

**DRAFT
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 10, 2006 Council Meeting**

**Tina Renna⁷⁶
Complainant**

GRC Complaint No. 2006-73

v.

**Union County Alliance⁷⁷
Custodian of Records**

Records Relevant to Complaint:

1. All expenses associated with the *Union County Directions Newspaper* Issue VII Fall 2005; printing bids, printing bills, artwork bids, artwork bills, postage bills, mail services bills, ad commitment invoices, and bills to advertisers.
2. All expenses associated with the *Union County Directions Newspaper* Issue VI Spring 2005; printing bids, printing bills, artwork bids, artwork bills, postage bills, mail services bills, ad commitment invoices, and bills to advertisers.

Request Made: October 11, 2005

Response Made: October 11, 2005

Custodian: Michael Murray, President

GRC Complaint filed: April 10, 2006

Background

October 11, 2005

Complainant's Open Public Records Act ("OPRA") Request. The Complainant is seeking documents to include bids and bills, showing expenses for production of two (2) issues of the *Union County Directions Newspaper*.

October 11, 2005

Custodian's e-mailed response to the OPRA request. The Custodian responded within one (1) business day of the request. The Custodian states that the Union County Alliance ("Alliance") is not a government entity and is not subject to OPRA.

April 10, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- October 11, 2005 OPRA requests
- October 11, 2005 Custodian's e-mailed response to the OPRA request

⁷⁶ No legal representation listed.

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- January 4, 2006 Statement on Passing of Former County Manager Ann Baran
- Certificate of Incorporation of Union County Alliance, Inc.
- Pamphlet, “The Union County Alliance – A Coalition for Action”
- April 18, 1994 Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120 and cover letter

The Complainant states that she submitted two (2) requests for government records to the Custodian. The Complainant states her requests were denied because the Custodian claims that the Alliance is a 501(c)(3) tax exempt entity and therefore not a public agency subject to the provisions of OPRA. The Complainant asserts that the Alliance is a public agency. The Complainant attached the April 14, 1994 Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120 and cover letter which indicate that:

- (1) at the time of the filing, the Alliance was operating under a grant from Union County approved by resolution in 1993 following an initial grant from the NJ Department of Higher Education, and
- (2) office space, secretarial and similar assistance was being provided by Kean College.

The Complainant claims that the Alliance is an instrumentality created by the County of Union based on the following;

- (1) the Alliance was formed by Ann Baran, former Union County Manager,
- (2) the Alliance’s Certificate of Incorporation indicates Ann Baran, c/o Union County Administration Building as one of the three Initial Board of Trustees and Incorporators,
- (3) membership in the Alliance is limited to governmental entities and the Alliance specifically excludes individuals and private business corporations from membership,
- (4) a pamphlet entitled “The Union County Alliance – A Coalition for Action” lists Ann Baran, Union County Manager as part of the Executive Committee, and
- (5) the Alliance was initially funded by a grant from Union County.

April 11, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this matter.

April 20, 2006

Request for the Statement of Information (“SOI”) sent to the Custodian. The GRC also requested the following:

- The documents that brought the organization into existence and which outline its operations such as the (1) certificate of incorporation and (2) bylaws, and

- A certification stating if any ordinance, resolution or agreements exist discussing the relationship between the organization and any state or local government agency.

April 20, 2006

Custodian's response to the request for SOI with the following attachments:

- Certificate of Incorporation of the Union County Alliance, Inc., and
- Bylaws of the Union County Alliance, Inc. as amended February 2001.

The Custodian states that the Alliance is not a public agency pursuant to the decision in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (April 2004).

The enclosed Certificate of Incorporation provides that:

- (1) the Alliance is a nonprofit corporation created exclusively for charitable, educational, civic and social purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986,
- (2) the Alliance was created to revitalize and strengthen the economy and quality of life in Union County, NJ,
- (3) membership in the Alliance is limited to government agencies and authorities, educational institutions, trade, business and professional leagues, civic and cultural organizations, labor unions, hospitals, religious bodies and the like,
- (4) the County Manager and Freeholder Chairman are appointed ex officio by virtue of their position to serve on the Executive Committee and/or Board of Directors,
- (5) the Certificate of Incorporation was executed and signed by County Manager Ann Baran and President of Kean College Dr. Henry J. Ross
- (6) County Manager Ann Baran and President of Kean College Dr. Henry J. Ross are listed as the Initial Incorporators, indicating their addresses as "care of" the Union County Administration Building and Kean College respectively, and
- (7) upon dissolution of the Corporation, assets shall be distributed for one or more purposes under Section 501(c)(3) of the Internal Revenue Code of 1986, or shall be distributed to the federal government or to a state or local government for a public purpose. Any such assets not so disposed of shall be disposed of by the Superior Court of NJ of the county in which the principle office of the Corporation is located.

April 25, 2006

E-mail from the Custodian to the GRC. The Custodian states that although County Manager Ann Baran was a driving force in the creation of the Alliance her role was exclusive of her position with the County. The Custodian states that the Alliance does not have a reporting relationship with the County of Union. The Custodian goes on to claim that while government representatives serve on the Board of Directors, government officials comprise only one-fourth of the Board of Directors; the remaining positions are held by individuals in academia, labor and business.

May 17, 2006

E-mail from the GRC to the Custodian. The GRC requests that the Custodian state whether or not the April 18, 1994 Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120 and cover letter, filed by the Alliance in April 2004 and provided by the Complainant as an attachment to the Denial of Access Complaint, is an accurate copy of that filing.

May 17, 2006

E-mail from the Custodian to the GRC. The Custodian states that the April 18, 1994 Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120 and cover letter is a copy of the original document that established the Union County Alliance as a 501(c)(3) tax exempt corporation.

June 13, 2006

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide further clarification as to the functions of the Alliance. (See GRC questions and Custodian’s corresponding responses in the chart shown under July 27, 2006 below.)

June 27, 2006

E-mail from the Custodian to the GRC.

June 13, 2006 – Questions posed by the GRC to Custodian	June 27, 2006 – Response from the Custodian to the GRC
What activities does the Union County Alliance perform to fulfill its mission?	<ul style="list-style-type: none">• The Custodian states that the Alliance is working with business and industry in Union County to hold an economic development conference in September 2006; the purpose of which is to convey the need for federal and state funding for projects within Union County and to discover the next steps for Union County strategic plan, which was drafted by the Alliance.• The Custodian states that the Alliance holds quarterly networking meetings for leaders in business, government, academia, and labor to listen to speakers from various organizations and discuss issues pertinent to the economic development of Union County.• The Custodian also indicates that the Alliance hosts a Public Safety Day meant to offer the public comprehensive information on police, fire and emergency services available in Union County.• The Custodian states that the Alliance also

	publishes a newspaper, <i>Directions</i> , to inform the public of available programs in Union County.
Was Kenneth L. Estabrook, Esq. an employee of the County at the time of the incorporation of the Union County Alliance?	The Custodian contends that Kenneth L. Estabrook, Esq. was not an employee of the County of Union at any time.
What is the corporation's percentage of government funding v. percentage of private funding?	The Custodian states that in 2005 40% of the operating budget was from government grants and 60% from private companies and project management.
Does County/State/local government own the property where the facilities of the Union County Alliance are located?	The Custodian asserts that the Alliance is not located in a County/State/local government owned property.
Who pays the salaries of the employees of the Union County Alliance? Are these individuals receiving County/State/local government benefits?	The Custodian states that the Alliance received a grant for one (1) salary and benefits and sends those monies to the County of Union so that one employee ⁷⁸ can receive benefits and no other employee receives County/State/local government benefits.

July 20, 2006

Complainant's E-mail Submission to the GRC. The Complainant provided an article dated July 17, 2006 from *The Inside Edge* by Wally Edge⁷⁹ (an Internet website affiliated with PoliticsNJ.com) entitled "GOP watchdog says Stender's husband won county printing jobs", which indicates that the husband of an assemblywoman has won printing contracts with Union County, including the Union County Alliance even though he was not the lowest bidder. The Complainant also included an article from the *News Record/Patriot*⁸⁰ entitled "Union County: Outcasts Assail Ex-Employer." This article states that:

- (1) the Union County Alliance is a bi-partisan business partnership founded by former acting Governor Donald DiFrancesco and Democratic Sen. Raymond Lesniak, with the goals of jump starting economic development, improving quality of life, and working with public and private groups to implement a long-term plan for lasting prosperity in the county,
- (2) GOP Sen. Tom Kean Jr. is an honorary co-chairman,

⁷⁸ The Custodian has not provided information as to

⁷⁹ http://politics.nexcess.net/insideedge/2006/07/gop_watchdog_says_stenders_hus.html

⁸⁰ <http://www.new-jersey.ws/modules.php?name=News&file=print&sid=8778>Published by Divine Media, Inc. in the July 28, 2005 issue of the *News Record/Patriot*

- (3) Twice a year the Alliance publishes Union County Directions, a report on government programs, business news and upcoming events that is mailed to every home in the county,
- (4) a study commissioned by the Alliance showed its partnership with the freeholder board has produced more than \$6 billion in development,
- (5) the Alliance has supported county quality of life efforts by also conducting a study in 2002 on health issues, which serves as a policy-making document

July 23, 2006

Complainant's facsimile submission to the GRC with attachments⁸¹:

- July 23, 2006 *Star Ledger* article "Dems deny flier is campaign lit,"
- List of Resolutions of Union County,
- June 18, 2002 Letter from Ann Marie Kay, Executive Vice President of the Alliance to the Postmaster, and
- October 23, 2001 Letter from the County of Union Department of Finance to the Union County Alliance.

The Complainant submitted documents supporting her assertion that the Alliance is a public agency. The Complainant asserts that the *Union County Directions* newsletter is sent out labeled "Postal Patron." The Complainant alleges this is a distinction that only government organizations can use and has provided one of the Alliance's mailings in support of this. The Complainant states that the newsletter is designated as "political." The Complainant states that the newsletter is produced in the County Administration building using county employees and equipment and is mailed to every postal patron only days before the Primary and General Election Day, featuring freeholders who are up for re-election throughout its pages.

In the List of Resolutions of Union County submitted by the Complainant it appears that Resolution 1303-98 awarded a contract to Union County Alliance (with the address listed as Kean University, P.O. Box 411, Union, New Jersey) to provide support for the long term planning for the revitalization of Union County in an amount not to exceed \$35,000.

The July 23, 2006 *Star Ledger* article states that:

- (1) the Alliance was founded in 1994 as a bipartisan organization to promote local economic development. The corporation still boasts both Democrats and Republicans on its board and is registered as a tax-exempt, 501(c)(4) organization, which allows it to engage in political activity.
- (2) Union County provides the Alliance with roughly 80 percent of its \$300,000 annual budget.
- (3) Freeholders also grant the Custodian (who is the Executive Director of the Alliance) use of a county-owned 2002 Ford Explorer.
- (4) Kean University provides offices for the Alliance's three staff members.

⁸¹ Only those documents not previously provided are being included.

The June 18, 2002 letter from Ann Marie Kay, Executive Vice President of the Alliance to the Postmaster, submitted by the Complainant indicates that the County of Union and the Alliance share a postal account.

In the October 23, 2001 letter from the County of Union Department of Finance to the Union County Alliance, the Director of the Department of Finance asks that the Alliance submit their \$150,000 voucher to the County Manager, outlining details of how the funds would be spent and the goals and objectives of that spending. The letter goes on to state that payment for this voucher and invoice must be approved by the Board of Chosen Freeholders before a check can be distributed.

August 3, 2006

Complainant's E-mail Submission to the GRC with the following attachment:

- Kean University Employee List

The Complainant adds that an officer of the Alliance, Ann Marie Kay, is listed as a state employee on the Kean University Employee list.

Analysis

Whether the Union County Alliance is a public agency?

OPRA defines a public agency 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.” N.J.S.A. 47:1A-1.1.

The Custodian states that the Alliance is not a public agency pursuant to the decision in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (April 2004). The Complainant claims that the Alliance is an instrumentality created by the County of Union and is therefore a public agency subject to OPRA.

Most definitions of "public agency" under NJ statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act ("OPMA") defines "public body" as a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function

affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds. N.J.S.A. 10:4-8a.

OPMA's definition of public body requires that an entity, "... (1) consist of 'two or more persons' and (2) be 'collectively empowered as a voting body' (3) 'to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.' N.J.S.A. 10:4-8a..." The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425, 846 A.2d 659 (April 2004).

In that case, the court held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the city of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the "agency" and the corporation as the "redeveloper" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a "public body" under OPMA. The court further held that the corporation was "an 'instrumentality' created by the City and a 'public agency' under the OPRA for essentially the same reasons that it is a 'public body' under the OPMA." *Id.* at 442,670.

The decision of the Superior Court that Lafayette Yard Community Development Corp. qualifies as a "public body" was affirmed by the New Jersey Supreme Court (Times of Trenton, 183 N.J. 519, 874 A.2d 1064 (June 2005)). See also Snyder v. American Association of Blood Banks, 144 N.J. 269, 676 a.2d 1036 (1996) (finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J.Super. 164, 541 A.2d 1125 (1988) (finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J.Super. 542, 480 A.2d 953 (1984) (citing Wade v. N.J. Turnpike Authority, 132 N.J.Super. 92, 332 A.2d 232 (Law Div. 1975), "The Court noted the official comment to N.J.S.A. 59:1-3: 'The definition of 'Public Entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.'").

Additionally, two rules in the Administrative Code define "public agency" more precisely than other rules and statutes by adding the following language to the usual definition, "... agencies exercising sovereign powers of government." This language is

very illustrative of the meaning of public agencies, as explained by the court in the Lafayette Yard cases cited above. While other state statutes and rules do not include this language, it appears that the New Jersey Supreme Court confirms that "exercising sovereign powers of government" is required for an entity to be deemed a public body or agency.

In Fallstick v. Haddon Township Business Partnership, GRC Case No. 2004-73 (October 2004), the GRC found that the business partnership, incorporated by the municipal clerk, was an instrumentality created by a political subdivision or a combination of political subdivisions.

In the case at hand, the documents submitted by the Complainant and the Custodian's Certificate of Incorporation, Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120, and By-Laws provide that:

- (1) the Alliance is a nonprofit corporation created exclusively for charitable, educational, civic and social purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986,
- (2) the Union County Alliance is a bi-partisan business partnership founded by former acting Governor Donald DiFrancesco and Democratic Sen. Raymond Lesniak, with the goals of jump starting economic development, improving quality of life, and working with public and private groups to implement a long-term plan for lasting prosperity in the county,
- (3) GOP Sen. Tom Kean Jr. is an honorary co-chairman,
- (4) membership in the Alliance is limited to government agencies and authorities, educational institutions, trade, business and professional leagues, civic and cultural organizations, labor unions, hospitals, religious bodies and the like,
- (5) the County Manager and Freeholder Chairman are appointed ex officio by virtue of their position to serve on the Executive Committee and/or Board of Directors,
- (6) the Certificate of Incorporation was executed and signed by County Manager Ann Baran and President of Kean College Dr. Henry J. Ross
- (7) *County Manager Ann Baran and President of Kean College Dr. Henry J. Ross are listed as two (2) of the Initial Incorporators*, indicating their addresses as "care of" the Union County Administration Building and Kean College respectively,
- (8) at the time of filing Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120, the Alliance was operating under a grant from Union County; following an initial grant from the NJ Department of Higher Education.
- (9) Union County provides the Alliance with roughly 80 percent of its \$300,000 annual budget.
- (10) Freeholders also grant the Custodian (who is the Executive Director of the Alliance) use of a county-owned 2002 Ford Explorer.

- (11) Kean University provides offices for the Alliance's three staff members at Union County Alliance, Kean University, P.O. Box 411, Union, New Jersey.
- (12) at the time of filing Form 1024: Application for Recognition of Exemption Under Section 501(a) or for Determination Under Section 120, office space, secretarial and similar assistance was being provided by Kean College, and
- (13) upon dissolution of the Corporation, assets must be distributed for one or more purposes under Section 501(c)(3) of the Internal Revenue Code of 1986, or *must be distributed to the federal government or to a state or local government for a public purpose. Any such assets not so disposed of must be disposed of by the Superior Court of NJ of the county in which the principle office of the Corporation is located,*
- (14) a study commissioned by the Alliance showed its partnership with the freeholder board has produced more than \$6 billion in development,
- (15) the Alliance has supported county quality of life efforts by also conducting a study in 2002 on health issues, which serves as a policy-making document.

Thus, in considering the meaning of a public agency as explained by the court in the Lafayette Yard case, the GRC decision in Fallstick and all the document submissions of the Custodian and the Complainant, the Alliance is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Alliance is subject to the provisions of OPRA and is required to respond to OPRA requests for records.

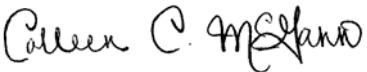
Hence, the Custodian should respond to the OPRA request subject of this Complaint pursuant to N.J.S.A. 47:1A-1.1 et. seq., either granting access or denying access to the requested records. In the event of a denial of access, the legal basis for any denial must be explained pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6.

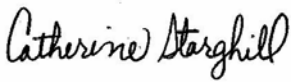
Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. In considering the meaning of a public agency as explained by the court in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425, 846 A.2d 659 (April 2004), the GRC decision in Fallstick v. Haddon Township Business Partnership, GRC Case No. 2004-73 (October 2004) and all the document submissions of the Custodian and the Complainant, the Alliance is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Alliance is subject to the provisions of OPRA and is required to respond to OPRA requests for records.
2. The Custodian should respond to the OPRA request subject of this complaint pursuant to N.J.S.A. 47:1A-1.1 et. seq., either granting access or denying access to the requested records. In the event of a denial of access, the legal basis for any denial must be explained pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6.

3. The Custodian shall comply with "2." above within ten (10) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.

Prepared By: 
Colleen C. McGann
Case Manager

Approved By: 
Catherine Starghill, Esq.
Executive Director

August 3, 2006