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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0208-15T1

ALEXIS SERRINGER,

Plaintiff-Appellant,

v.

CHOOSE NEW JERSEY, INC.,

Defendant-Respondent.

Argued November 15, 2016 – Decided March 31, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No. L-
1267-15.

Eric Dixon argued the cause for appellant.

Robert A. Mintz argued the cause for
respondent (McCarter & English, LLP,
attorneys; Mr. Mintz, of counsel and on the
brief; James A. Kellar, on the brief).

PER CURIAM

The question raised by this appeal is whether Choose New
Jersey, Inc. (ChooseNJ), a privately funded 501(c)(3) nonprofit
corporation, must comply with the document production requirements

of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common-law right of access. For the reasons set forth, we conclude ChooseNJ was not required to produce the requested documents pursuant to either legal authority.

I.

Plaintiff filed an OPRA request for all correspondence between ChooseNJ and Michele Brown dated between January 1, 2013 and April 24, 2015. After her request was denied on the ground that ChooseNJ is not a public agency, she filed an order to show cause and verified complaint to seek an order compelling production of requested documents from defendant, claiming the denial of her document request was unlawful under OPRA and the common-law right of access. Plaintiff further contends this was a knowing and willful violation of OPRA and plaintiff's rights that triggers OPRA's civil penalty provision, N.J.S.A. 47:1A-11. She appeals from the denial of her OPRA request and the dismissal of her complaint. The trial judge denied plaintiff's order to show cause seeking records and dismissed plaintiff's verified complaint with prejudice.

The trial judge's determination that plaintiff's OPRA request was properly denied and the legal conclusion regarding the appropriate exemption are both legal issues subject to de novo review. K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337,

349 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012); see also Fair Share Hous. Ctr., Inc. v. N.J. State League of Muns., 207 N.J. 489, 493 n.1 (2011). Our review of the determination regarding the common-law right of access is de novo as well. Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). Following our review of plaintiff's arguments in light of the record and applicable legal principles, we conclude that plaintiff's request for documents was properly denied and affirm.¹

II.

We first review the largely undisputed facts regarding defendant.

ChooseNJ, a nonprofit corporation organized under the New Jersey Nonprofit Corporation Act, N.J.S.A. 15A:1-1 to 16-2, is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code created for the purpose of "encouraging and nurturing

¹ Because we review judgments and not the reasoning provided for judgments, Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001), we need not address plaintiff's arguments that the trial court erroneously applied a three-part test and relied upon an unpublished opinion. Plaintiff's argument that proposed legislation signals an ambiguity in the definition of "public agency" that we should recognize, lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E); see Cty. of Warren v. State, 409 N.J. Super. 495, 508 (App. Div. 2009), certif. denied, 201 N.J. 153, cert. denied, 561 U.S. 1026, 130 S. Ct. 3508, 177 L. Ed. 2d 1092 (2010).

revitalization and economic growth in the State of New Jersey, including a focus on . . . distressed cities." It is run by a Board of Directors who are representatives from businesses within the State. None are employed by the State or local government. Defendant has its own certificate of incorporation and bylaws, which provide for the election of directors and officers by the Board of Directors.

According to defendant's answer, "[n]o governmental representative or entity plays any role in nominating, electing or removing . . . directors or officers." Defendant's Board of Directors oversees the company's governance and operations and approves or addresses any changes to the certification of incorporation or bylaws along with other issues that may need to be addressed. Defendant is entirely funded by private sources which include both organizations and individuals. It does not receive any funds from the State of New Jersey. No government entity has any control over how defendant's business or decisions are conducted.

Defendant's website describes itself² as follows:

Founded in 2010, Choose New Jersey's mission is to encourage and nurture economic growth throughout New Jersey, with a focus on our urban centers.

² <http://www.choosenj.com/about-us/choose-new-jersey> (last checked March 20, 2017).

Through our integrated marketing and business attraction and retention efforts, we stimulate job creation and capital investment. We collaborate with the State's universities to encourage research, discovery, and innovation.

Privately funded, Choose New Jersey is supported by a prominent group of leaders from many of the State's Fortune 500 and other top companies, labor organizations, associations, and higher education institutions. These organizations represent 1.25 million people, or nearly one-quarter of the State's private-sector workforce.

Choose New Jersey markets the State as a premier business location to both domestic and international businesses. We offer companies interested in locating or expanding in New Jersey a full range of complimentary services to ensure a smooth process from planning through move-in including:

- Customized RFP responses
- Market assessment and planning services
- Site visits
- State assistance information
- Connections to a wide range of services provided by our public and private partners – from financial, regulatory and legal assistance to workforce training.

Choose New Jersey is a member of the New Jersey Partnership for Action (PFA), a four-pronged public-private approach [sic] to economic development. The PFA serves as the starting point for all initiatives, policies and efforts related to growing New Jersey's economy and creating sustainable jobs.

Led by Lt. Governor Kim Guadagno, the PFA includes:

- Choose New Jersey, Inc.
- The New Jersey Business Action Center (BAC), which applies a proactive, customer-oriented approach to businesses' interactions with state government
- The New Jersey Economic Development Authority (NJEDA), which serves as the State's financing arm
- The Office of the Secretary of Higher Education, which coordinates, plans, and develops policies, and advocates for the State's higher education system

Choose New Jersey, Inc. is a recognized 501 (c)(3) nonprofit organization.

III.

The Legislature's stated purpose in enacting OPRA was to make government records "readily accessible" to the public "with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1. OPRA directs that "all government records shall be subject to public access unless exempt," and that "any limitations on the right of access . . . shall be construed in favor of the public's right of access." Ibid.

Plaintiff's challenge to the denial of her OPRA request turns on whether the requested documents qualify as government records as defined in N.J.S.A. 47:1A-1.1:

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[(Emphasis added).]

"Public agency" or "agency" is defined 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.

[Ibid.]

This definition does not preclude a nonprofit corporation from qualifying as a public agency if it is created, controlled or funded by the government. See League of Muns., supra, 207 N.J. at 507 (citing Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535-36 (2005)).

Plaintiff argues that the correspondence she sought qualifies as a "government record" under OPRA if it is (1) either made, received or otherwise possessed by an individual (2) in the course of ChooseNJ's official business (3) by an officer or commission, agency or authority of the State or political subdivision. She contends that, to meet this test, she need only show either that ChooseNJ is an "agency" under OPRA or that any officer of ChooseNJ was acting as an "officer" of "the State or political subdivision." She argues further that both tests are satisfied here. We disagree.

Plaintiff relies upon ChooseNJ's website and correspondence between ChooseNJ personnel and State of New Jersey employees to support her argument that there is a "close working relationship between" the executive branch of the State government and ChooseNJ. We reject plaintiff's argument that the existence of a "close working relationship" transforms the private party in a public-private partnership into a public agency.

Plaintiff relies upon Lafayette Yard, supra, 183 N.J. at 519 and League of Muns., supra, 207 N.J. at 489, as support for her argument that a nonprofit entity may be subject to OPRA. Both cases are distinguishable.

Lafayette Yard Community Development Corporation (Lafayette Yard), a private nonprofit corporation, was established "solely to assist the City of Trenton . . . the Trenton Parking Authority and the State of New Jersey to provide for redevelopment of a 3.1 acre site." Lafayette Yard, supra, 183 N.J. at 522 (omission in original). Even though it was a nonprofit corporation, Lafayette Yard operated under certain IRS Revenue Rules that allowed it to issue tax-exempt bonds that were deemed to be issued "'on behalf" of the state or a political subdivision' of the state." Id. at 523. In addition, any property that Lafayette Yard acquired would revert to the City when the indebtedness was retired. Ibid. Consistent with the purpose for its formation – to redevelop the property for the City – the requirements allowing the issuance of tax-exempt bonds and reverting property to the City were all in the certificate of incorporation and bylaws for Lafayette Yard. Ibid. Eventually, a resolution was passed to transfer the redevelopment property to the City for one dollar. Id. at 524.

The City's control over Lafayette Yard was reflected in its bylaws which provided that "five of the Corporation's seven

uncompensated Trustees were initially selected by the Mayor (with two named later by the City Council), whereas subsequent vacancies on the Board were required to be filled by the Mayor and approved by the City Council." Id. at 523. Furthermore, any trustee could be removed by the Board or a majority vote of the City Council approved by the Mayor of the City. Ibid. The Mayor also had to approve any amendments made to the bylaws. Ibid.

Lafayette Yard attempted to evade the application of OPRA by claiming "it was not 'created' by 'a political subdivision of the State,' but rather, by public-spirited citizens of the City who incorporated as a private nonprofit entity to assist the City in redeveloping the 3.1 acres designated as a key component in its redevelopment plan." 183 N.J. at 535. Although acknowledging the truth of that claim, the Court found OPRA applied because "the Mayor and City Council have absolute control over the membership of the Board of Lafayette Yard and . . . the Corporation could only have been 'created' with their approval." Ibid.

The New Jersey League of Municipalities (the League), a nonprofit, unincorporated association, was created pursuant to statutory authority, N.J.S.A. 40:48-22, for "[t]he promotion of the general welfare of the municipalities of the State [and] [t]he study and advocacy of necessary and beneficial legislation affecting municipalities." League of Muns., supra, 207 N.J. at

494 (first and third alterations in original). The question whether OPRA applied to the League turned on whether the League was "an instrumentality . . . created by a . . . combination of political subdivisions," and therefore fell within the definition of "public agency." Id. at 503 (quoting N.J.S.A. 47:1A-1.1). To determine whether the League was subject to OPRA entailed a two-step process: first, whether it was an "instrumentality" and second, whether it was created by a combination of political subdivisions.

