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LIVE COVERAGE

  **Is CPANJ a Public Agency? ACLU, County Prosecutors Face Off at NJ Supreme Court Arguments**

 "Do you really want to turn this argument into a question about the ethics of those who have proceeded in this court?" Chief Justice Stuart Rabner asked counsel at one point.

 October 11, 2023 at 04:46 PM

 Live Coverage



Colleen Murphy

At oral arguments Tuesday, the New Jersey Supreme Court considered whether the County Prosecutors Association of New Jersey is a public agency and therefore subject to the Open Public Records Act.

On July 19, 2019, the American Civil Liberties Union of New Jersey submitted records requests to CPANJ for meeting agendas, funding records, briefs filed by CPANJ in state and federal courts, and any policies or practices shared with county prosecutors. In a Sept. 18, 2019, letter, CPANJ denied access to the records.

The ACLU filed an action in Essex County Superior Court that claimed CPANJ violated both OPRA and the common-law right of access by denying the records request in its entirety, according to an Appellate Division opinion. CPANJ contended that it is "not a public agency subject to the dictates of OPRA or requests made under the common law right of access." Before the exchange of discovery, CPANJ moved to dismiss the complaint for failure to state a claim on which relief can be granted.

According to the opinion, 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 21 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," according to the opinion.

Appellate Division Judge Richard J. Geiger held that “any entity created by the county prosecutors is, at most, an instrumentality of an instrumentality” and that it “furthers the state’s objectives by assisting the Attorney General in the development of criminal justice policy.”

With a few notable exceptions, Geiger said, 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.”

“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,” Geiger said. “We conclude that the ACLU’s argument for disclosure fares no better as a demand for documents under the common law right of access.”

However, Geiger said that the Appellate Division reached its conclusion for different reasons than the trial court, which found that the records requested by the ACLU “are not public records under the common law.” But Geiger held that CPANJ is not a public entity subject to the common-law right of access and therefore was not required to provide the requested documents.

The state Supreme Court granted certification last March on whether CPANJ is subject to OPRA as a “public agency” under N.J.S.A. 47:1A-1.1 and its records are subject to the common-law right of access.

“We believe that it is and we are asking the court to reverse the decision of the lower court, to reaffirm and clarify the meaning of public agency pursuant to this court’s prior precedent, and to direct the CPANJ to respond to our 2019 OPRA request,” the ACLU’s Karen Thompson said when addressing the justices. Thompson said that CPANJ is using public resources and that it should be treated by the court as a public agency.

“When you look at CPANJ’s structure, formation, and function, there is no question that it is a public agency,” Thompson said. “It was completely created by state-appointed county prosecutors.”

Thompson argued that CPANJ is an instrumentality of a combination of political subdivisions.

Justice Anne Patterson asked Thompson why CPANJ is not an instrumentality of an instrumentality, analogous to the volunteer fire department in the New Jersey Supreme Court’s decision in *Verry v. Franklin Fire Dist. No. 1*. Thompson stated that in *Verry* the municipality is functioning as the political subdivision of the state.

Patterson said that in *Verry* the fire district was not subject to OPRA because it was an instrumentality created by a political subdivision. The *Verry* court held that the fire department was not a public agency, and therefore not subject to OPRA, because it did not have a “direct connection to a political subdivision.”

“You are a terrific advocate and I understand why you are making these arguments,” Patterson said. “But identify for us the political subdivision that created the CPANJ.”

Thompson argued that CPANJ is the political subdivision. Patterson responded by stating that the Legislature does not view political subdivision as anything that has an influence on politics and that it is a technical term.

CJ Griffin of Pashman Stein Walder Hayden argued the cause for amicus Libertarians for Transparent Government. Griffin said that CPANJ is a public agency. However, she opened by explaining the implications of a decision finding that CPANJ is not a public agency.

“If CPANJ is not a public agency, then we have serious concerns about the extensive use of public resources, particularly the use of assistant prosecutors in ... more than three dozen cases arguing and entering court appearances on behalf of CPANJ,” Griffin said. “That is in direct violation of ... 2A:158-15.1b.”

