



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

February 23, 2010 Government Records Council Meeting

Laura Ann Cole
Complainant

Complaint No. 2009-68

v.

Newton Memorial Hospital (Sussex)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Hospital is a charitable nonprofit corporation that does not perform a governmental function affecting the rights of others and has no collective authority to spend public funds, it is not a public agency as defined by OPRA and therefore not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1., The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App. Div. 2004), and Nash v. Children’s Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 23rd Day of February, 2010



Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Laura Ann Cole¹
Complainant**

GRC Complaint No. 2009-68

v.

**Newton Memorial Hospital (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of all records for the following:

1. How many times in the past three (3) years was the exterminator in Milford Health and Wellness for flea infestations, dates they were there;
2. How often is the building cleaned and what solutions are used, the name of company or companies involved;
3. After the exterminator came in for the numerous flea infestations what solutions were used, how were the fleas disposed of at Milford Health and Wellness;
4. License number of Director Dziak or any other directors, plus their license numbers;
5. Management company or companies for the inspection, extermination, and cleaning company or companies for the inside of Milford Health and Wellness;
6. Dates of all inspections for the last three (3) years on Milford Health and Wellness; and
7. Dates of all violations and what were the violations for the last three (3) years which incurred in Milford Health and Wellness.

Request Made: January 27, 2009

Response Made: February 6, 2009³

Custodian: Sean O'Rourke⁴

GRC Complaint Filed: February 11, 2009⁵

Background

January 27, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on a modified Government Records Council model request form.

¹ No legal representation listed on record.

² Represented by Christina Manuelli, Esq., of Reed Smith, LLP (Princeton, NJ).

³ The Custodian verbally responded to the OPRA request on this date.

⁴ Mr. O'Rourke is the Chief Operating Officer for the Newton Memorial Hospital.

⁵ The GRC received the Denial of Access Complaint on said date.

February 11, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s request dated January 27, 2009. The Complainant states that she spoke to Mr. Henderson and the Director of Milford Health and Wellness Center, Gerry Dziak, on February 6, 2009 and was told that she used the incorrect request form. The Complainant states that the Director provided her with the contact information for the hospital’s attorney, Ms. Albright. The Complainant also states that on February 9, 2009 she was informed that the hospital did not have an official OPRA request form and she was again directed to speak to the hospital’s attorney. The Complainant states that she spoke to the hospital’s attorney on February 10, 2009 and she was told that the hospital was not required to disclose the requested information. However, the Complainant further states that the hospital’s attorney offered to answer her questions as long as they met hospital regulations. The Complainant states that she was asked not to speak to hospital personnel.

The Complainant does not agree to mediate this complaint.

March 16, 2009

Letter from Newton Memorial Hospital’s (“Hospital”) Counsel to the GRC. The Hospital’s Counsel states that the Hospital is a privately-owned, nonprofit corporation organized under the laws of the State of New Jersey. The Hospital’s Counsel argues that for this reason, the Hospital is not a public agency subject to OPRA.

April 8, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

April 17, 2009

Custodian’s SOI attaching the Complainant’s OPRA request dated January 27, 2009.⁶ The Custodian certifies that on or about February 9, 2009, Gerry Dziak, the Director of Milford Health and Wellness Center advised the Complainant that she should contact the Hospital’s attorney, Ms. Albright, regarding her request. The Custodian further certifies that Ms. Albright advised the Complainant on or about February 10, 2009, that the Hospital was not required by law to provide the requested information. The Custodian also certifies that no search was undertaken because the Hospital was advised by its legal counsel that it is not subject to OPRA and did not need to provide the requested information.

The Custodian certifies that the Hospital is a private, nonprofit corporation organized under the New Jersey Nonprofit Corporation Act.⁷ The Custodian further certifies that the Hospital is wholly owned, controlled and managed by the North Jersey Health Care Corporation, a private New Jersey nonprofit corporation. The Custodian contends that for these reasons, the Hospital is not a public agency of the State of New Jersey as defined by OPRA and therefore is not subject to the requirements of OPRA. The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425, 442 (App. Div. 2004; *aff’d*, 183 N.J. 519, 535-36 (2005)). *See also Nash v. Children’s Hospital of New Jersey*, GRC Complaint No. 2006-13 (May

⁶ The Custodian attached additional material that was not relevant to the adjudication of this complaint.

⁷ N.J.S.A. 15A:1-1.

2006) (finding that the Children’s Hospital of New Jersey, owned and operated by Newark Beth Israel Medical Center, was not a public agency pursuant to OPRA and therefore was not subject to the provisions of OPRA.)

April 27, 2009

Letter from the GRC to the Hospital’s Counsel. The GRC requests that the Hospital provide documentation to support its claim that it is not a public agency.

April 29, 2009

Letter from the Hospital’s Counsel to the GRC. The Hospital’s Counsel objects to the GRC’s request for additional documentation regarding its status. The Hospital’s Counsel requests that that the GRC accept the Custodian’s certification and find that said statement forms a sufficient basis for determining that the Hospital is not a public agency subject to OPRA. In the alternative, the Hospital’s Counsel requests that the GRC waive its requirement that the Hospital provide a copy of documentation regarding its status to the Complainant and allow an in-camera inspection of the additional documents.

The Hospital’s Counsel also contends that because the Milford Health and Wellness Center is an urgent care facility that is located in Milford, Pennsylvania, its operations are outside the jurisdiction of the State of New Jersey.

May 15, 2009

Letter from the Hospital’s Counsel to the GRC. The Hospital’s Counsel provides the GRC with the Hospital’s Certificate of Incorporation as originally filed on April 26, 1943 and as amended and restated on November 22, 1993, as well as a copy of its Bylaws.

Analysis

Whether the Newton Memorial Hospital is a public agency?

OPRA defines a public agency as:

“...[a]ny 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.” N.J.S.A. 47:1A-1.1.

Most definitions of “public agency” under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public

Meetings Act (“OPMA”) defines “public body” as a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, *and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds.* N.J.S.A. 10:4-8a. (Emphasis added.)

OPMA’s definition of public body requires that an entity, “... (1) consist of ‘two or more persons’ and (2) be ‘collectively empowered as a voting body’ (3) ‘to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.’ N.J.S.A. 10:4-8a...” The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App. Div. 2004). Lafayette Yard undertook the task of deciding whether or not an entity was a public agency under both OPRA and OPMA because the plaintiff requested access to both meetings and copies of meeting minutes of the Community Development Corporation.

In that case, the court held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the city of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a “public body” under OPMA. The court further held that the corporation was “an ‘instrumentality’ created by the City and a ‘public agency’ under the OPRA for essentially the same reasons that it is a ‘public body’ under the OPMA.” *Id.* at 442, 670.

The decision of the Superior Court that Lafayette Yard Community Development Corp. qualifies as a “public body” was affirmed by the New Jersey Supreme Court (Lafayette Yard, 183 N.J. 519 (2005)). See also Snyder v. American Association of Blood Banks, 144 N.J. 269 (1996) (finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J. Super. 164 (Law Div. 1988) (finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J. Super. 542 (Law Div. 1984) (citing Wade v. N.J. Turnpike Authority, 132 N.J. Super. 92 (Law Div. 1975), “The Court noted the official comment to N.J.S.A. 59:1-3: ‘The definition of

‘Public Entity’ provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.”).

Additionally, two rules in the Administrative Code define “public agency” more precisely than other rules and statutes by adding the following language to the usual definition, “... agencies exercising sovereign powers of government.” This language is very illustrative of the meaning of public agencies, as explained by the court in the Lafayette Yard case cited above. While other state statutes and rules do not include this language, it appears that the New Jersey Supreme Court confirms that “exercising sovereign powers of government” or performing a specific governmental function is required for an entity to be deemed a public body or agency under OPRA.

In the current complaint, the Custodian contends that the Hospital is not a public agency subject to the requirements of OPRA because the Hospital is a private, nonprofit corporation wholly owned, controlled and managed by the North Jersey Health Care Corporation, which is also a private, New Jersey nonprofit corporation.

Newton Memorial Hospital’s Certificate of Incorporation provides the following:

“3(i) The general purposes of the Corporation shall be to promote and advance charitable, health, scientific, social and educational purposes of the nature set forth pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, or the corresponding provision of any applicable future United States Internal Revenue Law.

(ii) The specific purposes of the Corporation shall be to establish, maintain, conduct and operate a general hospital for the treatment and care of the sick, indisposed and injured, and in connection therewith to operate laboratories, dispensaries, diagnostic and therapeutic devices of any kind and nature, and to carry on such educational, philanthropic, research and scientific activities as may be connected with or incident to the healing, treatment or cure of the sick, indisposed or injured and to the promotion of health.