In the absence of a statutory definition, the Court employed the generally accepted meaning of instrumentality, and found the League qualified as an instrumentality of the State's municipalities because it provided "a function on behalf of all 566 of New Jersey's municipalities," pooling financial contributions³ and personnel,⁴ lobbying the Legislature, providing testimony from its officials before legislative committees to advance the interests of municipalities, conducting educational

³ "Sixteen percent of the League's budget is comprised of taxpayer public funds in the form of membership fees from each municipality. More than one-half of the League's annual income is raised at a yearly convention." League of Muns., supra, 207 N.J. at 495.

⁴ Following a 1955 Attorney General Memorandum Opinion that declared the League was a "public agency or organization" which allowed its members to be eligible for the Public Employees' Retirement System (PERS), all seventeen of the League's employees are members of PERS. League of Muns., supra, 207 N.J. at 494.

programs for municipal officials bringing lawsuits that will benefit all municipalities, and in the case before the Court, forwarding to the Coalition on Affordable Housing comments critical of the proposed Third Round regulations governing affordable housing obligations of municipalities. Id. at 503-04. In concluding the League was an "instrumentality," the Court also observed, it is "controlled by elected or appointed officials from the very municipalities it represents. The League's constitution provides that, generally, 'each member municipality shall act and be represented by its Mayor or other chief executive authority, or his nominee.'" Id. at 504. The Court concluded the League fit "squarely within the term 'public agency.'" Id. at 503.

The Court found it "also clear that a 'combination of political subdivisions' -- the municipalities of this State -- 'created' the League," as the member municipalities formed a nonprofit, unincorporated association and drafted a constitution that would govern the organization pursuant to statutory authority. Id. at 504.

Plaintiff argues that ChooseNJ is an instrumentality of the State government because it acts in cooperation with the government to advance goals it shares with the government. That ChooseNJ has a close working relationship with the government and its officers and employees work toward those ends is insufficient, however, to

make it a public agency or its officers "public officers." ChooseNJ lacks the significant attributes that secured Lafayette Yard's identity as an instrumentality of the City. It is funded by contributions from private organizations and individuals and receives no public funding. Its Board of Directors includes representatives from businesses throughout New Jersey; none of the representatives or Board members are employed by the State or local government. Directors and officers are chosen with no governmental representative or entity playing any role in nominating, electing, or removing defendant's directors and officers. Furthermore, defendant's Board of Directors oversees the operations of the company and hires the company's president/CEO who hires other members of the company's staff, with no State or governmental representative involved. ChooseNJ has no authority to issue tax-exempt bonds. No governmental entity has any claim or right to its assets if ChooseNJ were to dissolve; its assets would be distributed based on the certificate of incorporation and bylaws passed by the Board of Directors.

And, unlike either the League or Lafayette Yard, ChooseNJ was not created or authorized by any legislative action. The ChooseNJ website states it is part of the Partnership for Action (PFA), a public-private approach to economic development. The website also states "New Jersey is one of only a handful of states that has

charged a non-governmental agency with state-wide marketing efforts for economic development purposes." (Emphasis added). Participation in a "public-private" partnership does not render the private partner a public agency where, as here, it was created through independent incorporation and not created or authorized by governmental action.

IV.

Plaintiff's argument for disclosure fares no better as a demand for documents under the common-law right of access.

To determine whether a record must be produced under the common-law right of access, courts will consider three requirements: "(1) the records must be common-law public documents; (2) the person seeking access must 'establish an interest in the subject matter of the material'; and (3) the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" Keddie v. Rutgers, 148 N.J. 36, 49 (1997) (citations omitted); see also Higq-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995); S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991).

The common-law definition of "public record" is different from "government records" under OPRA. Plaintiff contends, "A common-law public record includes any record that is merely received or kept by the public body, regardless of legal

requirements. . . ." Plaintiff further contends it is immaterial whether ChooseNJ is a public agency because its officials are "clearly acting to exercise very public functions of their state agency counterparts." Plaintiff's interpretations of the definition of a common-law public record and application to this case are erroneous.

To qualify as a common-law public document, the document must be "one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." Keddie, supra, 148 N.J. at 49. Therefore, the document must be created in the exercise of a public function and, further, must be filed in a public office or maintained as required by law.

Contrary to plaintiff's argument, the status of the party from whom documents are requested is a threshold issue. Simply put, a document cannot be a common-law public record if it is not "made by a public official in the exercise of his or her public function." Ibid. As we have discussed, ChooseNJ is not a public agency and its officers are not public officials. According to defendant's chief executive officer, Michael Winter, "ChooseNJ does not file or record the documents requested by plaintiff in any public office, and . . . is not required by law to do so."

Plaintiff cites no authority that refutes this assertion.
Therefore, the common-law right of access did not require ChooseNJ
to produce the requested documents.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION