NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2572-20

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,

Plaintiff-Appellant,

v.

COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY,

Defendant-Respondent.

**APPROVED FOR PUBLICATION**
**December 22, 2022**
**APPELLATE DIVISION**

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Argued November 29, 2022 – Decided December 22, 2022

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8169-19.

Karen Thompson argued the cause for appellant (American Civil Liberties Union of New Jersey Foundation, attorneys; Karen Thompson, Elyla Huertas, Jeanne LoCicero and Alexander Shalom, on the briefs).

Christopher J. Gramiccioni argued the cause for respondent (Kingston Coventry LLC, attorneys; Joseph Paravecchia, of counsel and on the brief).

CJ Griffin argued the cause for amicus curiae Libertarians for Transparent Government (Pashman

Stein Walder Hayden, PC, attorneys; CJ Griffin, on the brief).

The opinion of the court was delivered by

GEIGER, J.A.D.

Plaintiff American Civil Liberties Union of New Jersey (ACLU) contends defendant County Prosecutors Association of New Jersey (CPANJ) is a public agency subject to records requests under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. The ACLU requested CPANJ to produce documents regarding CPANJ's funding, the context and contents of its meetings and events (including dates, times, and locations), and the people performing its operating functions. CPANJ denied the records request in its entirety, contending it is "not a public agency subject to the dictates of OPRA or requests made under the common law right of access."

The ACLU filed this action to compel disclosure of the requested records, claiming that CPANJ violated OPRA and the common law right of access. In response, CPANJ filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted prior to any discovery being exchanged.

Following oral argument, the trial court issued an oral decision and order granting CPANJ's motion to dismiss the complaint. The court found CPANJ

was not a public agency under OPRA and was not subject to the common law right of access. The ACLU appeals from that order. We affirm.

I.

CPANJ is a nonprofit association comprised of the twenty-one county prosecutors of New Jersey. It is organized under Section 501(c) of the Internal Revenue Code.[1] CPANJ does not compensate any of its members. It has no staff or office. According to its IRS Form 990 tax filings, CPANJ derives revenue solely from educational conferences and membership dues and assessments.

In support of its position that CPANJ's records are subject to disclosure under OPRA and the common law right of access, the ACLU's asserted:

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[1] In its records request denial, CPANJ stated it "was originally formed" pursuant to Section 501(c)(6) of the Internal Revenue Code in 1982, converted to a Section 501(c)(3) nonprofit in December 2011, and applied to have its status returned to a Section 501(c)(6) association in July 2019. Under Section 501(c)(6) of the Internal Revenue Code, business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues, which are not organized for profit and do not distribute any net earnings to any private shareholder or individual are exempt from federal income taxation. According to the Internal Revenue Service (IRS), "[a] business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. Trade associations and professional associations are business leagues." Business Leagues, IRS, https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues.

- "CPANJ regularly meets with representatives of the Attorney General of New Jersey . . . and is treated by the Office of the Attorney General [(OAG)] as a partner in implementing statewide criminal justice policy." For example, in February 1985, the Attorney General and CPANJ issued a joint "Policy Statement . . . Regarding Prosecutorial Review of Search Warrant Applications."

- In March 2018, the OAG announced the availability of "$870,450 in funding to support training in the County Prosecutors' Offices . . . under the . . . STOP Violence Against Women Act ('VAWA') Grant Program" after "[t]he VAWA Advisory Committee, which includes representation of [CPANJ], identified the essential need for municipal and county prosecutor's training."

- "CPANJ describes its mission as 'maintain[ing] close cooperation between the Attorney General of the State of New Jersey, the Division of Criminal Justice . . . and the twenty-one (21) county prosecutors of the State of New Jersey relative to the developing [of] educational programs so as to promote the orderly administration of criminal justice within the State of New Jersey consistent with the Constitution and the laws of the State of New Jersey.'"

- "Despite being classified as 'volunteers' in their 990 tax forms, all officers, trustees, and members of CPANJ are New Jersey county prosecutors, appointed by the Governor and paid by the State of New Jersey."

- "CPANJ regularly sends copies of its meeting minutes and agendas to the [OAG]."

- "CPANJ has a designated seat on the Department of Law and Public Safety Police Training Commission (N.J.S.A. 52:17B-70) as well as on the New Jersey Parole Advisory Board. N.J.S.A. 30:4-123.47A."

- "County Prosecutors use the resources of their offices to conduct CPANJ business, including the development of agendas, the coordination of meetings and dinners, and the administration of its scholarship program."

- "CPANJ has appeared as amicus curiae and filed appearances using the government resources of various county prosecutors to do so." In such cases, CPANJ is represented by a county prosecutor or assistant county prosecutor.

- "CPANJ is operated entirely by government appointees who are paid with New Jersey taxpayer funds to perform legal duties on behalf of the State of New Jersey while using government resources to do so."

- "According to its 990 forms, CPANJ does not compensate any staff."

- CPANJ has statutorily designated seats alongside public and private entities on the Department of Law and Public Safety Police Training Commission, N.J.S.A. 52:17B-70(b).

- CPANJ has appeared as amicus curiae in several cases before trial courts and the Supreme Court.

CPANJ also has a designated seat on the Domestic Violence Fatality and Near Fatality Review Board, N.J.S.A. 52:27D-43.17c. Similarly, one member of the Commission on Human Trafficking shall be "a county prosecutor, appointed by the Governor based upon the recommendation of [CPANJ]." N.J.S.A. 52:17B-237.

## II.

On July 19, 2019, the ACLU submitted records requests to CPANJ pursuant to OPRA and the common law right of access. The requests sought production of meeting agendas and minutes, funding records, and briefs filed in state or federal courts by CPANJ, as well as any policies or practices shared with county prosecutors by CPANJ. On September 18, 2019, CPANJ sent a letter to plaintiff denying access to all the document requests under both OPRA and the common law. CPANJ stated it is "a private non-profit organization and not a public agency subject to the dictates of OPRA or to requests made under the common law right of access." CPANJ described itself as:

> a non-profit society, organized pursuant to Section 501(c)(6) of the Internal Revenue Code, which covers business leagues, chambers of commerce, boards of trade, and similar organizations. It is a private association comprised of the [twenty-one] County Prosecutors and has as its goal the promotion of the orderly administration of criminal justice within the State and the fair and effective enforcement of the constitution and laws of this State through the cooperation of all law enforcement agencies . . . .

CPANJ stated its goals "are not binding upon any of [its] members" and it does not "assume the responsibilities of any of the member's [sic] individual duties." It further claimed "CPANJ does not fulfill a purpose or perform the

duties of the prosecutors' offices, individually or as a whole" and that "a County Prosecutor is not required to be a member of the CPANJ."

CPANJ provided two additional bases for the denial. First, even if it were a public agency, the records sought would be exempt from production as confidential materials "which, if disclosed, would compromise an agency's ability to effectively conduct investigations," and/or as "inter-agency advisory, consultative, or deliberative materials" or "records . . . related to criminal investigations."

Second, CPANJ claimed it could not execute plaintiff's request because CPANJ "does not 'possess' or 'maintain' records." CPANJ explained that it "does not have a physical office, location, or even an online presence" and that "records related to the CPANJ are scattered and possessed by [its] many members . . . making possession by a custodian unrealistic." On its 990 tax forms, however, CPANJ lists the Fairfield address of a New Jersey accounting firm as its own address, and states that "the organization's books and records" are located at that address. To date, CPANJ has not provided the requested documents.

The ACLU stated it filed this action to obtain the requested records to:

> (1) continue its investigation into how county prosecutors and their staff members coordinate their efforts on criminal justice policy; (2) determine if those efforts are in anyway financed by or supported

> with State funds or resources; and (3) adequately monitor prosecutorial transparency and accountability within the New Jersey criminal justice system.

The ACLU maintains the records it requested "are all 'government records' as that term is defined by OPRA because they were all 'made, maintained or kept on file in the course of [CPANJ's] official business.'" N.J.S.A. 47:1A-1.1. The ACLU contends the "documents are not exempt from production under any of OPRA's exceptions[,] . . . are required to be kept in the regular order of business, were filed with the courts of this State, and disseminated by CPANJ to the Attorney General." It further contends it does not seek information that would compromise the CPANJ's investigatory capacities; rather, to the extent that the requested documents contain privileged or confidential information, redaction, not non-disclosure, is the proper response.

The ACLU alleged CPANJ violated OPRA by failing to: (1) make "the records requested 'readily accessible for inspection, copying, or examination' in violation of N.J.S.A. 47:1A-1"; (2) "grant access to government records within seven business days, in violation of N.J.S.A. 47:1A-5([i])"; (3) "prove that the denial of access is authorized by law, in violation of N.J.S.A. 47:1A-6"; (4) "designate a records custodian, in violation of N.J.S.A. 47:1A-1.1"; (5) "maintain an OPRA request form, in violation of N.J.S.A. 47:1A-5(f)"; and (6)

lawfully allow "access to non-exempt portions of government records, in violation of N.J.S.A. 47:1-5([g])."

Regarding CPANJ's alleged violation of the common law right of access, the ACLU asserted it, "and by extension, its members and the public, [have] a significant interest in reviewing these documents to learn more about the CPANJ's relationship with prosecutors across the state and the role the CPANJ plays in setting policy and/or procedures for prosecutors around the state." The ACLU further asserted it "has a right to know the information contained in the requested documents to provide complete information to the public regarding prosecutorial decision making, accountability, and funding for actions taken by the CPANJ on behalf of the State."

The trial court rejected the ACLU arguments, and granted CPANJ's motion to dismiss the complaint, reasoning:

> Plaintiff is not a public agency under OPRA and it's not subject to the common law right of access. First, OPRA has defined public agency, or agency, as follows: Any of the principal subdivisions in the executive branch of state government, or and any division, board, bureau, office, commission, or other instrumentality withing, or created by such department, the Legislature of the State of New Jersey, and any office, or 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 a combination of political subdivision, and any division, board, bureau,

office, commission, or other instrumentality within, or created by a political subdivision of the State, or a combination of political subdivisions, and any independent authority, commission, instrumentality, or agency created by a political subdivision, or a combination of political subdivision. N.J.S.A. 47:1A-1.1. Per the definition provided by OPRA, CPANJ . . . is a non-public agency.

Next, in order to access public records under common law three requirements must be met: [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. Kiddie v. Rutgers State Univ., 148 N.J. 36, 50 (1997). See also N. Jersey Media Grp., Inc. v. Dep't of Pers., 389 N.J. Super. 527, 538 (Law Div. 2006). While county prosecutors are constitutionally granted authority in their individual jurisdictions, their powers are not authorized by law to extend beyond their jurisdiction. Here the records created by [CPANJ] are deliberative, contemplative and informative, but they are not created under the powers granted independently to each of the [twenty-one] county prosecutors and, as such, they cannot be considered as public records under the common law. Therefore, because CPANJ . . . does not meet the statutory definition of a public agency under OPRA, and [CPANJ] records are not public records under the common law, defendant's motion must be . . . granted.

I'm also going to note in passing that while county prosecutors are invited to join the [CPANJ,] I don't believe they are mandated to join [CPANJ]. It's not a condition of any function of their public function, and if having an interest in a non-profit, independently-organized entity transforms all such

entities into public agencies, then agencies such as the ACLU might face similar requests.

This appeal followed. The Libertarians for Transparent Government (LFTG) was granted leave to appear as amicus curiae.

ACLU raises the following points for our consideration:

POINT I

[CPANJ] IS A PUBLIC AGENCY SUBJECT TO BOTH THE OPEN PUBLIC RECORDS ACT AND THE COMMON LAW RIGHT OF ACCESS.

A. Plaintiff Has Presented Sufficient Facts to Show That CPANJ is a Public Agency Subject to OPRA'S Provisions and the Common Law Right of Access.

1. CPANJ is Subject to OPRA.

2. CPANJ is Subject to the Common Law Right of Access.

B. Plaintiff is Entitled to Attorney's Fees.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT [CPANJ] IS NOT A PUBLIC AGENCY.

A. The Trial Court Failed to Conduct the Proper Inquiry to Determine Whether Plaintiff Established a Prima Facie Case on a Motion to Dismiss.

POINT III

POLICY CONCERNS SUPPORT A FINDING THAT CPANJ IS A PUBLIC AGENCY BECAUSE OF THE OUTSIZED EFFECT PROSECUTORIAL POLICIES HAVE ON THE EVERYDAY FREEDOMS OF NEW JERSEYANS.

LTFG argues CPANJ is a public agency subject to OPRA.

III.

Our review of a trial court's ruling on a motion to dismiss is de novo, without deference to the judge's legal conclusions. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Although the review of the factual allegations of a complaint on a motion to dismiss is to be "undertaken with a generous and hospitable approach," Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one," Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011).

IV.

We first address whether CPANJ is a "public agency" under OPRA. We are guided by the following legal principles.

Appellate courts "exercise plenary review over issues of statutory interpretation. Likewise, determinations about the applicability of OPRA and its exemptions are legal conclusions . . . subject to de novo review." Carter v.

Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 273-74 (2017). A court's "primary 'objective [in] statutory interpretation is to discern and effectuate the intent of the Legislature.'" Id. at 274 (alteration in original) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). "If the Legislature's intent is clear on the face of the statute, then [the court] must apply the law as written." Ibid. (quoting Murray, 210 N.J. at 592). "Absent a clear indication from the Legislature that it intended statutory language to have a special limiting definition, [the court] presume[s] that the language used carries its ordinary and well-understood meaning." Ibid. (quoting State v. Lenihan, 219 N.J. 251, 262-63 (2014)). A court should only turn to extrinsic evidence of the Legislature's intent if the statutory language at issue "is ambiguous, or 'leads to more than one plausible interpretation.'" Ibid. (quoting DiProspero v. Penn, 183 N.J. 477, 492-93 (2005)).

As a threshold matter, CPANJ argues this court cannot determine whether it is "a public agency subject to OPRA," because our "appellate jurisdiction is solely limited to de novo review of the trial court's decision to dismiss the complaint." (Db10-11). We disagree. See Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 285-93 (App. Div. 2013) (considering the merits of the same issue under the same procedural posture).

OPRA declares that it is the State's public policy 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." N.J.S.A. 47:1A-1. OPRA's purpose "is to maximize public knowledge about public affairs . . . and to minimize the evils inherent in a secluded process." Fair Share Hous. Ctr., Inc. v. N.J. State League of Muns., 207 N.J. 489, 501 (2011) (alteration in original) (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)). "An underlying premise of OPRA is that society as a whole suffers when 'governmental bodies are permitted to operate in secrecy.'" Id. at 502 (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004)). "Where the statute is unclear, the Court has construed it in a way consistent with its broad purpose." State Firemen's Ass'n, 431 N.J. Super. at 287 (citing Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012)).

An entity is subject to OPRA if it is a "public agency," defined as:

> 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.
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> [N.J.S.A. 47:1A-1.1.]

Our Supreme Court "has acknowledged that the definition of 'public agency' is broad." State Firemen's Ass'n, 431 N.J. Super. at 288 (citing Rutgers, 210 N.J. at 544). "[A] court must look behind the technical form of an entity to consider its substantive attributes" and therefore "determining whether an entity is a public agency involves a fact-sensitive inquiry." Ibid.

In League of Municipalities, the Court considered whether the League of Municipalities -- a nonprofit, unincorporated association created pursuant to a statute to secure concerted action by municipalities -- was an "instrumentality . . . created by a . . . combination of political subdivisions" and thus a public agency. 207 N.J. at 503 (alterations in original) (quoting N.J.S.A. 47:1A-1.1). The Court noted that "OPRA does not define 'instrumentality'" and gave the word its generally accepted meaning: "'[a] thing used to achieve an end or purpose' and, alternatively, . . . '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.'"

Ibid. (alterations in original) (quoting Black's Law Dictionary 814 (8th ed. 2004)).

Applying that definition to the League, the Court concluded that it was a public agency, reasoning:

> Here, the League is achieving an end and providing a function on behalf of all 566 of New Jersey's municipalities. It is "securing concerted action in behalf of . . . the common interest of the organizing municipalities" -- that is, the municipalities that established and presently support the League. See N.J.S.A. 40:48-22. The maxim that there is strength in numbers comes into play here. Through the pooling of financial contributions and personnel, the League--in a more efficient and cost-effective way--can do for all municipalities what no one municipality can do for itself. The League lobbies the Legislature, and its officials testify before legislative committees to advance the interests of municipalities. It conducts educational programs for municipal officials. It also brings lawsuits that will benefit all municipalities.
>
> [Id. at 503-04 (alteration in original).]

The Court also considered that the League was "controlled by elected or appointed officials from the very municipalities it represents" and that the member municipalities "'created' the League," id. at 504 (quoting N.J.S.A. 47:1A-1.1), "by forming a nonprofit, unincorporated association and drafting a constitution" after the Legislature enacted a statute permitting the creation of such an organization. Ibid. (citing N.J.S.A. 40:48-22). The Court rejected both the lower courts' focus on the fact that the League did not "perform a

traditional governmental task, such as trash collection," explaining that "[t]he language of N.J.S.A. 47:1A-1.1 does not set forth a governmental-function test." Ibid.

In State Firemen's Association, we considered whether the Firemen's Association was a public agency, examining the Association's creation, control, funding, and functions. 431 N.J. Super. at 289-93. The Association was established pursuant to statute and "organized by the several incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families." Id. at 279. It was initially "authorized to conduct an annual convention, and to oversee activities of the local associations," which "were funded with the direct payment of a tax on premiums of fire insurance companies." Id. at 279-80. The Association was later empowered by statute to adopt rules and regulations to govern the local associations, N.J.S.A. 43:17-10, to exercise oversight over their expenses, N.J.S.A. 43:17-29, and "to make direct benefit payments," N.J.S.A. 43:17-41. Id. at 280-81.

We held that the Association was "an independent State instrumentality" and thus a public agency, id. at 293, "ground[ing] our decision principally on the Association's statutory powers, we also rel[ied] on undisputed facts regarding the Associations activities." Id. at 284. The court rejected the

Association's argument that it was "merely a creature of private non-profit relief associations," explaining that "[t]he Association 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." Id. at 290. Furthermore, "[t]he Association serve[d] numerous governmental functions" and was therefore an "instrumentality" as defined in League of Municipalities. Id. at 291-92.

As we explained, "[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. Considering whether an entity performs a governmental function would seem relevant to OPRA's purpose of "promot[ing] the public interest by granting citizens access to documents that record the workings of government in some way." Ibid. (quoting Rutgers, 210 N.J. at 546). Indeed, in Rutgers, the Court found it significant that a Rutgers law clinic did "not perform any government functions," conduct any "official government business," or "assist in any aspect of State or local government" in reaching its conclusion that the clinic was not a public agency. 210 N.J. at 546. "Also pertinent, neither the University nor any government agency 'control[led] the manner in which

clinical professors and their students practice[d] law." State Firemen's Ass'n, 431 N.J. Super. at 289 (alterations in original) (quoting Rutgers, 210 N.J. at 547).

Ultimately, any test "demarcating the boundaries of what qualifies as a public agency"--including the "creation" or "governmental-function" tests--is "useful only insomuch as [it] effectuate[s] application of the statutory language." Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 302 (2017). In Verry, the Court determined that the Millstone Valley Fire Department, a volunteer fire company operating within Franklin Fire District No. 1 (District), was not a public agency because it did not have a "direct connection to a political subdivision." Id. at 301.

The Court found the District was the "instrumentality" of a political subdivision, because it was created by a municipality pursuant to N.J.S.A. 40A:14-70 and because "the Legislature did not provide that the fire district being created would itself be a political subdivision." Id. at 296-97. In contrast, the volunteer fire department, created pursuant to N.J.S.A. 40A:14-70.1, could only "be regarded as an instrumentality of a fire district," that is, "the instrumentality of an instrumentality." Id. at 300-01. Because OPRA "does not provide that an instrumentality of an instrumentality constitutes a public agency," the Court could not "conclude from the language used by the

Legislature that it intended for a volunteer fire company to be considered a separate public agency for OPRA purposes under N.J.S.A. 40A:14-70.1(a)." Id. at 301.

The Court also distinguished the association in State Firemen's Association from the volunteer fire company, explaining that the association "was itself a creation of the State Legislature." Id. at 302 (citing N.J.S.A. 43:17-41). However, the Court held that "the documents requested from the [fire company] must be either on file with the District or subject to the District's demand for production," and "[a]s such, they are documents necessary to the District's performance of its responsibilities and properly were ordered by the [Government Records Council] to be produced." Id. at 303-04.

Here, plaintiff and amicus contend that CPANJ meets the definition of a public agency as an instrumentality "created by a . . . combination of political subdivisions." CPANJ argues it is not an instrumentality "of political subdivisions" because "[i]t does not perform the governmental functions of its creators"

While we recognize that a county is a political subdivision of the state, Camden Cnty. v. Pennsauken Sewerage Auth., 15 N.J. 456, 470 (1954), we reject the contention that CPANJ was created by a combination of political subdivisions. Nothing in the record before us suggests that the counties

directly created CPANJ or authorized its creation. There is no indication the counties came together to form the CPANJ in the same way that "the member municipalities created the League [of Municipalities] by forming a nonprofit, unincorporated association and drafting a constitution that would govern the organization." League of Muns., 207 N.J. at 504.

Moreover, county prosecutors are distinct from the counties they operate in. As a historical matter, "the jurisdiction of the county prosecutor [was] carved out of the original powers of the attorney-general." Morss v. Forbes, 24 N.J. 341, 368 (1957). "By provision of the Constitution of 1947, both the attorney-general and the county prosecutor are constitutional officers." Id. at 369. "The attorney-general, as head of the Department of Law and Public Safety, is within the executive department . . . . " Ibid. (citing N.J. Const. art. V, § 4, ¶ 3). County prosecutors are nominated and appointed by the Governor with the advice and consent of the Senate for a term of five years. N.J. Const. art. VII, § 2, ¶ 1; accord N.J.S.A. 2A:158-1.

"It has long been recognized . . . that the county prosecutor is the foremost representative of the executive branch of government in law enforcement in his [or her] county." Cherrits v. Ridgewood, 311 N.J. Super. 517, 528-29 (App. Div. 1998) (citing State v. Winne, 12 N.J. 152, 171 (1953)).

Currently, N.J.S.A. 2A:158-4 provides that "[t]he criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors."

While our Supreme Court once described the county prosecutor as "primarily a local official," Morss, 24 N.J. at 373, the Court subsequently recognized that "the county prosecutor's law enforcement function is unsupervised by county government or any other agency of local government," Yurick v. State, 184 N.J. 70, 80 (2005) (quoting Wright v. State, 169 N.J. 422, 452 (2001)). As a general matter, county prosecutors operate autonomously but are supervised by the Attorney General, id. at 79; N.J.S.A. 52:17B-103, and may be superseded by the Attorney General, N.J.S.A. 52:17B-106, and are subject to removal by the Governor for cause, N.J.S.A. 52:17B-110. However,

> [the power to supersede a prosecutor] is exercised infrequently, and in most instances, at the request of a county prosecutor to avoid a conflict of interest. In the absence of any such supersession, county prosecutors have independent authority to prosecute the crimes that are committed within their jurisdictions, and they enjoy considerable discretion in exercising that authority.
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> [Report of the Cnty. Prosecutor Study Comm'n at 6 (2011).]

The Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, brought "the county prosecutor more closely within the control and supervision of the

executive branch through the attorney general." In re Ringwood Fact Finding Comm., 65 N.J. 512, 530 (1974). The Act requires the Attorney General to consult with, advise, and supervise the county prosecutors "with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State," N.J.S.A. 52:17B-103, obligates the "county prosecutors to cooperate with and aid the Attorney General in the performance of his duties," N.J.S.A. 52:17B-112(a), and empowers the Attorney General to supersede a county prosecutor, N.J.S.A. 52:17B-106, and to call prosecutors into conference to "discuss[] the duties of their respective offices," N.J.S.A. 52:17B-112(c). Thus, "county prosecutors occupy a 'hybrid' role, serving both the county and the State." Gramiccioni v. Dep't of L. & Pub. Safety, 243 N.J. 293, 310 (2020) (citing Wright, 169 N.J. at 455-56). Nevertheless, the Attorney General "has both the authority and the duty to establish and enforce uniform statewide policies, practices, and procedures to ensure the most efficient and effective use of the law enforcement resources of all other police and prosecuting agencies throughout the State." Report of the Cnty. Prosecutor Study Comm'n at 6.

As the county prosecutors' law enforcement function is independent of the counties they operate in, under the primary supervision of the Attorney General, it cannot be assumed that the counties played any role in creating

CPANJ. On the contrary, the offices of the county prosecutors are better characterized as "office[s] . . . created by the Legislative Branch," N.J.S.A. 47:1A-1.1, for while a county prosecutor is a constitutional officer, "the task of defini[ng]" their "powers, rights, duties and responsibilities" was "left to the Legislature." Morss, 24 N.J. at 369; see also N.J.S.A. 2A:158-1 (providing for the appointment of county prosecutors and assigning them "all of the powers and . . . all of the duties formerly had and performed by the prosecutor[s] of the pleas of such count[ies]").

Thus, any entity created by the county prosecutors is, at most, an instrumentality of instrumentalities or of offices. Such an entity does not constitute a public agency, because an "instrumentality" only qualifies as a "public agency" if it is "within or created by" a "principal department[] in the Executive Branch," "the Legislative Branch," or "a political subdivision . . . or combination of political subdivisions," or if it is an "independent State . . . instrumentality." N.J.S.A. 47:1A-1.1. OPRA "does not provide that an instrumentality of an instrumentality constitutes a public agency," Verry, 230 N.J. at 301, or that an instrumentality of offices constitutes a public agency, N.J.S.A. 47:1A-1.1.

We recognize that until 2018, the county "pa[id] the salary established by law for the county prosecutor, . . . and set[] the salaries of key members of

the county prosecutor's staff." Yurick, 184 N.J. at 80. (citing N.J.S.A. 2A:158-13; N.J.S.A. 2A:158-15.3).[2] "Additionally, the county board of [commissioners] appropriates the funds expended by the county prosecutor in investigating and prosecuting crime." Ibid. (citing N.J.S.A. 2A:158-7). These facts are not controlling. Indeed, the Legislature has provided a mechanism for the prosecutor to address the prosecutor's complaint of insufficient funding. Id. at 81. Specifically, N.J.S.A. 2A:158-7 provides:

> All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county. The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county.

The statutory scheme enacted by the Legislature "place[s] the prosecutor in a dominant position with relation to the freeholders for the purpose of

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[2] The salary of county prosecutors is set by statute. N.J.S.A. 2A:158-10. Until 2018, the salary of a county prosecutors was paid entirely by the county. N.J.S.A. 2A:158-10 was amended, effective July 1, 2018, to require the State to reimburse the county for the "amount by which the annual salary paid to the county prosecutor under this section exceeds $100,000.00." L. 2018, c. 14, § 4. The salary of assistant prosecutors and staff continues to be paid by the county.

maintaining his [or her] independence and effectiveness." Tate v. Amato, 220 N.J. Super. 235, 241 (App. Div. 1987) (quoting In re Mercer Freeholder Bd. v. Mercer Cnty. Prosecutor, 172 N.J. Super. 411, 414 (App. Div. 1980)). While "[c]ounty prosecutors are expected to interact freely with county and state officials in the performance of their respective responsibilities[,]" Yurick, 184 N.J. at 79, county prosecutors act independently and their "law enforcement function is unsupervised by county government or any other agency of local government[,]" id. at 80 (quoting Wright, 169 N.J. at 452).

For example, unlike other county employees, a county prosecutor has unfettered discretion to select his or her assistant prosecutors, who are at-will employees who serve at the pleasure of the prosecutor, and to promote assistant prosecutors, subject only to budgeted funding for the position. See Bezich v. Bd. of Chosen Freeholders of Camden Cnty., 55 N.J. 24, 27 (1969) (holding that the board of chosen freeholders does not have any authority over the filling of budgeted assistant prosecutor vacancies or the promotion of assistant prosecutors to another budgeted position carrying higher pay). Additionally, the State, not the county, is required to "to indemnify and defend [the county prosecutor and his or her] subordinates for tortious conduct committed during the investigation, arrest, and prosecution" of a suspect,

provided their "acts or omissions . . . do not involve actual fraud, actual malice or willful misconduct." Wright, 169 N.J. at 456.

Alternatively, CPANJ could qualify as an instrumentality "created by . . . a combination of political subdivisions," if a county prosecutors' office is a "political subdivision." N.J.S.A. 47:1A-1.1. However, just as "the Legislature did not provide that [a] fire district being created would itself be a political subdivision," Verry, 230 N.J. at 296-97, the same is true of the county prosecutors' offices. The Legislature has not statutorily labeled the county prosecutors or their offices "political subdivisions." Accordingly, the county prosecutors' offices do not constitute political subdivisions because "[t]he Legislature did not designate [them] so." Id. at 299. Moreover, unlike municipalities and counties, we are aware of no authority that suggests that county prosecutors have "long been understood as" political subdivisions. Id. at 297. More fundamentally, they possess none of the governmental attributes of a political subdivision.