Griffin said that the county prosecutor’s offices and CPANJ are essentially one and the same. Griffin began to list the statutory violations of the assistant prosecutors and the possible ethical violations for misuse of public property by using these extensive resources, when Chief Justice Stuart Rabner interrupted.

“Do you really want to turn this argument into a question about the ethics of those who have proceeded in this court?” Rabner asked. “Or should we focus on the statutory language and put that to one side?”

Griffin turned back to other consequences of a finding that CPANJ is not a public agency.

“If CPANJ is a private entity, its communications with the government, most likely the attorney general, would not be subject to any privilege,” Griffin said. “The deliberative process privilege is probably the privilege that the attorney general would likely use the most.”

Griffin said that, for that privilege to apply, it has to be intra- or interagency. As an example, Griffin said that communications between colleagues at the ACLU and the Attorney General’s Office would not have any applicable privilege.

“I think you could say in *Verry* ... that this volunteer fire department is totally dominated by the professional firefighter organization that is there, and yet the court said no ... because it is not the instrumentality of a political subdivision, it is an instrumentality of an instrumentality, and it is outside the definition,” Patterson said.

“I think *Verry* is ... factually different because you don’t have constitutional officers that are the sole members of the organization and there is not that extra level,” Griffin said.

Counsel to CPANJ, Christopher J. Gramiccioni of Kingston Coventry, opened by stating that the fact that this court is still grappling with, and basically performing legal gymnastics, defining CPANJ as a public agency under the OPRA statute should tell the court everything it needs to know.

“Nothing in the OPRA statute’s plain language says anything, nor the past precedence by this court, that OPRA applies to a volunteer, nonprofit organization that happens to be made up of people that hold public jobs, public actors,” Gramiccioni said.

Gramiccioni stated that what constitutes a public agency is clear, and that the statute applies only to instrumentalities within or created by one of the covered entities. He stated that CPANJ is a private entity that is outside that definition.

“I am sure there are many county prosecutors who would have loved to have made an argument about how it is not a public agency, but it has never been made in the history of litigation as far as we can tell,” Patterson said. “So you think, most likely, it is an office of a political subdivision in the second part of the statute?”

Gramiccioni stated that that would be his position, but it was not included in the briefing.

Justice Rachel Wainer Apter asked Gramiccioni why prosecutors are representing CPANJ in court. Gramiccioni replied by stating that, for example, amicus welcomes opinions from anyone who might have a stake in a case before the court.

“But in this case,” Justice Fabiana Pierre-Louis said, “the initial attorney of record was an AP from Mercer County, assigned to this case by the Mercer County prosecutor, a member of CPANJ. So it wasn’t a friend of the court ... it was in the context of representing a private entity in court, in a matter that had nothing to do with the usual duties of an assistant prosecutor in the prosecution of criminal matters in the state.”

Gramiccioni replied by stating that, just like anyone, the prosecutor was volunteering to support an endeavor and that he was not under any particular orders.

“Prosecutors aren’t allowed to do that though,” Wainer Apter said. “There is a specific statute that says they can only represent the state of New Jersey in court. So they could not represent their friend in a divorce matter. They could not represent their friend in a child custody matter. They could not represent their child’s Little League team in a civil matter.”

“But the Prosecutors Code of Ethics says that they can participate and volunteer in charitable organizations, which is what they are doing here,” Gramiccioni said.

“Without practicing law,” Wainer Apter said. “So you are saying filing a brief in court and having your signature at the bottom is the same as coaching Little League and it is not the same as practicing law?”

“No, of course I appreciate your honor’s point about practicing law,” Gramiccioni said, “but it is for the benefit of the court when it is considering whatever legal issue is before it.”

Gramiccioni concluded by stating that “we are not here on an ethics complaint issue.” He said, reframing this from the beginning, that this was a motion to dismiss for failure to state a claim with all favorable inferences to the plaintiff.

“They put up baseless and conclusory allegations and it did not cut the mustard,” Gramiccioni said. “I would just encourage the court to affirm the lower court’s position.”

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