

## Public-Private Partnerships May Be Subject to OPRA

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Over the past decade, New Jersey courts have expanded the definition of “public agency” under the Open Public Records Act (OPRA) so that the statute covers more than what is traditionally thought to be a government agency (i.e., municipalities and state agencies). Through a series of decisions, our courts have made it clear that a nonprofit corporation will be subject to OPRA if it is an “instrumentality” of a public agency or was created by a public agency. Thus, our courts have held that separately incorporated day-care centers, business improvement districts and various associations are subject to OPRA. This article will explore what factors New Jersey courts consider in determining whether a nonprofit organization or other separately incorporated entity is a “public agency” subject to OPRA, and what steps that entity must take to comply with OPRA.

OPRA defines “public agency” 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.*

N.J.S.A. 47:1A-1.1 (emphasis added). Accordingly, while it is thus clear from the language of OPRA that a state agency or a local municipality must comply with OPRA, the circumstances under which a nonprofit organization, commission, authority or agency would fall within the definition of “public agency” and be subject to OPRA have often been less clear.

The New Jersey Supreme Court has provided guidance as to whether an entity is encompassed by OPRA’s “public agency” definition. First, in *Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation*, 183 N.J. 519 (2005), the court held that a private, nonprofit corporation that was established solely to assist the City of Trenton in redeveloping a public property was a “public agency” under OPRA. The court was persuaded by a number of factors, including that the corporation was authorized to issue tax-exempt bonds and was controlled by the city and created with its approval. Its trustees were appointed by the mayor and city council, amendments to its bylaws had to be approved by the mayor and, upon dissolution, the corporation’s assets would be conveyed to the city. The court also found that the nonprofit corporation performed traditional government functions. In the end, the court held that allowing Lafayette Yard Community Development Corporation to escape the requirements of OPRA simply because it was technically incorporated as a private nonprofit organization would “elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the Legislature.”

Six years later, in *Fair Share Housing Center v. New Jersey State League of Municipalities*, 207 N.J. 489 (2011), the Supreme Court held that the League of Municipalities, a nonprofit, unincorporated association, is a “public agency” because it was created with explicit statutory authority (see N.J.S.A. 40:48-22) and is an “instrumentality” that is controlled by the elected or appointed officials from the municipalities it represents. The court clarified its decision in *Lafayette Yard* and stated that while the Open Public Meeting Act’s definition of “public body” includes a “governmental functions” test, OPRA’s definition of “public agency” does not. Thus, an organization could be subject to OPRA even if it did not perform traditional government tasks.

However, despite the court’s findings in *League of Municipalities*, the failure to perform any governmental function at all can still inform a court’s decision regarding whether a nonprofit is subject to OPRA. In *Sussex Commons Associates v. Rutgers, the State University*, 210 N.J. 531 (2012), the Supreme Court held while Rutgers and its law schools were public agencies whose records were subject to OPRA, a law school environmental clinic was not. The court applied the control test and found that neither the university nor any other government agency controlled the manner in which clinical professors and the students in the clinical program practiced law. The court also examined OPRA’s underlying purpose and held that because the law clinic did not perform any government functions whatsoever, it was not subject to OPRA; “unlike a request for documents about the funding of a clinic or its professors’ salaries, which are discoverable under OPRA, case-related records would not shed light on the operation of government or expose misconduct or wasteful government spending.”

Applying the holdings in *Lafayette Yard* and *League of Municipalities*, it is clear that the key test for the applicability of OPRA to nonprofits is whether the entity was created by a political subdivision and whether it is controlled by a political subdivision. Courts will thus look at factors such as whether the entity was created by statute or ordinance; whether the entity's employees are enrolled in the public employee retirement system; whether the entity lobbies on behalf of a political subdivision; whether the entity is funded with taxpayer funds; how the entity's assets are distributed upon dissolution; whether the entity's board members are appointed by elected or appointed officials; and the extent of control other public agencies exert over the entity. Additionally, *Rutgers* informs us that a court will look at whether holding the entity subject to OPRA will advance OPRA's underlying purposes.

In recent years, our courts have held that numerous other quasi-public private corporations are subject to OPRA, such as the New Jersey State Firemen's Association, as held in *Paff v. New Jersey State Firemen's Association*, 431 N.J. Super. 278 (App. Div. 2013); the city-run day-care program, as held in *Joseph Blaettler v. Union City Day Care Program*, HUD-L-5838-13 (Law. Div. Mar. 14, 2014); and business improvement districts, as held in *Kennedy v. Montclair Center Corporation Business Improvement District*, A-459-12T2 (App. Div. June 24, 2014), and *Gilleran v. Rutherford Downtown Partnership*, BER-L-6239-14 (Law. Div. Aug. 11, 2014).

Given the increased likelihood that they will be found subject to OPRA's dictates, nonprofit corporations that were created by or are heavily controlled by other government agencies thus need to proactively comply with OPRA. While most of New Jersey's case law addresses only the issue of whether the organization was subject to OPRA, in *Gilleran v. Rutherford Downtown Partnership*, the Law Division provided guidance as to what specific steps a nonprofit organization needs to take to comply with OPRA. There, the plaintiff submitted a request for public records to the Rutherford Downtown Partnership (RDP), a nonprofit organization that runs Rutherford's business improvement district. The plaintiff maintained that she did not receive a response to her request, while RDP argued that it sent the plaintiff an auto-response form email stating that it does not respond to OPRA requests and that the borough of Rutherford should be contacted instead.

The Law Division found in favor of the plaintiff and held that the RDP was required to adopt an OPRA request form, in accordance with N.J.S.A. 47:1A-5(f); identify a records custodian, in accordance with N.J.S.A. 47:1A-1.1; and make records "readily available" for public inspection within at least seven business days, in accordance with N.J.S.A. 47:1A-5 (i). The court held that the RDP's alleged auto-response to the plaintiff was insufficient, as N.J.S.A. 47:1A-5(h) states, "Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." While the court held that the RDP was free to designate the borough of Rutherford's clerk as its records custodian, the RDP violated OPRA by failing to forward the plaintiff's request or failing to tell her the specific name of its records custodian. Thus, as a matter of practice, an organization that might be considered a "public agency" under OPRA should place an OPRA request form on its website or provide the specific name and contact information for its designated records custodian.

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