

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4591-12T2

SCOTT KENNEDY,

Plaintiff-Appellant,

v.

MONTCLAIR CENTER CORPORATION
BUSINESS IMPROVEMENT DISTRICT,

Defendant-Respondent.

Argued March 17, 2014 – Decided June 24, 2014

Before Judges Ashrafi, St. John, and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No.
L-0924-13.

Richard Gutman argued the cause for
appellant.

Gerald B. Sweeney argued the cause for
respondent (Sweeney Lev L.L.C., attorneys;
Mr. Sweeney, on the brief).

PER CURIAM

Plaintiff Scott Kennedy, who owns a business in the central
business district of Montclair, appeals from an order dismissing
his summary action alleging violations of the Open Public
Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. He seeks a

declaration that the corporation responsible for managing Montclair's business improvement district is subject to OPRA because it is an agency of the municipal government. We agree and reverse.

I.

In 1984, the Legislature enacted The Pedestrian Mall and District Improvement Act, N.J.S.A. 40:56-65 to -89, which authorizes municipalities to create special improvement districts (SID) and management corporations to administer those districts. The goal of the legislation is to encourage municipalities to "execute self-help programs to enhance their local business climates." N.J.S.A. 40:56-65(b). The legislation allows a municipal government to designate a geographic area as a SID, and to collect special assessments from businesses in that area to enhance the district in ways such as cleaning, beautification, and attracting new businesses.

In February 2002, the Montclair Township Council adopted an ordinance creating the Montclair Center Special Improvement District and the Montclair Center Corporation (MCC). Three days after adoption of the ordinance, plaintiff Kennedy and six others filed a certificate of incorporation for MCC as a not-for-profit entity with the stated purpose of managing the newly created Montclair Center SID, which became known as BID, the

Business Improvement District. Kennedy was also on the board of directors of MCC, and his printing and copying business, Studio 042 on Bloomfield Avenue, was designated its registered agent.

By a March 2012 ordinance, the Township Council renewed the authorization of MCC to manage Montclair's BID. Our record does not state whether Kennedy retained any role with MCC ten years after its creation.

In December 2012, Kennedy sent an e-mail to the executive director of MCC making a formal OPRA request for copies of MCC's telephone bills for the year. The executive director responded that MCC is not subject to OPRA, and that Kennedy could inspect the telephone records in person at MCC's office, but that, pursuant to MCC's policy, he could not have copies. After several e-mails among Kennedy, the executive director, Kennedy's attorney, and the township's attorneys, MCC changed its position and stated it would give Kennedy copies of the records at a cost of twenty cents per page. Kennedy responded that the standard charge permissible under OPRA was five cents per page, and refused to pay more.

MCC then offered to charge the lesser of twenty cents or the cost of copying by an outside commercial service, including the commercial copying service that Kennedy himself operated. Kennedy rejected this option. Kennedy's attorney then sent a

letter threatening to sue MCC if it refused to provide copies of the phone records at five cents per page. The executive director responded again that OPRA does not apply to MCC.

In January 2013, Kennedy filed suit against MCC pursuant to N.J.S.A. 47:1A-6. He alleged that MCC had failed to comply with OPRA in that it had no OPRA record custodian, had no OPRA request form as required by N.J.S.A. 47:1A-5(f),¹ and charged excessive copying costs, in violation of N.J.S.A. 47:1A-5(b).²

¹ OPRA states: "The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5(f).

² With respect to copying costs, the statute provides:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$ 0.05 per letter size page or smaller, and \$ 0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of

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MCC filed an answer denying it was a public agency subject to OPRA, denying any violation, and asserting several affirmative defenses.

In February 2013, MCC sent an employee to Studio 042 as an ordinary customer and presented for duplication the 142 double-sided pages of telephone billing records that responded to Kennedy's OPRA request. According to MCC, Studio 042 said the charge would be twenty-five cents per page. MCC agreed to pay that price, but actually was charged and paid \$33.43 to have the records copied, indicating a rate of twenty-two cents per page. Studio 042 later claimed that the cost would have been ten cents per page, but the customer wanted expedited service. MCC responded that it was never offered the ten cents rate.

In any event, seeking to resolve the lawsuit, MCC provided the copies to Kennedy and charged him only five cents per page, totaling \$7.10, which Kennedy paid. Also, MCC modified its policies in March 2013 so that copies of its records would be made available and the copying charges would be more in line

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this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

[N.J.S.A. 47:1A-5(b).]

with OPRA for future requests. MCC then asked Kennedy to dismiss his lawsuit, but he refused, demanding that MCC acknowledge that OPRA applied and pay his expenses and attorney's fees for the litigation.

In a summary proceeding before the Law Division conducted in April 2013, the parties argued the issue of OPRA's applicability to MCC. The judge issued a memorandum decision on April 19, 2013, finding that MCC was created by private individuals, not by the township, and concluding that it was not a "public agency" subject to OPRA. The judge dismissed Kennedy's complaint with prejudice. This appeal followed.³

II.

An organization is subject to OPRA if it is a "public agency." Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005). The issue before us is whether MCC is a "public agency," a question of law subject to our plenary review. See Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 493 n.1 (2011);

³ Although Kennedy has received the copied records at five cents per page, the case is not moot because he still alleges that MCC must appoint a records custodian and create an OPRA request form, and because N.J.S.A. 47:1A-6 permits Kennedy to apply for reimbursement of his attorney's fees if successful in this litigation. We make no determination here as to those issues, and specifically, what attorney's fees might be appropriate in the circumstances we have described.

see also K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011) (whether OPRA applies is a legal question subject to de novo review on appeal), certif. denied, 210 N.J. 108 (2012). "[W]e look at the law with fresh eyes and need pay no deference to legal conclusions reached by the trial court" Fair Share, supra, 207 N.J. at 493 n.1.

OPRA requires that "'government records shall be readily accessible' to the public 'with certain exceptions, for the protection of the public interest.'" Sussex Commons Assocs., LLC v. Rutgers, the State Univ., 210 N.J. 531, 541 (2012) (quoting N.J.S.A. 47:1A-1). "OPRA's clear purpose . . . 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.'" Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). The law "enables 'citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.'" Sussex Commons Assocs., supra, 210 N.J. at 541 (alteration in original) (quoting Burnett v. County of Bergen, 198 N.J. 408, 414 (2009)).

"Public agency" is defined in N.J.S.A. 47:1A-1.1 to include "any . . . board, bureau, office, commission or other

instrumentality within or created by a political subdivision of the State and any independent authority, commission, instrumentality or agency created by a political subdivision." A municipality is a political subdivision of the State.

When evaluating whether an entity is an instrumentality of government, and thus a public agency, OPRA "'shall be construed in favor of the public's right of access.'" Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 287 (2013) (quoting Fair Share, supra, 207 N.J. at 501). "[T]he definition of 'public agency' is broad." Id. at 288. A court determines whether an entity is a "public agency" by engaging in a fact-sensitive inquiry, looking beyond the entity's technical form to consider its "substantive attributes." Ibid.

First and foremost, courts look to the extent to which a government body created and controls the organization. See, e.g., Fair Share, supra, 207 N.J. at 504; Times of Trenton, supra, 183 N.J. at 535-36. Second, courts look to whether an organization is performing some government function, conducting official government business, or assisting in any aspect of State or local government. See, e.g., Sussex Commons Assocs., supra, 210 N.J. at 546-48. Put succinctly, courts look to the "formation, structure, and function" of an organization when determining whether it is a public agency under OPRA. Paff,

supra, 431 N.J. Super. at 289-90. The Supreme Court has also considered more generally whether public access to documents would further the purposes of OPRA, that is, whether public access would "shed light on the operation of government or expose misconduct or wasteful government spending." See, e.g., Sussex Commons Assocs., supra, 210 N.J. at 546-47.

These directives of the cases lead us to conclude that the attributes of MCC classify it as a "public agency."

First, the Township Council adopted an ordinance on February 19, 2002, that created MCC. The trial court stated that "while the municipality undoubtedly played a role in its creation . . . MCC was ultimately formed on February 22, 2002 by its seven incorporators, none of whom were Montclair officials or employees." We disagree that MCC was privately created. Because the trial court's statement was not a finding of fact based on testimonial evidence presented at a hearing, and we review the same documentary evidence that was made available to the trial court, our standard of review is broader than if the court made findings after an evidentiary hearing. See N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 396 (2009); State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011); see also Fair Share, supra, 207 N.J. at 493 n.1 (de novo review where no testimony was taken

and facts before trial court were essentially undisputed). The record fully supports a finding that MCC was initially created by the Montclair Township Council by means of an enabling ordinance.

The statutory definition of a "District Management Corporation" under N.J.S.A. 40:56-66 uses the language "an entity created by municipal ordinance or incorporated pursuant to Title 15A of the New Jersey Statutes." The 2002 Montclair Township ordinance states: "There is hereby created a District Management Corporation which shall be known as the 'Montclair Center Corporation' (the 'Corporation'), which shall exercise the following powers[.]" The ordinance sets forth the powers that MCC would have, procedures for adopting a budget, the structure of MCC's governing board, and other provisions establishing the township's oversight of how MCC would function.

Several days after the ordinance was adopted, Kennedy and six other individuals filed a certificate of incorporation to effectuate the provisions of the ordinance. For example, as the incorporators, the seven individuals would play a role in choosing the initial board of directors for MCC. The ordinance also required the board of directors to meet within thirty days. What is most important, however, is that the ordinance preceded

and authorized the filing of the certificate of incorporation and the actions of the incorporators.

Furthermore, the 2002 ordinance initially set a termination date for the SID and MCC at the end of 2006, unless the Township Council formally extended their existence. The Council adopted an amending ordinance before the initial termination date extending the life of the SID and MCC to December 31, 2016, at which time the Township Council must act again if they are to continue.⁴ In March 2012, the Township Council reestablished the SID and MCC by another ordinance.