Nor is CPANJ akin to the State Firemen's Association, which is an "independent State instrumentality." State Firemen's Ass'n, 431 N.J. Super. at 293. ACLU contends CPANJ is furthering the objectives of the county prosecutors and the State using government resources, and amicus likens CPANJ to the State Firemen's Association. We acknowledge that the record

supports the view that CPANJ furthers the State's objectives by assisting the Attorney General in the development of criminal justice policy.[3] Thus, CPANJ appears to be a means by which the county prosecutors fulfill their obligation under the Criminal Justice Act of 1970 to "cooperate with and aid the Attorney General," N.J.S.A. 52:17B-112(a), with the aim of "secur[ing] the benefits of a

[3] In that regard, we note that in 1976, CPANJ and the Division of Criminal Justice collaborated on "uniform standards" regarding the administrative termination of prosecutions. Off. of the Att'y Gen., Formal Op. No. 11-1976. A 1977 formal opinion of the Attorney General notes that "[CPANJ] and the Division of Criminal Justice . . . established an Organized Crime Policy Board." Off. of the Att'y Gen., Formal Op. No. 10-1977. Also in 1977, the [OAG] and CPANJ jointly promulgated a "Grand Jury Manual for Prosecutors." State v. Shaw, 455 N.J. Super. 471, 484 (App. Div. 2018). In February 1985, the Attorney General and CPANJ issued a joint "Policy Statement . . . Regarding Prosecutorial Review of Search Warrant Applications." In 1988, our Supreme Court recommended that the Attorney General "and the various County Prosecutors . . . adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases." State v. Koedatich, 112 N.J. 225, 258 (1988). The following year, CPANJ adopted "Guidelines for Designation of Homicide Cases for Capital Prosecution." State v. Jackson, 128 N.J. 136, 143 (1992) (Handler, J., dissenting). The guidelines were approved by the Attorney General. Jackson, 128 N.J. at 137. In 2004, the OAG and CPANJ jointly adopted the "Interim Policy Statement of the New Jersey Attorney General and [CPANJ]" regarding the electronic recording of stationhouse confessions. State v. Anthony, 443 N.J. Super. 553, 568 (App. Div. 2016). Attorney General Law Enforcement Directive No. 2016-6 v3.0 directed "[t]he Division of Criminal Justice, in cooperation with [CPANJ], the State Police, and the New Jersey Association of Chiefs of Police, . . . [to] develop a training program for police officers . . . to explain the policies established under the Bail Reform Law" and to "develop and periodically update" a "Preliminary Law Enforcement Incident Report form."

uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B-98. With these notable exceptions, CPANJ does not issue directives. Rather, CPANJ serves as a vehicle by which county prosecutors are afforded an opportunity by the Attorney General to comment on and participate as stakeholders in the drafting of directives and guidelines to be issued by the Attorney General, which thereafter are binding on the prosecutors.

CPANJ's monthly meetings are a convenient forum for the Attorney General to meet with the county prosecutors. Such meetings could be convened, of course, without the existence of CPANJ.

Importantly, the court in State Firemen's Association "ground[ed its] decision principally on the Association's statutory powers," 431 N.J. Super. at 284, emphasizing that "[t]he Association owes its existence to state law, which authorized its creation [and] granted it powers," id. at 290. The same is not true of CPANJ, which is not a creation of state law, and which has no statutory powers or official authority of any kind. While the ACLU notes in its complaint that CPANJ has statutorily designated membership on the Police Training Commission, N.J.S.A. 52:17B-70, and the New Jersey Parole Advisory Board, N.J.S.A. 30:4-123.47A, both statutes also require the appointment of members from private organizations, such as the National

Organization of Black Law Enforcement Executives, in the case of the Police Training Commission, and "victims' rights groups," in the case of the Parole Advisory Board. Thus, while CPANJ has a role in formulating criminal justice policy, it does so as a private entity that has no governmental authority.

For these reasons, we conclude that the trial court correctly found that CPANJ is not a public agency under OPRA. We therefore affirm the dismissal of ACLU's claims under OPRA, without reaching the issue whether the records are excluded from disclosure under any of OPRA's exceptions.

V.

We next address whether the ACLU is entitled to obtain the requested records under the common law right of access. The ACLU argues that CPANJ is subject to the common law right of access, that the requested records are common law public documents, and that the trial court therefore erred by not ordering the records produced under the common law. We conclude that the ACLU's argument for disclosure fares no better as a demand for documents under the common law right of access. We reach this conclusion for reasons different than the trial court. See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating that an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

A trial court's legal conclusions regarding access to public records under the common law right of access subject are subject to de novo review. Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011).

"At common law a citizen had an enforceable right to require custodians of public records to make them available for reasonable inspection and examination." Irval Realty Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972). OPRA does not limit the right of access to government records under the common law. Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 143 (2022) (citing N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 578 (2017); see also N.J.S.A. 47:1A-8 ("Nothing contained in [OPRA] . . . shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency."). Indeed, "[t]he definition of a public record under the common law is broader than under OPRA." Rivera, 250 N.J. at 143 (citing Mason v. City of Hoboken, 196 N.J. 51, 67 (2008)).

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 v. Rutgers, 148 N.J.

36, 49 (1997); see also Rivera, 250 N.J. at 143-44 ("To constitute a common law public record, an item must 'be a written memorial . . . made by a public officer, and . . . the officer [must] be authorized by law to make it.'" (alterations in original) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978))). 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.

The ACLU argues that the documents are common law public records because they were all "made by county prosecutors while conducting business related to or filed as a result of their public functions." (Pb16). The trial court determined that the records requested by the ACLU "are not public records under the common law."

The status of the party from whom documents are requested is a threshold issue under the common law right of access. Simply put, a document cannot be a common public record if it is not "made by a public official in the exercise in the exercise of his public function." Keddie, 148 N.J. at 49.

The ACLU requested records from and brought this lawsuit against CPANJ, a non-profit association, not the Attorney General, an individual county prosecutor, a county prosecutor's office, nor any other governmental entity. As we have stated, CPANJ was not created or authorized by statute or regulation. Membership in CPANJ is optional. While every county prosecutor

is currently a member, for fellowship's sake, nothing requires a county prosecutor to be a member of CPANJ. The county prosecutors' voluntary participation in CPANJ does not render the association a public agency where, as here, it was created through independent action, not governmental action.

Actions to enforce the common law right of access are actions against public entities. See Mason, 196 N.J. at 69-70 (holding that common law right of access actions are subject to a forty-five-day statute of limitations, consistent with actions in lieu of prerogative writs and "[o]ther challenges to governmental decisions"). CPANJ is not a public entity under the common law right of access.

Unlike the Attorney General, county prosecutors are granted powers that are geographically limited to their individual jurisdictions—the county for which they were appointed prosecutor. See N.J.S.A. 2A:158-5 (providing that each prosecutor is vested with the same powers within his or her county as the attorney general is vested). With limited, infrequently exercised exceptions, the powers a county prosecutor is "authorized by law" to exercise do not extend beyond the perimeter of that individual county. See Yurick, 184 N.J. at 79 ("Generally stated, the county prosecutor is responsible for the prosecution of crimes committed in the county, subject to law and to action by the grand jury."); accord State v. Josephs, 79 N.J. Super. 411, 415 (App. Div. 1963)

(citing N.J.S.A. 2A:158-4)). While county prosecutors and their assistant prosecutors and detectives can be "cross-designated" by an assistant attorney general to participate in standing ad hoc multi-county task forces or to handle specified cases in another county due to conflict of interest or other specific reason, those narrow exceptions to this jurisdictional limitation are not pertinent to our analysis.

Excepting when cross-designated by the OAG to serve on multi-county task forces or to handle specified cases in another county, county prosecutors have no constitutional or statutory extraterritorial powers to act collectively with other county prosecutors. Nor do they have any official prosecutorial powers when participating as members in CPANJ activities, either individually or collectively.

While CPANJ is afforded a statutory seat on the Police Training Commission, N.J.S.A. 52:17B-5(b), and the Parole Advisory Board, N.J.S.A. 30:4-123.47(a), and has appeared as amicus curiae in various cases, these recognitions of CPANJ's existence are entirely distinguishable from statutes that create and grant powers and responsibilities to a governmental entity.

For these reasons, we conclude CPANJ is not a public entity subject to the common law right of access. Accordingly, CPANJ was not required to

provide the requested documents and the ACLU's common law right of access claims were properly dismissed.

We further note that the documents sought by the ACLU were not "authorized by law," Nero, 76 N.J. at 222, or "directed by law to be made or kept" by any statute or regulation, Keddie, 148 N.J. at 49. Moreover, CPANJ was not required by any statute or regulation to create or preserve its meeting minutes or the other requested documents. This is hardly surprising since CPANJ was not created by statute or regulation and has no statutorily assigned duties or responsibilities. We are unaware of any documents CPANJ is required to make other than those necessary to maintain its tax-exempt status.

Although CPANJ's meeting minutes[4] and other submissions may have been kept on file by the OAG, and CPANJ's amicus briefs were filed with various courts, this does not change the result since CPANJ is not a public entity subject to the common law right of access. Consequently, we need not further address whether the requested records were common law public records

[4] The record is unclear as to who prepares the meeting minutes. CPANJ has no staff. The meetings are attended by the county prosecutors. If a county prosecutor is unavailable, a designee attends in his or her stead.

subject to disclosure. Hence, the fact-specific test adopted in Keddie, 148 N.J. at 50, does not apply and discovery related to that test is not necessary.[5]

Affirmed.

[5] We note that to obtain records under the common law right of access, "[a] requestor must make a greater showing than OPRA requires." Rivera, 250 N.J. at 144 (alteration in original). In particular, "(1) 'the [requestor] seeking access must establish an interest in the subject matter of the material'; and (2) 'the [requestor's] right to access must be balanced against the State's interest in preventing disclosure.'" Lyndhurst, 229 N.J. at 578 (quoting Mason, 196 N.J. at 67-68). "Finding the right balance calls for a careful weighing of the competing interests." Rivera, 250 N.J. at 144 (citing Loigman, 102 N.J. at 108).