



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

Rafael L. Martinez
Complainant

Complaint No. 2013-286

v.

NJ Shares
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 the Custodian lawfully denied access to the requested records because NJ Shares does not sufficiently possess the characteristics required to be considered an instrumentality of the state, or a political subdivision thereof, and thus a “public agency” subject to OPRA. N.J.S.A. 47:1A-1.1; Fair Share Housing Center, Incorporated v. New Jersey State League of Municipalities, 207 N.J. 489, 507 (2011); Paff v. New Jersey State Firemen’s Association, 431 N.J. Super. 278, 290-92 (App. Div. 2013).

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 24th Day of June, 2014

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 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Rafael L. Martinez¹
Complainant**

GRC Complaint No. 2013-286

v.

**NJ Shares²
Custodial Agency**

Records Relevant to Complaint: All records for the grants approved for Rafael L. Martinez such as: date and time grants were approved; date, time, grant amount and utility notified on the approved grant; record showing by whom, how and where grant was approved; record showing when grant was issued and to be paid or paid to the utility; all email communications regarding the approved grants.

Custodian of Record: Jim Jacob

Request Received by Custodian: August 12, 2013

Response Made by Custodian: August 14, 2013

GRC Complaint Received: September 24, 2013

Background³

Request and Response:

On August 12, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 13, 2013, the Complainant re-sent his request and sought confirmation of its receipt. On August 14, 2013, two (2) business days later, a representative from NJ Shares replied and stated that the Complainant’s accounts had been approved and that the appropriate utility companies had been notified. The Complainant responded by reiterating his request and by asking to know who NJ Shares’ custodian is.

¹ No legal representation listed on record.

² Represented by Joseph Maddaloni, Jr., Esq. (West Orange, N.J.).

³ 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.

Denial of Access Complaint:

On September 24, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the response he received did not acknowledge his OPRA request or advise him of the name of NJ Shares’ custodian.

Statement of Information:

On October 1, 2013, the GRC requested that NJ Shares submit a Statement of Information (“SOI”). The GRC also included a request for a certification and related questionnaire meant to clarify NJ Shares’ status, under OPRA, as either a public or private entity. NJ Shares did not submit a SOI. NJ Share’s additional response to the questionnaire is described below.

Additional Submissions:

Counsel for the Custodian’s (“Counsel’s”) Response to the GRC’s Letter

The GRC’s October 1, 2013 letter to NJ Shares requested the following in order to determine whether or not NJ Shares is a public agency pursuant to OPRA:

A copy of the Certificate of Incorporation for your organization, or other documentation that brought your organization into existence;

A copy of the bylaws for your organization;

A legal certification stating if any ordinances, resolutions or agreements exist which discuss the relationship between your organization and any state or local government agency;

A copy of the documents referenced in the immediately preceding point.

On October 9, 2013, Counsel provided NJ Shares’ Certificate of Incorporation and Bylaws to the GRC. Counsel represents that “there are no ordinances, resolutions or agreements that exist which establish and/or discuss a relationship between New Jersey Shares and any state or local government agency.” Counsel states that NJ Shares is a private, not-for-profit corporation and not a government office, agency, or instrumentality created or controlled by a government office or agency subject to OPRA. *Citing N.J.S.A. 47:1A-1.1, et seq.; Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities*, 207 N.J. 489 (2011).

Complainant’s Reply to Counsel’s Response

On October 9, 2013, the Complainant submitted an email to the GRC arguing that NJ Shares is a state funded utility program overseen by the New Jersey Board of Public Utilities (“BPU”), the New Jersey Comptroller (“Comptroller”), and the New Jersey Treasury (“Treasury”). The Complainant argues that NJ Shares receives escheat funding from the

Treasury based on N.J.S.A. 46:30B-74, in addition to funding from the state legislature, municipalities, counties, and New Jersey Department of Human Services (“Human Services”). The Complainant attached links to several websites to support his claims, including one to the Comptroller’s December 11, 2012 report on NJ Shares’ “Selected Fiscal and Operating Practices” (“Comptroller’s Report”).

Counsel’s Rebuttal of Complainant’s Reply

On October 11, 2014, Counsel responded to the Complainant’s October 9, 2013 email. Counsel argues that the fact that NJ Shares receives funding from the State, and has been audited by the Comptroller, does not make NJ Shares a public entity or transform NJ Shares into an “agency” or “instrumentality” of the state. Counsel contends that in order to be deemed an “agency” or “instrumentality” subject to OPRA, an entity receiving public funding must also be created and controlled by the State or a political subdivision thereof, and it must serve a governmental function. *Citing Paff v. N.J. State Firemen’s Ass’n*, 431 N.J. Super. 278 (App. Div. 2013). Counsel states that the audit report linked to by the Complainant determines that NJ Shares is a non-profit organization, established by New Jersey energy companies and other non-profit organizations, that provides financial assistance to private individuals and families living in New Jersey who are in need of temporary help in paying their energy bills. Counsel notes that the report also states that NJ Shares is overseen by an independent board of directors comprised of private citizens.

Counsel argues that, unlike other entities examined by New Jersey courts, NJ Shares was not created and empowered by statute, but instead is an independent entity subject to the New Jersey Nonprofit Corporation Act and is not controlled by a governmental office or agency. *Citing Paff*, 431 N.J. Super. at 278; *Fair Share Hous.*, 207 N.J. at 489. Counsel further argues that the recipients of the services provided by NJ Shares are private individuals and families, rather than public employees. Counsel contends that there is no connection between NJ Shares and the state other than the fact that NJ Shares receives funding from the state and is subject to being audited by the state, but that this does not support a finding that NJ Shares is an subject to OPRA.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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.

OPRA does not define an “instrumentality” of the state or a political subdivision, but the New Jersey Supreme Court has assigned it the generally accepted meaning of a “thing used to achieve an end or purpose and, alternatively, as a means or agency through which a function of another entity is accomplished, such as a branch of a governing body.” League of Municipalities, 207 N.J. at 503 (citations omitted) (quotations omitted).

The question of whether an entity is a “public agency” subject to OPRA has been examined by both the New Jersey Supreme Court and, most recently, by the Appellate Division.

In The Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation, 368 N.J. Super. 425 (App. Div. 2004), the Appellate Division found that Lafayette Yard was both a “public body” subject to the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq., and a “public agency” as defined by OPRA, and ordered disclosure of records. Id. In so doing, the court noted the definition of a “public agency” under OPRA 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. Id. at 435-41. The court further held that the corporation was an “instrumentality” created and ultimately controlled by the city, and thus a “public agency” under OPRA for essentially the same reasons that it was a “public body” under the OPMA. Id. at 442. The New Jersey Supreme Court affirmed this decisions in The

Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation, 183 N.J. 519 (2005).

In League of Municipalities, the Supreme Court reviewed the Appellate Division's decision that the New Jersey State League of Municipalities ("League") was not a public agency under OPRA. League of Municipalities, 207 N.J. at 489. The Court acknowledged that although the Appellate Division relied on the 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 are distinctly different." Id. at 504-05. 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. Id. 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.' . . . 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 (emphasis in original) (citations omitted).

In Firemen's Association, 431 N.J. Super. at 278, the Appellate Division reversed a Law Division decision holding that the Firemen's Association ("Association") was not a public agency and remanded the complaint to trial court for further proceedings. Id. The Court provided a comprehensive history of the Association, which was established in 1885 by a group of "incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families." Id. at 279. However, the Association "changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. New Jersey State Firemen's Association, 230 N.J. Super. 265 (Ch. Div.1988)." Id. at 280.

The Court noted that, as discussed in League of Municipalities, OPRA lacks a "government-function" test, but that "[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court [in League of Municipalities] did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity." Id. at 289. *See also* Sussex Commons Ass'n, LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012) (holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The Court thus determined that the Association was a "public agency" under OPRA, reasoning that it "owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association." Firemen's Ass'n, 431 N.J. Super., at 290 (citing N.J.S.A. 43:17-41). The court noted that the Association's financial activities implicated OPRA's aim to shed light on the fiscal affairs of government because it received substantial tax revenues, it had authority to assure those funds were properly spent, and it both disbursed funds and oversaw such disbursement by local groups. Id. The Court further reasoned that the Association served numerous government functions in addition to the receipt and

management of tax revenues, including providing welfare benefits to a significant number of public servants and regulating the activities of other corporate entities. Id. at 291.

Turning first to the Certificate of Incorporation (“COI”) and Bylaws provided by Counsel, the record indicates that NJ Shares filed its COI on January 5, 1998 with the stated purpose of providing “assistance to individuals and families living in New Jersey who are in need of temporary help in paying their energy bills.” The Bylaws show that NJ Shares is a statewide non-profit corporation with a board consisting of up to eight (8) members selected from other non-profit corporations, eight (8) to nine (9) members selected from utility companies, and up to eight (8) at large members selected by a majority vote of the Board of Directors (“Board”). NJ Shares’ officers, in turn, are appointed by the Board and, upon dissolution, its assets are to be distributed to “charitable, religious, scientific, literary, or educational organizations” The three (3) initial Board members came from Rockland Electric, New Jersey AARP, and PSE&G.

The record also reveals relevant information regarding NJ Shares’ funding, expenditures, and operations. Several New Jersey statutes, dating to 2000, describe how NJ Shares receives a portion of its yearly funding from unclaimed customer deposits held by New Jersey electric and gas utilities:

The Board of Public Utilities [“BPU”] shall designate an established Statewide nonprofit energy assistance organization representing the State's major electric and gas utilities and human service nonprofit groups to receive supplemental funding from unclaimed property held by the State's electric and gas utilities that is transferred to the State in accordance with the requirements of [N.J.S.A. 46:30B-74].

N.J.S.A. 48:2-29.39.

The Statewide nonprofit energy assistance organization receiving such funding from the State shall utilize the funds to provide temporary financial assistance to residential customers having short-term difficulties paying their energy bills The organization shall develop and file with the [BPU] the eligibility criteria for customers to receive energy assistance grants. The organization shall also file annually with [BPU] and the Legislature a detailed report on the use of the funds received from the State and the number of recipients and amount of energy assistance grants.

N.J.S.A. 48:2-29.40.

All moneys received in unclaimed property deposits from electric and gas utilities shall be deposited into the Unclaimed Utility Deposits Trust Fund. Each year, unless the administrator deems it prudent and advisable to do otherwise, the administrator shall pay to the New Jersey Statewide Heating Assistance and Referral for Energy Services (SHARES) nonprofit corporation, or to another Statewide nonprofit energy assistance organization designated by the Board of

Public Utilities within 45 days of the receipt of such funds, 75% of the unclaimed utility deposits received from each of the electric and gas utilities by the administrator.

N.J.S.A. 46:30B-74.

As described in the Comptroller's Report, NJ Shares received approximately \$1.7 million in 2009, \$880,000 in 2010, and \$840,000 in 2011 through the escheat funding process described in the above statutes. NJ Shares received, approximately, a further \$2.8 million in 2009 and \$50,000 in 2010 through a Request for Proposals process administered by the BPU that distributed the proceeds of carbon dioxide allowance auctions stemming from the state's participation in the Regional Greenhouse Gas Initiative ("RGGI").⁴ The New Jersey legislature also appropriated approximately \$13 million in 2009 and \$2 million in 2010 to NJ Shares as part of the "New Jersey Economic Assistance and Recovery Plan," ("NJEARP") which allocated supplemental grants-in-aid to provide food, energy, and legal aid assistance to state residents following the financial crisis that began in 2008. Individuals and utilities companies contributed, in turn, over \$2 million to NJ Shares between 2009 and 2011.

Here, NJ Shares was not, unlike the entities at issue in Lafayette Yard and League of Municipalities, created by the state or a political subdivision thereof, and it does not "owe its existence to state law" in the same manner as the group in Firemen's Association. See Firemen's Ass'n, 431 N.J. Super., at 290; League of Municipalities, 207 N.J. at 507; Lafayette Yard, 183 N.J. at 519. Instead, NJ Shares was incorporated under New Jersey law by private citizens as a non-profit organization on January 5, 1998.

Similarly, NJ Shares is not "controlled" by the state Legislature or any other political entity. NJ Shares' Board is comprised of individuals from various utilities companies and non-profit organizations. While NJ Shares receives a portion of the unclaimed property funds held by state utilities companies pursuant to statute, it does not normally receive direct tax revenue like the group in Firemen's Association. See Firemen's Ass'n, 431 N.J. Super., at 290. When NJ Shares obtained money outside of private donations and the unclaimed deposits paid by utilities customers, via the RGGI grant process and NJEARP supplemental funds, it has been in the form of "one off" awards that do not implicate OPRA in the manner of the continuous, specific tax-based funding of the Association. Id. NJ Shares neither depends on nor requires the above-referenced statutes in order to operate.

Lastly, NJ Shares is not an "instrumentality" of the state by virtue of its functions. NJ Shares does not "serve[] numerous governmental functions aside from the receipt and management of tax revenues," such as by providing welfare benefits as a reward to public servants or by regulating the activities of other corporate entities. See Firemen's Ass'n, 431 N.J. Super. at 291-92. That an organization or charitable group receives, or has received, funds from

⁴ NJ Shares was subject to an audit by the Comptroller, which produced the referenced Comptroller's Report in 2012, because the statute authorizing the distribution of RGGI funds "to support programs that are designed to reduce electricity demand or costs to electricity customers in the low-income and moderate-income residential sector with a focus on urban areas" gave the Comptroller authority to "conduct or supervise independent audit and fiscal oversight functions of the fund and its uses." N.J.S.A. 26:2C-51(b), (d).

an organ of the state does not automatically mean that such a recipient is an instrumentality used to achieve an end or purpose of the state. *See League of Municipalities*, 207 N.J. at 507.

Therefore, the Custodian lawfully denied access to the requested records because NJ Shares does not sufficiently possess the characteristics required to be considered an instrumentality of the state, or a political subdivision thereof, and thus a “public agency” subject to OPRA. N.J.S.A. 47:1A-1.1; *League of Municipalities*, 207 N.J. at 507; *Firemen’s Ass’n*, 431 N.J. Super., at 290-92.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the requested records because NJ Shares does not sufficiently possess the characteristics required to be considered an instrumentality of the state, or a political subdivision thereof, and thus a “public agency” subject to OPRA. N.J.S.A. 47:1A-1.1; *Fair Share Housing Center, Incorporated v. New Jersey State League of Municipalities*, 207 N.J. 489, 507 (2011); *Paff v. New Jersey State Firemen’s Association*, 431 N.J. Super. 278, 290-92 (App. Div. 2013).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014