Thus, the record demonstrates that MCC was created and its existence continued by municipal ordinances, and not by private individuals.

Second, MCC is funded by special assessments imposed by the municipal government on property owners in the central business district. The township collects the special assessments and transfers the funds to MCC for its operations. Studio 042, for

⁴ The 2006 amendment states:

The district and Corporation shall terminate on December 31, 2016, unless an ordinance is passed by the Township Council specifically amending the date contained in this section. Upon such termination, or earlier dissolution, the Township of Montclair shall acquire title to the assets and assume the liabilities of the Corporation.

example, was required to pay a SID assessment of \$1,210.57 for the 2012-2013 tax year, in addition to more than \$24,000 in property taxes. Eighty-nine percent of MCC's funding comes from the special assessments; eleven percent from grants and other public support. For 2013, MCC's proposed budget was more than \$460,000.

The Township Council decided which property owners must fund MCC by designating the geographic area of the SID. The ordinance does not include any mechanism for a property owner to opt out if the owner does not want to be a part of the business improvement district or does not want to pay special assessments. Thus, funding of MCC by the affected property owners is mandated by the local government.

Third, the ordinance establishes means by which the Township Council retains control over how MCC manages the business district. MCC must submit an annual budget to the Council setting forth the cost estimate of operating and maintaining the district. The Township Council may approve or disapprove MCC's budget. MCC must also prepare an annual audit of its books, accounts, and financial transactions to be filed with the Township Council, and it must also file an annual report describing its activities in the preceding year. The twenty-one member MCC board of directors must include at least

two Township Council members, and the township manager (or a designee) must be an additional non-voting member of the board.

Fourth, the ordinance also gives the Township Council the power to terminate both the SID and MCC at any time. Their termination can be accomplished if the Council does not extend the date upon which the district and corporation are set to expire. If MCC is terminated, the township acquires title to all of its assets and liabilities.

Fifth, MCC assists in performing at least some local government functions. The ordinance states that MCC shall "[p]rovide security, sanitation, and other services to the District supplemental to those provided normally by the municipal government."

The municipal government is deeply involved in the creation, structure, and functioning of MCC. Allowing access in accordance with OPRA to the records of MCC could "shed light on the operation of government." See Sussex Commons Assocs., supra, 210 N.J. at 547.

MCC emphasizes that it manages and administers "self-help, self-financed programs and activities established for [the] benefit" of the business owners and "under the control of a board of directors dominated by them." The trial court also emphasized "the efforts of private individuals [performing]

activities that are particularly important to property and business owners in the district." MCC, however, is not a voluntary, autonomous organization of business owners. To the contrary, the municipal government determined the geographic area that formed the district and included many businesses that preferred not to be involved.⁵

Moreover, there is nothing voluntary about the special assessment that the township imposes on the property owners. All businesses within the district must pay the assessment along with their regular property taxes. While the New Jersey Supreme Court has held that a special assessment is not a tax, 2nd Roc-Jersey Assocs. v. Town of Morristown, 158 N.J. 581, 595 (1999), the municipal government is still the authority that imposes the assessment.

The terms "self-help" and "self-financing," as used in the legislative findings of N.J.S.A. 40:56-65 and the township ordinance, do not mean that district management corporations are independent of local government. When read in context, those terms mean that the funds procured from local businesses should

⁵ We have considered MCC's citation to an unpublished opinion of this court which held that a not-for-profit "alliance" of casinos and other entities in Atlantic City established to promote a "tourism district" is not a "public agency" subject to OPRA. The statute that established the public-private alliance did not require that casinos or other private entities join the alliance.

be used to benefit them directly, and that those local businesses should be involved in the process of determining how the funds should be used.

Nor does the intent of the Township Council to benefit private business owners make MCC a private entity. Our cases do not evaluate such claims of intent in determining public versus private agency status under OPRA. Rather, the actual attributes of an agency as we have described determine its status.

Finally, MCC argues that the costs of making its records available under OPRA are burdensome and would harm the legislative policies of the enabling business improvement legislation. It argues that it already makes its records available to all property owners in the district because disclosure is mandated by statute, N.J.S.A. 15A:5-24, and that it has adopted a self-imposed access policy that is in line with OPRA. MCC maintains that full application of OPRA would add "rigid requirements and costly burdens that could potentially destroy the MCC (and [similar management corporations]) under the guise of enforcing access and openness to the MCC's records."

In enacting OPRA, the Legislature understood that public agencies would incur costs in complying with its requirements, and it addressed those concerns where a record request would be

burdensome. See N.J.S.A. 47:1A-5(b) ("If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record."); N.J.S.A. 47:1A-5(c) (If the nature of the requested record involves extraordinary time and effort, the rates for duplication may be set in advance by ordinance.). Thus, OPRA includes controls over the costs of its implementation.

In sum, considering the broad definition of "public agency" in N.J.S.A. 47:1A-1.1, and the State policy in favor of the public's right of access to government records, we conclude that MCC is a "public agency" as defined in OPRA and is subject to its requirements.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION