SUPERIOR COURT OF NEW JERSEY

COUNTIES OF
CUMBERLAND, GLOUCESTER AND SALEM

GEORGIA M. CURIO
ASSIGNMENT JUDGE

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January 27, 2014

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JAN 29 2014

Re: Block v. Pitman School District, et al
Docket No. GLO-L-657-13

Dear Counsel:

This matter is before the court for determination of whether a booster club for a high school sports team is a "public agency" for purposes of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.

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 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 and 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 and 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.

This determination requires a fact sensitive inquiry governed by case law.

Times of Trenton Publishing Corp. vs. Lafayette Yard Community Development Corporation, 183 N.J. 519, 535-36 (2005) held that a private, non-profit corporation authorized to issue tax-exempt bonds was a "public agency," noting that the mayor and city council had "absolute control" over the corporation's members and the corporation could not have been created without the city's approval.

Fairshare Housing Center, Inc. vs. New Jersey State League of Municipalities, 207 N.J. 489, 504 (2011) held that the League, which is a non-profit, unincorporated association, is a "public agency." The court noted that the League was created by its member municipalities and controlled by the elected officials of its member municipalities.

Sussex Common Associates, LLC vs. Rutgers, the State University, 210 N.J. 531, 534 (2012) held that a law school clinic was not a public agency under OPRA, because it did not perform any governmental function, conduct official government business, or assist in any aspect of state or local government. Neither the university nor other governmental agency controlled the manner in which the professors and their students practiced law.

Paff vs. New Jersey State Firemen's Association, 431 N.J. Super. 278 (2013) looked to the "formation, structure and function" of the organization there under review in order to determine that the Fireman's Association was a "public agency" under OPRA.

The court finds Paff vs. Atlantic City Alliance Inc., 2013 N.J. Super. Unpub. LEXIS 2127 (App Div. August 27, 2013), though unpublished, persuasive and instructive. A copy is attached to this opinion. In that case the Appellate Division determined that the Atlantic City Alliance Inc. is not a public agency subject to OPRA.

Instead, the Court found it to be a:

> public-private partnership.... While the two entities *work together*, neither controls the other. Indeed, there was no requirement imposed in the legislation that required casinos to form ACA. It was entirely *voluntary* on their part." [...] [T]he board is comprised of trustees who were *not selected* by the state. [*9] ACA is funded by the contributions of its member casinos. It *receives no state funds*.
>
> [...]

> Thus, the mere fact that a private entity assists [*10] a public agency in performing a government function is not determinative.... 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. *Id.* at [*8] – [*10] (emphasis added).

In this case, the testimony presented supports the conclusion that the booster clubs are not created by or under the control of the Pitman School Board or any other governmental agency or subdivision. Nor do the booster clubs undertake any governmental function or serve as an instrumentality of the Pitman School Board.

The testimony of Karla Langlois, Kelly J. Gipe, Karen Bevilacqua and Susan Crispin support the foregoing conclusion.

Each witness was credible, testifying in a direct and straightforward manner. Each witness corroborated the other and was further corroborated by the testimony of Superintendent Patrick McAleer. The testimony of these witnesses had the ring of truth. It makes sense that the booster clubs operate the way they say they operate. Their testimony was unrefuted and they were consistent under cross-examination.

These witnesses were volunteers for various booster clubs. Their testimony demonstrated clearly that the booster clubs are a loose amalgam of parents which do not have regular meetings, in most instances do not have officers except for a treasurer, some are incorporated and some are not. Some have a tax identification number and some do not. They concern themselves with raising money for "extras" for the student-athletes. According to their testimony, these extras could be team trips, articles of clothing, tournament fees and the like. Although there is communication by and among the booster parents and the athletic coach, the coach does not run the booster club nor direct its activities. Rather the coach may make suggestions as to the needs of the athletes and facilitate communication, and otherwise help out with booster club events.

The monies raised by the booster clubs are not deposited with the school board. Nor do the booster clubs receive money from the school board. In some instances for activities on school premises, they may be required to fill out a "use of facilities form" and to pay ancillary expenses. Sometimes, those requirements are waived as they sometimes are for other local organizations.

The Pitman School Board does not name members to the booster club nor does the school board seek or receive a list of members of the booster clubs.

Plaintiff/OPRA requester points to the involvement of the coach/liaisons as evidencing control of the booster clubs by the school board. However, the testimony was clear that the coaches were asked for their input concerning what the student-athletes could most use and provided a means of communication for fundraising events. Though they sometimes worked together and to a common purpose, neither one controlled the other.

Similarly the Plaintiff/OPRA requester points to Pitman Board of Education Policy 9191 (Pl.'s Ex. 1) as establishing that the Board of Education controls the booster club or that the booster club is an instrumentality of the Board of Education.

This policy, observed in the breach and unenforced, does not so establish. A fair reading of the actual language of Policy 9191 demonstrates that it offers "guidelines" for the operation of booster clubs, that it references the school district's goals and objectives and provides that it is not intended to demonstrate the board's "assumption of responsibility for any activity conducted by booster club." This is not language establishing the control recognized by case law as conferring public agency status. See e.g. Times of Trenton vs. Lafayette Yard, 183 N.J. at 535-36.

Superintendent McAleer testified that the policy is not followed. The board has not asked for tax identification numbers or certification of adherence to school district policies. The booster clubs do not seek nor receive superintendent or school board permission to run fundraisers. McAleer's testimony confirmed that in some instances the booster clubs submit a "use of facilities form" for events on school property and pay ancillary costs which are sometimes waived as is the case on occasion for other local organizations.

In one exchange on cross-examination, the superintendent testified that Policy 9191 recognizes the support of booster clubs but does not authorize their existence.

While acknowledging that booster clubs further the intentions of the athletic department and of the Board of Education, Superintendent McAleer testified that the Board of Education has no control over the booster clubs and athletics would continue at the school with or without the booster clubs assisting the student-athletes.

Superintendent McAleer further testified that the assignment of coach/liaisons to each booster club is a matter of practicality so that there can be communication and feedback as to the needs of the student-athletes. The arrangement facilitates the necessary "give-and-take of ideas."

Nevertheless, Superintendent McAleer testified that he provides "oversight" to the booster clubs. He reserves the right to decline any gift or to intercede if he thinks an event is inappropriate or that an activity is being carried out in an inappropriate manner. Having the coach/liaison involved facilitates this oversight.

The court found Dr. McAleer's testimony to be credible. He spoke in a direct, straight-forward and professional manner. He did not equivocate or seek to evade. He candidly acknowledged that it is his responsibility to enforce the school district's policies and yet he did not and does not enforce Policy 9191. His testimony was consistent with the testimony of the other witnesses presented. His testimony, too, has the ring of truth. It is reasonable that the school board does not exercise control nor delegate any governmental authority or function to the booster clubs.

The court finds based on the evidence presented that the booster clubs are independent private groups neither created by, controlled by, or an instrumentality of the Pitman School District or

any other governmental subdivision. As such, the booster clubs are not public agencies and are not subject to the requirements of OPRA.

The Order of the Court is enclosed.

Very truly yours,

GEORGIA M. CURIO, AJSC

GMC/bg

PREPARED BY THE COURT

Dennis E. Block, Esquire, *Plaintiff,* v. Borough of Pitman School District, et al., *Defendants.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET No. GLO-L-657-13 CIVIL ACTION ORDER

This Matter having been opened to the Court by Plaintiff Dennis E. Block, Esq., for a legal determination as to whether the Pitman High School Booster Club's records are subject to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, the Court having considered the arguments of counsel, oral and written, and evidence presented; and in the presence of Jeffrey Hark, Esq., co-counsel for Plaintiff, David DeClement, Esq., attorney for the Pitman School District's booster clubs, collectively, Jack Kennedy, Esq., attorney for the Pitman School District, and Barbara Riefberg, Esq., attorney for Alyssa Worbetz, Eugene Reed and Kevin Crawford, having heard the arguments of counsel and evidence presented on the record on January 10, 2014, and as more fully set forth in the attached opinion letter; for good cause shown;

IT IS, on this 27TH day of January, 2014,

ORDERED as follows:

1. The Pitman High School Booster Clubs are not public agencies as

defined by the Open Public Records Act; and therefore,

2. The Pitman High School Booster Clubs are not subject to the OPRA requirements.

A copy of this Order shall be served upon all interested parties immediately.

HON. GEORGIA M. CURIO, A.J.S.C.

Paff v. Atl. City Alliance, Inc.

Superior Court of New Jersey, Appellate Division
August 21, 2013, Argued; August 27, 2013, Decided
DOCKET NO. A-1123-12T4

Reporter: 2013 N.J. Super. Unpub. LEXIS 2127; 2013 WL 4515915

JOHN PAFF, Plaintiff-Appellant, v. ATLANTIC CITY ALLIANCE, INC., Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-004089-12.

Counsel: 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).

Judges: Before Judges Waugh and Haas.

Opinion

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. 5:12-219(a)(1). The District would be managed by the Casino Reinvestment Development Authority (CRDA). N.J.S.A. 5:12-219(b).

Of particular significance [*2] to the present appeal, N.J.S.A. 5:12-221(a)(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. 5:12-221(a)(1) did not require the casinos to form such a corporation and provided for an 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 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).

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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).

[2] If the casinos did not form a not-for-profit corporation as envisioned by the statute, N.J.S.A. 5:12-221(a)(5)(b) [*3] provided that CRDA would enter into an agreement with the Convention Center Division created by N.J.S.A. 5:12-226(b)(1) to develop and implement the program.

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 [*4] Atlantic City" (the Agreement) as envisioned by N.J.S.A. 5:12-221(a). 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, 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 [*5] 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, 32 A.3d 1136 (App. Div. 2011), certif. denied, 210 N.J. 108, 40 A.3d 732 (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, 31 A.3d 623 (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, [*6] 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, 874 A.2d 1064, (2005), the Court held that a private, non-profit corporation authorized to issue tax exempt bonds [*7] 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, 25 A.3d 1063, (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, 46 A.3d 536 (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. , , 69 A.3d 118, 2013 N.J. Super. LEXIS 90 *2 (App. Div. 2013), [*8] we held that an association, organized pursuant to statute by several incorporated local firemen's relief associations to

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

provide assistance to indigent firefighters and their families, was a public agency under OPRA. (*2013 N.J. Super. LEXIS 90 at *11*). 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. 5:12-221(a)(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. [*9] 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.* (*2013 N.J. Super. LEXIS 90 at *23*). 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 [*10] 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*, 2013 N.J. Super. LEXIS 90 at *19. 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, 601 A.2d 693 (1992) (quoting *Nero v. Hyland*, 76 N.J. 213, 221-23, 386 A.2d 846 (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 [*11] officers in the exercise of a public function." *Keddie v. Rutgers*, 148 N.J. 36, 50, 689 A.2d 702 (1997). Therefore, the common law right of access does not extend to records maintained by ACA.

Affirmed.