

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2295-12T1

JOHN PAFF,

Plaintiff-Appellant,

v.

COMMUNITY EDUCATION
CENTERS, INC.,

Defendant-Respondent.

Argued October 28, 2013 – Decided November 21, 2013

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-
1658-12.

Richard Gutman argued the cause for
appellant.

Jennifer Borek argued the cause for
respondent (Genova Burns Giantomasi Webster,
L.L.C., attorneys; Ms. Borek, of counsel;
Ms. Borek and Matthew Kertz, on the brief).

PER CURIAM

Plaintiff John Paff appeals from an order entered by the
Law Division on October 12, 2012, dismissing his complaint

against defendant, Community Education Centers, Inc. (CEC). For the reasons that follow, we affirm.

Education and Health Centers of America, Inc. (EHCA) is a non-profit entity, which has been in business since 1978. Among other things, EHCA contracts with state and local governments to provide substance abuse treatment and education services to inmates preparing for release from incarceration. CEC is a privately held for-profit entity that provides treatment and education services aimed at changing addictive and criminal behaviors. In 1996, CEC entered into an agreement with EHCA to provide services and staff for EHCA's contracts in New Jersey.

In December 2011, Essex County awarded EHCA a contract to provide services at Delaney Hall in Newark for a five-year period, commencing on January 1, 2012.¹ According to the agreement, the facility would house approximately 1000 persons who would otherwise be incarcerated at Essex County's correctional facilities, as well as persons detained by federal immigration officials. CEC provides services at Delaney Hall, pursuant to its contract with EHCA.

On January 19, 2012, plaintiff submitted a request to EHCA and CEC seeking access to certain records pursuant to the Open

¹ It appears that EHCA previously provided services at Delaney Hall pursuant to an agreement with Essex County, which expired on December 31, 2011.

Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law. Plaintiff asserted that EHCA and CEC are "public agencies" under OPRA and are therefore subject to its requirements.

In his request, plaintiff sought access to resolutions or other writings by which EHCA and CEC designated a custodian of government records pursuant to OPRA, as well as the document request forms that EHCA and CEC have adopted. In addition, plaintiff sought access to attorney-billing records related to a lawsuit brought by the estate of a person who died while incarcerated at Delaney Hall, and personnel records for three individuals who worked at the facility.

CEC denied plaintiff's requests. CEC informed plaintiff that it was not a "public entity" under OPRA and not subject to OPRA's requirements.

On March 2, 2012, plaintiff filed a verified complaint against CEC in the Law Division, claiming that CEC is a "public agency" under OPRA.² Plaintiff sought an order requiring CEC to appoint a custodian of records, adopt an OPRA document-request form, and grant access to the attorney billing and personnel records he had requested.

² Plaintiff did not name EHCA in his complaint. He also did not assert any claim under the common law.

CEC filed an answer, denying that it was subject to OPRA. CEC also submitted a certification from its Chairman and CEO John J. Clancy, in which he asserted, among other things, that the State of New Jersey, its counties and its municipalities do not have the right to control - and do not control - CEC's operations. CEC sought dismissal of the complaint.

The trial court considered the matter on October 12, 2012, and determined that plaintiff's application to compel CEC to comply with OPRA should be denied. The court found that CEC was not a "public agency" under OPRA and entered an order dismissing the complaint. This appeal followed.

Plaintiff argues that OPRA applies to taxpayer-funded, governmental activities regardless of whether they are carried out by a public or private entity. According to plaintiff, the determining factor is whether the entity is engaged in governmental activities over which citizens and taxpayers should exercise "sovereignty." He contends that CEC is engaged in "exclusively" governmental activities and therefore should be considered a "public agency" under OPRA. We disagree.

OPRA provides that all "government records" must be "readily accessible for inspection, copying or examination by the citizens of this State." N.J.S.A. 47:1A-1. A "government

record" is a record "made, maintained or kept on file" by a "public agency," which is defined as

[A]ny of the principal departments in the Executive Branch of State Government, and the 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.]

Here, the trial court correctly determined that CEC does not qualify as a "public agency" under OPRA. As explained by Clancy in the certification he submitted to the trial court, CEC is an independent corporation that provides services in New Jersey pursuant to its contract with EHCA. CEC was not created, nor is it controlled, by any governmental entity.

Furthermore, CEC operates in seventeen states and in Bermuda. It has more than 3800 employees, and the majority of these individuals work outside of New Jersey. CEC provides its employees with access to a 401(k) retirement plan and its

employees do not participate in any government pension program. According to Clancy, CEC's Board of Directors is comprised predominantly of private investors, who manage and control the corporation.

Moreover, the members of CEC's board are not appointed or controlled by the State of New Jersey, its counties or its municipalities. CEC owns or leases its own property, and does not utilize the property, real or personal, of the State or any county or municipality. CEC also receives monies from EHCA for the services it renders, but Clancy said that is only "a fraction" of the revenue CEC receives from its operations throughout the United States and in Bermuda.

Case law supports the trial court's determination that CEC is not a "public agency" under OPRA. In Times of Trenton Publishing Corp. v. Lafayette Yard Community Development 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 a municipality and redevelop property in Trenton was a "public agency" under OPRA. Among other things, the Court noted that Trenton's Mayor and City Council had "absolute control" over the corporation's members and the corporation could not have been created without the municipality's approval. Id. at 535.

Furthermore, in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 504 (2011), the Court held that the League, which was a non-profit, unincorporated association created by statute to allow joint action by participating municipalities, was a "public agency" under OPRA. The Court pointed out that the League was created by its member municipalities, and it was controlled by the elected officials in the municipalities that it represented. Ibid.

In addition, in Sussex Common Associates, LLC v. Rutgers, The State University, 210 N.J. 531, 534, 544 (2012), the Court found that the environmental law clinic at Rutgers Law School-Newark was not a "public agency" under OPRA even though the university and the law school were "public agencies" subject to the Act. Id. at 534. The Court noted that the clinic did not perform any governmental function, conduct official government business, or assist in any aspect of State or local government. Id. at 546. The Court also noted that the clinic taught students how to practice law and represent clients. Id. at 547. The university and other government agencies did not control the manner in which the professors and their students practiced law. Ibid.

The decisions in Lafayette Yard, Fair Share Housing and Sussex Commons make clear that CEC is not a "public agency"

under OPRA. In those cases, the private entity was either created by government officials or subject to their control. Neither factor is present here. As we have explained, CEC is a private entity that provides services to the State of New Jersey and county governments, in accordance with EHCA's contracts with those governmental entities. CEC is not, however, an entity that is controlled by any government agency or official in this State. Moreover, the records sought here are personnel records of employees of a private entity and billing records of that entity's attorneys.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION