion to the casino licensees gross revenues generated in the preceding fiscal year . . . ." N.J.S.A. 5:12-221(a)(4).

After the legislation was enacted, five casinos[3] formed ACA as a private, not-for-profit corporation. On November 2, 2011, ACA and CRDA entered into a "Public-Private Agreement for Marketing Atlantic City" (the Agreement) as envisioned by N.J.S.A. 5:12-221a. Under the Agreement, ACA is "responsible for preparing a comprehensive marketing plan" for the tourism district. While it is required to "regularly consult and corroborate with the CRDA during the preparation of the Marketing Plan" the Agreement merely requires ACA to "give due consideration and respond to any and all recommendations of the CRDA to the Marketing Plan."

On April 11, 2012, plaintiff sent a letter to ACA's president requesting that ACA produce certain "government records in accordance with [OPRA] and the common law right of access." Among other things, he asked for copies of the contracts between ACA and certain of its employees, e-mails exchanged between these individuals, ACA's by-laws, and its certificate of incorporation. By letter dated April 24, 2011,

[3] There are now eight casino members of ACA. Each of the casino members is a private corporation.

ACA's president advised plaintiff that ACA was not a "public agency" under OPRA and, therefore, ACA would not produce any of its records in response to plaintiff's request.

Thereafter, plaintiff filed a complaint and order to show cause in the Law Division seeking to require ACA to respond to its request for documents. After conducting oral argument, the trial judge denied plaintiff's request and found that ACA was not a "public agency" under OPRA. The judge noted that ACA had not been formed by CRDA or any other State agency and, instead, was a private, not-for-profit corporation that was funded exclusively by its casino members. The judge also determined that plaintiff could not access the records under the common law right of access to public records. This appeal followed.

On appeal, plaintiff argues the trial court erred in failing to find that ACA is a "public agency" subject to OPRA. A "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012). Thus, no deference is afforded to the trial court's findings. Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 159 (App. Div. 2011).

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

After reviewing this provision in light of the Legislature's intent, we conclude that the ACA is not "public agency" subject to OPRA or the common law right of access to public records.

In three decisions, our Supreme Court has provided guidance for determining whether an entity is a "public agency" under OPRA. In The Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535-36, (2005), the Court held that a private, non-profit corporation authorized to issue tax exempt bonds guaranteed by the municipality and redevelop an urban site, was a public agency. In addition to having the power to issue tax exempt bonds, the Court also noted that Trenton's mayor and city council had "absolute control" over the

membership of the corporation, which could not have been created without the municipality's approval. Id. at 535.

Similarly, in Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 504, (2011), the Court held that the League of Municipalities, a non-profit, unincorporated association, created by statute to secure concerted action by municipalities, was a public agency, even though the League did not perform a "traditional governmental task." Significantly, the municipalities that belonged to the League created it as their instrumentality. Id. at 503-04.

Finally, in Sussex Common Assocs., LLC v. Rutgers, the State University, 210 N.J. 531, 534 (2012), the Court determined that, although Rutgers and its law schools were public agencies under OPRA, a law school environmental clinic was not. The Court found that the clinic did "not perform any government functions." Id. at 546.

Most recently, in Paff v. New Jersey State Firemen's Ass'n, ___ N.J. Super. ___, ___ (App. Div. 2013), we held that an association, organized pursuant to statute by several incorporated local firemen's relief associations to provide assistance to indigent firefighters and their families, was a public agency under OPRA. (Slip op. at 18). The association was funded by taxes on fire insurance premiums collected by the

State. Ibid. The statute creating the association also barred the creation of any competing state association. Ibid.

Applying these principles to this matter, it is abundantly clear that ACA is not a public agency subject to OPRA. N.J.S.A. 5:12-221a(1) specifically refers to the relationship between CRDA and ACA as a "public-private partnership," with CRDA as the public component and ACA as the private one. While the two entities work together, neither controls the other. Indeed, there was no requirement imposed in the legislation that required the casinos to form ACA. It was entirely voluntary on their part.

In addition, neither CRDA nor any other State agency selected the casinos that would comprise ACA. Significantly, not all of the Atlantic City casinos joined as members when ACA was first incorporated. ACA's board is comprised of trustees who were not selected by the State. ACA is funded by the contributions of its member casinos. It receives no State funds. It also lacks the power to tax or to issue tax exempt bonds.

Thus, ACA is plainly different from the entities the Supreme Court found were "public agencies" in Lafayette Yard, supra, and League of Municipalities, supra. The State did not create ACA, does not fund it, and did not grant the corporation

the power to raise its own funds through taxation or the selling of bonds.

This case is also readily distinguishable from Firemen's Ass'n, supra, where we found significant the fact that the association served a governmental function by using the funding it received from taxes imposed on fire insurance premiums to provide "welfare benefits to a significant number of public servants - - paid and volunteer firefighters." Id. (slip op. at 21). Undoubtedly, the marketing plan to be implemented by ACA, with recommendations received from CRDA, will benefit Atlantic City and the tourism district and thus serve "a public purpose." However, it will also benefit the casinos and the gaming industry represented by ACA. That is the nature of a "public-private partnership." Thus, the mere fact that a private entity assists a public agency in performing a government function is not determinative. League of Municipalities, supra, 207 N.J. at 506; Firemen's Ass'n, supra, slip op. at 15. Moreover, unlike the association involved in Firemen's Ass'n, ACA's salutary purpose is not funded by the State and ACA's performance of same was entirely voluntary on its part.

Contrary to plaintiff's argument, our conclusion that ACA is not a public agency subject to OPRA does not deprive him of the opportunity to seek public records concerning CRDA's work

with ACA. However, plaintiff will have to obtain those records from the public agency, CRDA, and not from ACA.

Plaintiff is also not entitled to the records he seeks from ACA under the common law right of access to public records. The common law right extends to written records "'made by public officers in the exercise of public functions.'" *N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders*, 127 *N.J.* 9, 12 (1992) (quoting *Nero v. Hyland*, 76 *N.J.* 213, 221-23 (1978)). Because ACA is not a public agency and its members do not act as public officers or conduct official business, the records plaintiff seeks were not "created by, or at the behest of, public officers in the exercise of a public function." *Keddie v. Rutgers*, 148 *N.J.* 36, 50 (1997). Therefore, the common law right of access does not extend to records maintained by ACA.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION