



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

George B. Melick
Complainant

Complaint No. 2010-04

v.

New Jersey Association of Counties (Mercer)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 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 evidence of record shows that the New Jersey Association of Counties is a non-profit organization that advocates the local government interests of New Jersey counties and is composed of voluntary members, does not provide any governmental services, receives its revenue from member dues, but does not spend public funds, and is a lobbying body and only provides general information and support for counties, the New Jersey Association of Counties is not a public agency under OPRA. N.J.S.A. 47:1A-1.1; Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 413 N.J. Super. 423 (App. Div. 2010).

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 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**George B. Melick¹
Complainant**

GRC Complaint No. 2010-04

v.

**New Jersey Association of Counties (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- The annual audit
- A detailed print-out of expenditures and claims paid by the organization during the year 2008. (A copy of the claim's register or check register would suffice.)
- A list of the salaried employees of the organization and their salaries.

Request Made: December 30, 2008

Response Made: January 30, 2009

Custodian: Celeste Capriano

GRC Complaint Filed: December 30, 2009³

Background

December 30, 2008

Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter which does not reference OPRA.

January 16, 2009

The Custodian responds to the Complainant's letter on the fourteenth (14th) business day following receipt thereof and informs the Complainant that she will have the New Jersey Association of Counties ("NJAC") part-time bookkeeper prepare finalized NJAC statements.

¹ No legal representation listed on record.

² Represented by James G. O'Donohue, Esq., Hill, Wallack LLP (Princeton, NJ).

³ The GRC received the Denial of Access Complaint on December 31, 2009.

January 20, 2009

Letter from Brett A. Radi, NJAC President, to the Complainant. Mr. Radi states that the NJAC is the sole organization in New Jersey whose mission is to advocate for the collective interests of county government. The Custodian also asserts that the NJAC has been active in its lobbying efforts that have significantly enhanced the ability of each of New Jersey's 21 counties to save their constituents millions of dollars in taxpayers' funds while still offering high levels of service.

The Custodian provides the following records:

1. NJAC December 31, 2008 financial statements
2. NJAC 2008 Budget
3. NJAC 2009 Budget
4. NJAC 2007 and 2008 Year in Review

January 23, 2009

Letter from Mr. Radi to the Complainant. Mr. Radi asserts that the Complainant appears to believe he needs to know NJAC staff salaries in order to evaluate the NJAC's quality of services and value to Hunterdon County. Mr. Radi asserts that as established in the NJAC constitution and bylaws, the Personnel Committee is the sole entity with the authorization to review and to evaluate staff performances and shall deal with all personal matters. Mr. Radi states that the staff salaries are confidential because the Personnel Committee reports to the NJAC President for approval of all actions.

Mr. Radi further states that the documentation previously sent to the Complainant contains salary lines which indicate those amounts are distributed among the six (6) NJAC employees and that after discussing the matter with the incoming NJAC President, Freeholder Carol Clark, the NJAC believes that the information already given should be sufficient for the Complainant's needs.

March 12, 2009

Letter from Gaetano M. De Sapon, counsel for Hunterdon County, to Custodian's Counsel. Mr. De Sapon asserts that he has been asked to write on behalf of the Complainant. Mr. De Sapon states that the Complaint was the duly appointed, seated Director of the NJAC for 2008. Mr. De Sapon maintains that last year, Mr. De Sapon requested the NJAC provide him with information that he felt was important in connection with his fiduciary responsibility as a seated Director. Mr. De Sapon states that as of March 12, 2009, the Complainant has not received the requested information. Mr. De Sapon maintains that suggestions have been made that the Complainant is not entitled to receive the records, and asserts that he is sure those suggestions would not have been made if the NJAC had contacted the Custodian's Counsel. Mr. De Sapon restates the records that the Complainant has requested. Mr. De Sapon argues that under applicable New Jersey law, the Complainant, as a Director, is entitled to the requested records; as they are essential for him to fulfill his fiduciary and legal responsibilities as a Director.

December 22, 2009

E-mail from Ms. Cynthia J. Yard to the GRC. On behalf of the Complainant, Ms. Yard seeks clarification on whether the NJAC is subject to the disclosure provisions of OPRA. Ms. Yard states that she has reviewed the GRC's "Handbook for Records Custodians" from the website, and as per section 1 page 11, what is a "public agency" under OPRA, it appears that the NJAC would be subject to disclosure under OPRA for the following reasons:

- NJAC is operated as a 501(c)3
- 20% of the NJAC operating budget is funded from the membership dues of the County governments in State of New Jersey
- NJAC participates in the State of New Jersey Health Benefit System
- The NJAC has a Board of Directors that are appointed by the governing bodies, the Board of Chosen Freeholders of each of the 21 county government's in the State of New Jersey

December 23, 2009

E-mail from the GRC to Cynthia Yard. The GRC states that the Complainant has the right to file an action in Superior Court if they wish to have the complaint resolved more quickly than with the GRC. The GRC additionally states that the Superior Court can assess the Complainant's common law right of access. The GRC also informs the Complainant that he may download a Denial of Access Complaint form from the GRC's website.

January 15, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from George B. Melick to the NJAC Board of Directors dated December 30, 2008
- Letter from Custodian to the Complainant dated January 16, 2009
- Letter from Mr. Radi to the Complainant dated January 20, 2009
- Letter from Mr. De Sapio to Custodian's Counsel dated March 12, 2009
- E-mail from Cynthia Yard to the GRC dated December 22, 2009
- E-mail from GRC to Cynthia Yard dated December 23, 2009

The Complainant states that the original December 30, 2008 request was made by him as a duly appointed seated Director of NJAC upon receiving the proposed 2009 budget that was included in the minutes of the December 8, 2008 minutes of the NJAC Board of Directors' meeting. The Complainant states that he received a response from Executive Director Celeste Carpiano dated January 16, 2009 which assured him that his request would be fulfilled.

The Complainant asserts that the NJAC forwarded incomplete information on January 20, 2009; and that on January 23, 2009; his request for salary breakdown was denied by NJAC President Brett Radi, stating that staff salaries are confidential.

The Complainant states that the County Counsel, Mr. Gaetano De Sapio, contacted the NJAC Legal Counsel on the Complainant's behalf on March 12, 2009 to request additional information for 2008 while the Complainant was NJAC's duly appointed seated Director Representative from Hunterdon County. The Complainant asserts that neither the County of Hunterdon, County Counsel, nor himself ever received a response.

That Complainant maintains that on December 22, 2009, Cynthia J. Yard, County Administrator, on behalf of the Complainant, contacted the GRC to inquire if the NJAC is subject to the disclosure provisions of OPRA for some of the following reasons:

- The NJAC is operated as a 501C3
- 20% of the NJAC's operating budget is funded from the membership dues of the County governments in the State of New Jersey
- The NJAC participates in the State of New Jersey Health Benefit system
- The NJAC personnel are part of the State of New Jersey Pension system
- The NJAC has a Board of Directors that is appointed by the Board of Chosen Freeholders of each of the 21 county governments in the State of New Jersey.

The Complainant declines mediation.

January 15, 2010

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

January 15, 2010

Letter brief from Custodian's Counsel to the GRC. In lieu of an SOI, the Custodian's Counsel states that he is in receipt of the Denial of Access Complaint filed by Hunterdon County Freeholder George B. Melick regarding NJAC's response to his request for records. Custodian's Counsel states that this complaint should be dismissed in its entirety because NJAC is not a public agency that is subject to the Open Public Records Act.

Custodian's Counsel states that on or about December 30, 2008, Freeholder Melick requested NJAC's 2008 budget and proposed 2009 budget listing expenditures by line item, including the employee salaries. Custodian's Counsel maintains that in response, NJAC provided Freeholder Melick with the following documents on January 20, 2009: (1) an NJAC December 31, 2008 financial statement; (2) NJAC 2008 Budget; (3) NJAC 2009 Budget; and (4) NJAC 2007 and 2008 Year in Review. Custodian's Counsel asserts that the information provided to Freeholder Melick included responses to all requested items, including an employee salary line item; however, Freeholder Melick was dissatisfied with this response because the individual employee salaries were not listed.

Custodian's Counsel argues that NJAC salaries are confidential under the NJAC Constitution and Bylaws because the Personnel Committee is the sole entity with the authorization to review and to evaluate staff performances and personnel matters. Custodian's Counsel states that the NJAC was responsive to the Complainant's requests; despite that NJAC is not a public agency under OPRA and cites the definition of a state agency at N.J.S.A. 47:1A-1.1.

In addition, Custodian's Counsel maintains that under New Jersey case law, the NJAC is not a public agency to which OPRA applies. Custodian's Counsel cites to Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 413 N.J. Super. 423 (App. Div. 2010) for the proposition that the Superior Court of New Jersey has found the New Jersey State League of Municipalities ("League") is not a state agency, and is analogous enough to assume that neither is the NJAC. Custodian's Counsel argues that the court found that the voluntary nature of membership in the League, lack of conformance with the definition of a "public agency" as provided in OPRA, and the fact that it is a lobbying organization for local government interests as a whole in New Jersey; disqualifies NJAC from being considered a government agency. *Id.* at 5-6. Custodian's Counsel asserts that the court evaluated whether the League met any of the public agency components listed in OPRA, like being a principal department of the Executive Branch. *Id.* at 8. Custodian's Counsel states that the court found that the League did not qualify as any of the defined entities in N.J.S.A. 47:1A-1.1 and that if the Legislature had intended to include associations in the definition of "public agency," it would have done so.

Custodian's Counsel also argues that in Fair Share Housing, the court rejected the fact that simply because employees of the League are members of the Public Employees Retirement System ("PERS"), the League was subject to OPRA. Custodian's Counsel notes that in defense of its position that it is not a public agency under OPRA, the League submitted a certification from the Director of Division of Pensions which stated that some seventeen (17) organizations participate in PERS, including NJAC. *Id.* at 13.

Custodian's Counsel maintains that the NJAC is not within the Executive or Legislative Branches of State government or an independent State authority, commission, instrumentality, agency, and is not a political subdivision of the State or a division, board, bureau, office, commission, or other instrumentality within or created by a political subdivision of the state. Instead, Custodian's Counsel asserts that the NJAC is a 501(c)(3) non-profit organization that advocates for the interests of New Jersey's counties. Custodian's counsel states that similarly to the League, the NJAC receives its revenue from member dues and does not spend public funds. Accordingly, Custodian's Counsel requests that the GRC dismiss the instant Denial of Access Complaint.

January 29, 2010

E-mail from the GRC to Custodian's Counsel. The GRC states that in order to determine whether or not the NJAC is a public agency pursuant to OPRA, the GRC needs:

- A copy of the Certificate of Incorporation for the organization, or other documentation that brought the organization into existence;
- A copy of the bylaws for the organization;
- A legal certification stating if any ordinance, resolution or agreements exist which discuss the relationship between the organization and any state or local government agency;
- A copy of the documents referenced in the immediately preceding point.

February 5, 2010

Letter from the Custodian's Counsel to the GRC with the following attachments:

- A copy of the NJAC's By-Laws
- A copy of the NJAC's Constitution
- A legal certification from Executive Director of NJAC, Celeste Carpiano
- E-copy of "N.J. Governor-elect Christie says lobbying groups should forfeit state pensions, health benefits," from the December 1, 2009, New Jersey Star-Ledger

The Custodian's Counsel states that the NJAC is not in possession of any Certificate of Incorporation for the organization or any other document which brought the organization into existence. The Custodian maintains that to their knowledge, the NJAC was formed approximately 70 years ago as a voluntary association and that each of the counties in New Jersey are permitted but not required to join the Association. The Custodian states that each county must pay dues from its general budgets.

Custodian's Counsel cites N.J.S.A. 40:23-6, concerning membership in the NJAC and County Officers Association of New Jersey, as follows:

"A County may agree to contribute and expend in any 1 year, for membership in and the service of the New Jersey Association of Counties and the County Officers Association of New Jersey, such sums as said county may determine." *Id.*

Custodian's Counsel encloses a certification indicating that NJAC does not have any controlling relationship with any state or local government agency. The Custodian certifies that Governor Christie has personally stated that the NJAC is a private organization and not a governmental entity.

Analysis

Whether the New Jersey Association of Counties ("NJAC") 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”) contains a definition of a “public body” which 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).

In Lafayette Yard, the City of Trenton, seeking to revitalize its city center, empowered a nonprofit corporation to oversee the use of public bond funds to develop a hotel and convention complex. A local newspaper’s reporter was excluded from certain deliberations regarding financial matters and was also denied access to copies of minutes and other documents. The Appellate Division held that the nonprofit was both a “public body” subject to the open meetings requirements of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq., and a “public agency” required under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., to release documents to requestors.

In so doing, the court noted that:

“to be subject to the OPMA, a “public body” must (1) consist of two or more persons” *and* (2) be “collectively empowered as a voting body” [and] (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 (emphasis added). Lafayette Yard, 368 N.J. Super. at 433.

The court also noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1:

“[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.

The Appellate Division 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.

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 (The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 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 (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 (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.’”).

More recently, in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, the Appellate Division of the New Jersey Superior Court examined whether an organization consisting of a group of municipalities is considered a public agency to which OPRA applies. 413 N.J. Super. 423 (App. Div. 2010). The New Jersey Appellate Division found that the New Jersey State League of Municipalities (the “League”) was not formed by statute but consisted of voluntary membership, with activities that included pooling information and resources for its members, publishing a magazine that reports on a variety of issues affecting municipal government, conducting educational programs for municipal officials, providing legislative analysis and legislative bulletins to its members, and maintaining a library of municipal ordinances. Id. at 426. The League's officers also testify at legislative hearings on a variety of issues of interest to municipal government and sometimes participate as a party or *amicus curiae* in litigation affecting municipalities generally. Id. at 426-7.

The court found that the League's role is purely to advise municipalities and municipal officials and to advocate the positions of its membership before the Legislature, administrative agencies, and the courts. The court determined that in these capacities, the League is not an “office,” “instrumentality,” or “agency” of any individual municipality or combination of municipalities. Id. at 432. The Complainant tried to argue that the League

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was a combination of political subdivisions and was therefore a public agency. Id. at 429. Not accepting this argument, the Court held that in order to constitute a political subdivision, an entity must provide some governmental service, such as education, police protection, maintenance of roadways, sewage disposal, or urban renewal. See Northwest Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (U.S. 2009) (citing Black's Law Dictionary 1197 (8th ed. 2004)). The Court found that the only reasonable interpretation of "combination of political subdivisions" in N.J.S.A. 47:1A-1.1 is a combination of political subdivisions established to provide a governmental service that otherwise would be provided by a single political subdivision. Id. Accordingly, the Court found the League is not a public agency and its employees are not "public officers" who "exercise . . . a public function" in performing their duties; thus, the League is exempt from the definition of a public agency under OPRA and is therefore not subject to OPRA's disclosure requirements. Id.

Similar to the League in Fair Share Housing, the NJAC is a non-profit organization that advocates the local government interests of New Jersey counties and is composed of voluntary members. Furthermore, the evidence of record indicates that the NJAC does not provide any governmental services and receives its revenue from member dues, but does not spend public funds. The evidence of record indicates that, like the League, the NJAC is a lobbying body and only provides general information and support for counties. Although the evidence of record shows that like the League, the NJAC is a member of PERS, as in Fair Share Housing, this fact alone does not stand as incontrovertible proof that the NJAC is a public agency.

Therefore, because the evidence of record shows that the NJAC is a non-profit organization that advocates the local government interests of New Jersey counties and is composed of voluntary members, does not provide any governmental services, receives its revenue from member dues, but does not spend public funds, and is a lobbying body and only provides general information and support for counties, the NJAC is not a public agency under OPRA. N.J.S.A. 47:1A-1.1; Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 413 N.J. Super. 423 (App. Div. 2010).

Because the GRC has determined that the NJAC is not a public agency subject to OPRA, the GRC finds that it is not necessary to determine whether the Complainant's request was valid under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the evidence of record shows that the New Jersey Association of Counties is a non-profit organization that advocates the local government interests of New Jersey counties and is composed of voluntary members, does not provide any governmental services, receives its revenue from member dues, but does not spend public funds, and is a lobbying body and only provides general information and support for counties, the New Jersey Association of Counties is not a public agency under OPRA. N.J.S.A. 47:1A-1.1; Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 413 N.J. Super. 423 (App. Div. 2010).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010