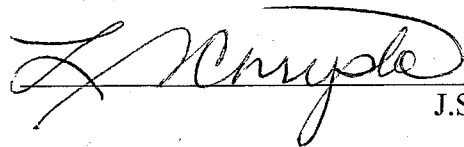


C. **ORDERED** that Plaintiff shall serve a copy of this Order upon Defendant within seven days of service of this Order.



J.S.C.

OPPOSED
UNOPPOSED

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
LISA F. CRYSTAL
JUDGE



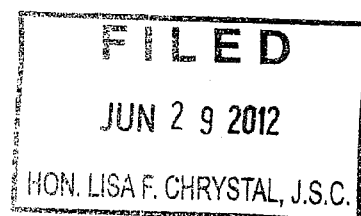
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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

June 29, 2012

Walter M. Luers, Esq.
Law Office of Walter M. Luers, LLC
23 West Main Street, Suite C203
Clinton, NJ 08809

Union County Performing Arts Center
1601 Irving Street
Rahway, NJ 07065



Re: **Renna v. Union County Performing Arts Center**
Docket No.: **UNN-L-1974-12**

Dear Counsel,

The Court has before it the Order to Show Cause of plaintiff Tina Renna as to why judgment should not be entered declaring that the Union County Performing Arts Center (UCPAC) is a “public agency” within the definition of OPRA and ordering UCPAC to provide copies of documents requested by plaintiff and to pay attorney’s fees. The Order to Show Cause was accompanied by a Verified Complaint by the plaintiff and a Certification of Walter M. Luers, Esq., attorney for the plaintiff. Proof of service upon the defendant was filed. No opposition was filed, and defendant did not appear on June 29, 2012, the return date of the Order to Show Cause.

On April 2, 2012, Plaintiff submitted a written OPRA request to Defendant for documents. See Luers Cert., Exh. 1. In the OPRA request, plaintiff requested copies of “2011 and 2012 meeting minutes for the Union County Performing Arts Center Board of Directors” and “All contracts for acts hired for the Union County 2011 [Musicfest].” Id. On April 12, 2012, UCPAC, through Executive Director Steinman, denied access to the records and claimed that UCPAC is not subject to OPRA. See Verified Complaint, ¶ 9.

UCPAC, which was created on October 16, 1928, is a tax-exempt non-profit organization that originally opened on October 16, 1928, as the Rahway Theater. See Complaint ¶ 2, 10. Union County bought the theatre in which UCPAC operates for \$1.3 million and leases the theatre back to UCPAC for \$1 per year. Id. at ¶ 10. Union County also spent \$6.2 million on renovations to the theater, which were completed in 2007. Id. It was renamed the “Union County Performing Arts Center” in 1985 after the union County Board of Chosen Freeholders

passed a resolution officially renaming it.” *Id.* Most of UCPAC’s revenues come from contracts with performing artists who perform at the annual “Musicfest,” which is an annual outdoor concert that is funded, managed, and promoted by Union County. *Id.* at ¶ 11. The performance artists appear at “Musicfest” pursuant to agreements between them and UCPAC.” *Id.*

In 2010, Union County hired a “Transition Overseer” at the rate of \$100 per hour to provide consulting services for nine months “for the implementation of the Interim Organizational Structure of the Union County Performing Arts Center in Rahway, NJ.” *Id.* at ¶ 12. The Official Statement of Bonds issued by the Union County Utilities Authority states that Union County “operates” UCPAC. *Id.* at ¶ 13.

Plaintiff asserts that the instant proceedings should proceed in a summary manner via an Order to Show Cause, supported by a Verified Complaint, pursuant to N.J.S.A. 47:1A-6. Plaintiff contends that the burden of proof in showing that a denial of access was justified rests solely with the Records Custodian, citing to N.J.S.A. 47:1A-6 and Ashbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009).

Plaintiff argues that UCPAC is an “instrumentality” created by a “political subdivision” of the State pursuant to N.J.S.A. 47:1A-1.1. Based on an analysis of Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), plaintiff contends that UCPAC is a public agency under the “creation test.” Plaintiff explains that in Fair Share, the Court held that the Legislature’s definition of a public agency includes those entities that are an “instrumentality ... created by a ... combination of political subdivision.” *Id.* at 503. In that case, the court determined that the defendant, a non-profit lobbying and educational organization comprised of representatives of New Jersey’s municipalities and which derived 28% of its funding from tax payer dollars, was a public agency pursuant to N.J.S.A. 47:1A-1.1. The court there noted that the statute “does not set forth a governmental-function test – that is, it does not suggest that the ‘instrumentality’ must perform a traditional governmental task, such as trash collection.” *Id.* at 504.

Plaintiff argues that UCPAC is an instrumentality of Union County because it could not exist without the county’s funding. Plaintiff notes that over the years, Union County has provided at least \$7.4 million in funding to UCPAC and UCPAC pays only \$1 per year in rent. Further, on September 30, 2010, Union County hired a consultant to act as a “Transition Overseer” for UCPAC. Plaintiff notes that the Official Statement of Bonds issued by the Union County Utilities Authority states that Union County “operates” UCPAC.

