



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Michelle Gorman Fisher
Complainant

Complaint No. 2012-164

v.

Matawan First Aid & Rescue Squad (Monmouth)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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 using on the creation test enunciated by the Supreme Court in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the evidence submitted by the Squad, specifically their Certificate of Incorporation and Constitution, established that the Squad is not a public agency. N.J.S.A. 47:1A-1.1. The Squad was created by and is run by the members of the Squad, with no oversight from the municipality or any other public agency. Thus, the Squad is not required to receive or respond to OPRA requests.

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 28th Day of May, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 11, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Michelle Gorman Fisher¹
Complainant**

GRC Complaint No. 2012-164

v.

Matawan First Aid & Rescue Squad (Monmouth)²

Records Relevant to Complaint:

1. All Matawan First Aid & Rescue Squad membership meeting minutes between May 1, 2009 and October 1, 2011.
2. All Matawan First Aid & Rescue Squad trustee meeting minutes between May 1, 2009 and October 1, 2011.

Request Made: May 4, 2012

Response Made: June 7, 2012

GRC Complaint Filed: June 1, 2012³

Background⁴

Request and Response:

On May 4, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Matawan First Aid & Rescue Squad (“Squad”) seeking the above-listed records. The Squad did not respond to the Complainant’s request until June 7, 2012, after the Complainant filed a Denial of Access Complaint with the Government Records Council (GRC). The Squad asserts that they are not a public agency under OPRA.

Denial of Access Complaint:

On June 1, 2012, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant states that she has not received any response to the OPRA request she mailed on May 4, 2012.

¹ No legal representation listed on record.

² Chuck Jameson responded this complaint on behalf of the Squad. No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Additional Information:⁵

On December 7, 2012, the GRC asked the Custodian to provide the following documents in order for the Council to determine whether the Squad is a public agency under OPRA:

- 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; and
- A copy of the documents referenced in the immediately preceding point.

On December 10, 2012, the Squad provided the GRC with their Certificate of Amendment to the Certificate of Incorporation as well as the agency's Constitution and Bylaws.

Analysis⁶

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).

⁵ The GRC did not require the Squad to submit a Statement of Information in response to this Denial of Access Complaint.

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

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In Lafayette Yard, the Appellate Division held that Lafayette Yard 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 OPRA, and ordered disclosure of records to plaintiff.

In so doing, the Court noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1. and 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 [C]ourt 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 qualified 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, 207 N.J. 489 (2011), the Supreme Court reviewed the Appellate Division’s holding that the New Jersey State League of Municipalities (“League”) is not a public agency under OPRA. 413 N.J. Super. 423. The Court acknowledged that although the Appellate Division relied on its previous holding in Lafayette Yard, it erred in “... importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in [OPMA] ... [t]he language defining a ‘public body’ ... under OPRA [is] distinctly different.” *Id.* at 504-505. The

Court thus held that a creation test, as opposed to a governmental function test, controlled in determining whether an entity was a public agency for purposes of OPRA. Specifically, the Court held that:

“In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ *See id.* at 535-36 ... The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with ... Lafayette Yard.” *Id.* at 507.

Thus, the Council must apply the creation test in determining whether the Matawan First Aid & Rescue Squad is a “public agency” under OPRA. As part of the creation test, the Council looks to the Squad’s Certificate of Incorporation, which designates the Squad as being “organized and operated exclusively for charitable, educational, religious or scientific purposes, within the meaning of Sec. 501(c)(3) of the Internal Revenue Code...” (Article 1). The Squad’s designation as a non-profit entity, however, does not automatically imply that the Squad is not a public agency for the purposes of OPRA. Nevertheless, the Squad’s Certificate of Incorporation also states that “upon winding up and dissolution of this corporation...the remaining assets shall be distributed to a non-profit fund, foundation, or corporation which is organized exclusively for charitable, educational, religious or scientific purposes...” (Article 4). Further, the Squad’s Constitution and Bylaws refer exclusively to members of the Squad as the Administrators of the agency. The Constitution never speaks to any role played by the municipality, or any other public agency, in creating the Squad, operating the Squad, or taking over the Squad upon dissolution.

Therefore, using the creation test enunciated by the Supreme Court in Fair Share Housing Center, *supra*, the evidence submitted by the Squad, specifically their Certificate of Incorporation and Constitution, established that the Squad is not a public agency. N.J.S.A. 47:1A-1.1. The Squad was created by and is run by the members of the Squad, with no oversight from the municipality or any other public agency. Thus, the Squad is not required to receive or respond to OPRA requests.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that using on the creation test enunciated by the Supreme Court in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the evidence submitted by the Squad, specifically their Certificate of Incorporation and Constitution, established that the Squad is not a public agency. N.J.S.A. 47:1A-1.1. The Squad was created by and is run by the members of the Squad, with no oversight from the municipality or any other public agency. Thus, the Squad is not required to receive or respond to OPRA requests.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013