...

9. Upon the dissolution of the corporation, the Sole Member shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Sole Member shall determine. Any such assets not so disposed of shall be disposed by the appropriate Court in the jurisdiction ... exclusively for such purposes or to

such organization or organizations... which are organized and operated exclusively for such purposes.

10. The business and affairs of this Corporation shall be managed by a Board of Governors, whose members are hereinafter referred to as Governors.

11. Ultimate control over the Corporation, shall be vested in North Jersey Health Care Corporation, a New Jersey not-for-profit corporation, herein referred to as the Sole Member.

...

21. The power to adopt, alter, amend or repeal the Bylaws for the Corporation shall be vested only in the Board of Governors with approval of North Jersey Health Care Corporation, the Sole Member, as more specifically provided in the Bylaws of the Corporation.

22. The power to alter, amend or repeal this Certificate of Incorporation shall be vested only in the Board of Governors with approval of North Jersey Health Care Corporation, the Sole Member as more specifically provided in the Bylaws of the Corporation.”

The Newton Memorial Hospital’s Bylaws provide that ultimate control over the Hospital is vested in the North Jersey Health Care Corporation, a New Jersey not-for-profit corporation. Article 3, paragraph 2 of the Hospital’s Bylaws provides that the New Jersey Health Care Corporation is the ultimate steward of the resources of the Hospital.

The Hospital’s Bylaws also provide that the New Jersey Health Care Corporation’s powers and responsibilities shall be to:

- “a. Direct the adoption by the Board of Directors of ethical directives which shall be binding upon the Hospital in its operations;
- b. Approve, upon recommendation of the Board of Directors, the adoption, amendment, repeal, or alteration of the Certificate of Incorporation and these Bylaws;
- c. With the exception of appointed and ex-officio Directors, elect and remove all members of the Board of Directors and fill any vacancy occurring thereon;
- d. Elect and remove every officer of the Hospital;”

An entity must meet two (2) requirements to be considered a public agency subject to the provisions of OPRA. Lafayette Yard, *supra*. An entity must perform a specific governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any other person. *Id.* Said entity must also have the collective authority to spend public funds. *Id.*

In Nash v. Children's Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006), the Council determined that a hospital was not a public agency subject to OPRA where the Certificate of Incorporation showed that the hospital was a private, not-for-profit corporation created exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 and having a Board of Trustees appointed by the sole member of the corporation, which was St. Barnabas Corporation, a New Jersey non-profit corporation. Moreover, the hospital's Certificate of Incorporation provided that in the event that the corporation's charter is surrendered to, taken away by or revoked by St. Barnabas Corporation, the corporation shall dissolve and the remaining assets of the corporation shall be distributed to a non-profit fund, foundation or organization which is organized and operated exclusively for charitable purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986.

As in Nash, the Certificate of Incorporation for the Hospital in the instant matter indicates that the Hospital is a private, not-for-profit corporation created exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986. The Certificate of Incorporation further indicates that the business and affairs of the Hospital shall be managed by a Board of Governors, while ultimate control over the Hospital is vested in North Jersey Health Care Corporation, a New Jersey not-for-profit corporation. Upon the dissolution of the Hospital, the New Jersey Health Care Corporation shall dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3) of the Internal Revenue Code.

Thus, in considering the meaning of a public agency as explained by the court in the Lafayette Yard case, the Council's decision in Nash and all the document submissions of the Custodian, the Hospital, owned and operated by North Jersey Health Care Corporation, is not a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Hospital is not subject to the provisions of OPRA and is not required to respond to OPRA requests for records.

Because the Hospital is a charitable nonprofit corporation that does not perform a governmental function affecting the rights of others and has no collective authority to spend public funds, it is not a public agency as defined by OPRA and therefore not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1, The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App. Div. 2004), Nash v. Children's Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Hospital is a charitable nonprofit corporation that does not perform a governmental function affecting the rights of others and has no collective authority to spend public funds, it is not a public agency as defined by OPRA and therefore not subject to the

provisions of OPRA. N.J.S.A. 47:1A-1.1., *The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp.*, 368 N.J.Super. 425 (App. Div. 2004), and *Nash v. Children's Hospital of New Jersey*, GRC Complaint No. 2006-13 (May 2006).

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010