Plaintiff analogizes this matter to Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005). The Lafayette Yard Community Development Corporation was a non-profit entity whose assets were conveyed to it for a nominal fee. There, the court there held that the defendant was subject to OPRA, since it could not have been created without public approval. *Id.* Plaintiff argues that, like in Lafayette Yard, UCPAC only exists because of Union County. Plaintiff maintains that UCPAC is thus an “instrumentality” “created” by a “political subdivision of the State” pursuant to N.J.S.A. 47:1A-1.1 and asserts that the Court should hold that UCPAC is a “public agency” within the meaning of OPRA.

N.J.S.A. 47:1A-6 provides:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c. 404 (C.47:1A-7).

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

The New Jersey Open Public Records Act is codified in N.J.S.A. 47:1A-1.1, et seq. The Act mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). The purpose of OPRA "is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 65 (2008); (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005). The New Jersey Supreme Court recently stated that "[t]hose who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011). The burden of proof in showing that a denial of access was justified rests solely with the party that holds the records. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009).

The first subsection of the OPRA statute sets forth the public policy of the State as determined by the Legislature:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

N.J.S.A. 47:1A-1.

The defendant will only be required to provide plaintiff with the requested documents if it is found to be a "public agency." That term is also defined in the statute:

"Public agency" or "agency" means any 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. (emphasis added)

Here, the Court must determine whether UCPAC is a "public agency" within the meaning of N.J.S.A. 47:1A-1.1. Two New Jersey Supreme Court cases, The Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005) and Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, (2011), discuss the relevant term.

In Fair Share, plaintiff requested documents from the New Jersey State League of Municipalities. The Court held that the League is a "public agency" that possesses "government records" within the meaning of OPRA. Fair Share, 207 N.J. at 509. The Court explained that "N.J.S.A. 47:1A-1.1 is broadly written so that a wide variety of entities fall within the compass

of that term.” Id. at 503. Accordingly, the Court concluded that “a ‘public agency’ includes an ‘instrumentality ... created by a ... combination of political subdivision’” and that the League falls directly within that definition. Id. The Court further explained that since OPRA does not define “instrumentality,” the word should be given its generally accepted meaning: “[a] thing used to achieve an end or purpose or [a] means or agency through which a function of another entity is accomplished, such as a branch of government.” Id. (quoting Black’s Law Dictionary 814 (8th ed. 2004).

The Court discussed a number of factors indicating that the League is a “public agency.” The League lobbies the Legislature to further the interests of the municipalities and brings lawsuits that benefit all municipalities. Id. at 504. It is controlled by elected or appointed officials from the municipalities it represents and “each member municipality [acts and is] be represented by its Mayor or other chief executive authority, or his nominee.” Id. Therefore, the Court concluded, the League is clearly an “instrumentality” of a “combination of political subdivisions.” Id. Further, the Court noted that “a combination of political subdivisions” “created” the League. Id.

The Court noted, as well, that “N.J.S.A. 47:1A-1.1 does not set forth a governmental-function test – this is, it does not suggest that the “instrumentality” must perform a traditional governmental task, such as trash collection.” Id.

In Lafayette Yard, plaintiff was denied access to minutes from the Board of Lafayette Yard meetings. The Court held that Lafayette Yard is an “instrumentality or agency created by a political subdivision” under OPRA. Lafayette Yard, 183 N.J. at 521.


Lafayette Yard argued that since it was not “created” by a “political subdivision of the State,” but instead “by public-spirited citizens of the City who incorporated as a private nonprofit to assist the City” in redevelopment, it is not subject to OPRA. Id. at 535. However, the Court rejected this argument, stating that “[t]o accept it without further discussion would be to elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the Legislature. Suffice it to say that the Mayor and City Council have absolute control over the membership of the Board of Lafayette Yard and that the Corporation could only have been ‘created’ with their approval.” Id.

In this case, the Court must determine whether UCPAC is a “public agency.” Pursuant to Lafayette Yard and Fair Share, the Court must consider whether the entity was formed by a political subdivision or combination of political subdivisions. Unlike in Fair Share, UCPAC was not originally formed by a political subdivision or combination of political subdivisions. However, the Court finds UCPAC comparable to Lafayette Yard, where the Court held that Lafayette Yard was subject to OPRA despite the fact that it was created by private individuals.

UCPAC was originally created in 1928 as a nonprofit corporation known as the Rahway Theatre. See Complaint ¶ 10. When it fell into disrepair, Union County paid for the renovations and purchased the theatre, leasing it back to UCPAC for \$1 per year. Id. UCPAC derives most of its revenue from the annual “Musicfest,” which is funded, managed and promoted by Union County. Id. at ¶ 11. As such, UCPAC is largely funded by taxpayer funds. Further, Union County hired a consultant to act as a “Transition Overseer” for UCPAC, which demonstrates that Union County has influence over the corporation. Id. at ¶ 12. The Court finds that while the

organization did not initially come into existence because of the County, UCPAC's continued existence is dependent upon Union County.

Based on the foregoing, the Court finds that UCPAC is a "public agency" within the meaning of OPRA. Therefore, plaintiff's Order to Show Cause is **GRANTED**.



HON. LISA F. CHRYS TAL, J.S.C.