

CERTIFICATION OF SERVICE

On January 30, 2007, I served a copy of this Notice of Motion, Certification, Statement of Material Facts, Letter Brief and form of Order upon Defendant Lawnside Borough Council by priority mail to Matthew B. Wieliczko, Esq., Zeller & Bryant, LLP, 10 Melrose Ave, Suite 400, Cherry Hill, NJ 08003.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 30, 2007

John Paff, Plaintiff

3. On September 5, 2006, Plaintiff submitted a request for, among other documents, “any and all minutes recorded or notes taken at any and all closed or executive sessions held during 2006 by the Borough Council and by any Redevelopment Agency or Housing Authority.” *Paff Certification*, ¶ 2, 4 and 5 and *Exhibits P-2*, ¶4 (*Complaint*) and *P-15*, ¶¶ 3 and 4.

4. In response to this request, Defendant furnished Plaintiff with no documents. Rather, Defendant’s counsel, in a September 11, 2006 letter, stated that nonpublic meeting minutes “are maintained, as required by law, but . . . are not as ‘formal’ as are the open session meeting minutes” and that the requested nonpublic meeting minutes were “not public records as provided by law and are exempt from access . . .” *Paff Certification*, ¶ 2, 4 and 5 and *Exhibits P-2*, ¶5 (*Complaint*), *P-16 through P-18* and ¶ 3, *P-21*.

5. As of the date of this Certification, I have not received any of the Defendant’s nonpublic meeting minutes that I requested on September 5, 2006. .” *Paff Certification*, ¶

6.

Dated: January 30, 2007

John Paff

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January 30, 2007

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Francis J. Orlando, Jr., A.J.S.C.

Hall of Justice

101 S Fifth St – Suite 670

Camden, New Jersey

RE: Paff v. Lawnside Borough Council

Docket No. L-7027-06

Returnable: March 16, 2007

Dear Judge Orlando:

Please accept this letter in lieu of a more formal brief in support of Plaintiff's Motion for Partial Summary Judgment against Defendant Lawnside Borough Council.

BRIEF PROCEDURAL HISTORY

On or about October 16, 2006, Plaintiff filed his Complaint (Exhibits¹ P-1 through P-38). On or about January 3, 2007, Defendant filed its Answer (Exhibit P-39 through P-43). Plaintiff now moves for summary judgment on the First and Second Counts of his Complaint.

LEGAL ARGUMENT

Point 1: Standard Of Review On A Motion For Summary Judgment

Plaintiff is entitled to summary judgment if, on the full motion record, the Defendant, who is entitled to have the facts and inferences viewed most favorably to it, has not demonstrated the existence of a dispute whose resolution in its favor will ultimately entitle him to judgment. R.4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520,

¹ The Exhibits referred to in this Letter Brief are attached to the accompanying Certification.

The issues in this case are:

First Count: Whether the motions passed by Defendant prior to excluding the public from its meetings (i.e. going into closed or executive session) comply with N.J.S.A. 10:4-13, and if not, whether an injunction should issue to ensure future compliance.

Second Count: Whether Defendant may entirely suppress its nonpublic meeting minutes from public inspection, and if not, a) whether an order should issue requiring Defendant to immediately disclose properly redacted minutes to Plaintiff, and b) whether an injunction should issue requiring properly redacted minutes to be made promptly available to the public in the future.

Third Count: Whether the Defendant's nonpublic meeting minutes, which have not yet been seen by Plaintiff, but have been described by Defendant's counsel as being "not as 'formal' as are the open session meeting minutes," are "reasonably comprehensible" as required by N.J.S.A. 10:4-14.

Since the evidence in this case is documentary and consists of public meeting minutes (Exhibits P-23 through P-38), a written request for public records (Exhibits P-13 through P-15) and correspondence between the parties (Exhibits P-7 and P-16 through P-22) there can be no genuine factual dispute as to what language those documents contain. Accordingly, the First Count and Second Count are ripe for summary judgment because all the Court needs to do is to apply the law to the language contained within those documents.

The Third Count, however, is not ripe for summary judgment because the Defendant has thus far completely denied Plaintiff any access to its nonpublic meeting minutes. Therefore, Plaintiff is not in a position to allege any facts, let alone uncontestable facts, about the content of these yet unseen documents. If Plaintiff prevails on the Second Count, he will be permitted to view at least redacted versions of the nonpublic minutes and should then be in a position to move for summary judgment on the Third Count.

Point II: The Defendant's motions authorizing the exclusion of the public from Defendant's meetings do not comply with N.J.S.A. 10:4-13.

N.J.S.A. 10:4-13 states:

Closed meetings; resolution to conduct. No public body shall exclude the public from any meeting to discuss any matter described in subsection [N.J.S.A. 10:4-12(b)] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

- a. Stating the general nature of the subject to be discussed; and
- b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

Yet, defendant passed no *resolutions* prior to excluding the public from any of the twelve executive or closed meetings it held between January 23, 2006 and August 28, 2006.² Statement of Material Facts, ¶¶ 1 and 2. Rather, Defendant passed *motions* that gave the public a) little or no information about the “general nature” of the topics to be discussed during nonpublic session, and b) no information concerning “the time when and the circumstances under which” the private discussionS could be publicly disclosed. For example, the March 27, 2006 public meeting minutes (Exhibit P-32) report only that “a motion was made by Stanton and seconded by Still to Close for Executive Session” and that the motion carried by a unanimous vote.

A. Defendant's motions, which only vaguely describe the topics to be privately discussed, are inconsistent with the Open Public Meetings Act's objectives and violate N.J.S.A. 10:4-13(a).

The Open Public Meetings Act was passed with the following legislative objective:

² Some of the public meeting minutes, e.g. Exhibits P-28 and P-29, are captioned “Redevelopment Meeting Minutes.” It appears from these minutes, however, that those meetings were not held by a separate municipal redevelopment agency, created in accordance with N.J.S.A. 40:12A-11, but by the Borough Council itself.

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

N.J.S.A. 10:4-6

The legislature also commanded the courts to construe the Open Public Meeting Act “in order to accomplish [the above stated] purposes.” N.J.S.A. 10:4-21. Accordingly, to the extent that the wording of the statute is susceptible to more than one meaning, that meaning will be adopted which comports with the general public policy of the State as manifested by its legislation rather than that which runs counter to such policy. Civil Service Dep't. v. Clark, 15 N.J. 334, 341 (1954).

The term “general nature,” as used in N.J.S.A. 10:4-13(a) is susceptible to more than one meaning. For example, suppose that a public body needed to privately discuss how it should respond to a settlement offer received from the plaintiff in a slip and fall negligence case (hypothetically Brown v. Borough Council, Docket No. CAM-L-0000-06) against the public body. Each of the following resolutions, which get progressively more specific, arguably set forth the “general nature” of the discussion: “The Council shall:

- a. go into closed session”³
- b. close the meeting for a personal matter.”⁴
- c. go into closed session to discuss litigation.”
- d. go into closed session to discuss Brown v. Borough Council, Docket No. CAM-L-0000-06.”
- e. go into closed session to consider a settlement offer received from the plaintiff in Brown v. Borough Council, Docket No. CAM-L-0000-06.”

None of the above hypothetical resolutions undermine the reason and purpose of going into closed session—to allow the Borough Council to privately discuss the received settlement offer and determine how to respond to it. Even if Plaintiff Brown was sitting in the meeting room when the body announced that it was going to go into nonpublic session to discuss his settlement offer, this would not give him any advantage in the litigation because he would not be able to witness the actual discussions.

Out of the above five hypothetical forms of resolution, the legislative purposes set forth in N.J.S.A. 10:4-6 would be best served by (e). Accordingly, the Court should, consistent with its obligation to construe the statute in favor of open and transparent government, declare⁵ that resolutions describing closed session topics need to be as specific as possible provided that the reason for going into closed session is not compromised.

This is essentially the result reached by other New Jersey courts that have addressed this issue. In Council of N.J. State College Locals v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108 (Law. 1995) the Court considered whether a resolution in the form of “The Board of Trustees will hold closed session on [specific date] and at any other time as

³ This is the form of motion the Defendant typically passes.

⁴ This is the form of motion the Defendant passed on April 24 and May 31, 2006 (Exhibits P-35 and P-36)

⁵ ¶ B of the complaint requests a declaration of the “minimum amount of detail and specificity that N.J.S.A. 10:4-13 requires Defendant to include within its resolutions that authorize nonpublic meetings.” The award of such relief is authorized by the Uniform Declaratory Judgments Law (N.J.S.A. 2A:16-51 et seq.” and by N.J.S.A. 10:4-16 which authorizes the Court to “issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of this act.”

necessary to consider personnel matters, labor relations, any pending litigation, and any other matters specifically exempted by the Open Meetings Act” complied with N.J.S.A. 10:4-

13. The Court, concluding that the notice was insufficient, stated:

The Board's notice is framed so broadly that it does no more than tell the public that there will be a meeting in executive session. The notice merely recites the litany of exceptions which would allow it to proceed in closed session. No attempt is made to indicate which one or ones of these exceptions are relevant to a particular closed-session proceeding. This complete failure to delineate which subject or subjects will be discussed in closed session does not comply with the statutory mandate that the public know the general nature of the agenda.

Id. at 113.

More recently, the Superior Court, Law Division, Middlesex County, in an unpublished opinion, followed Judge Carchman’s decision in Council of N.J. State College Locals and found that it “clearly articulates the public policy behind the Act, i.e., that closed session resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest.” Paff v. Monroe Township Board of Education, Middlesex County Superior Court, Docket No. MID-L-7770-06, January 22, 2006, Hon. Alexander P. Waugh, Jr., J.S.C., p. 9 (See Exhibits P-49 through P-54, specifically P-53).

Both the Council of N.J. State College Locals and Monroe Township Board of Education Courts quote the late Michael Pane:

Although there is no case law on the subject good practice would dictate that resolutions be as specific as possible, e.g., the 'general nature of the subject to be discussed' should not be set forth as 'litigation' but, rather, as 'litigation--A vs. B.' Resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest. 34 New Jersey Practice, Local Government Law § 141, at 174 (Michael A. Pane) (2d ed. 1993).

Council of N.J. State College Locals at 114 and Monroe Township Board of Education at pp. 7-8 (Exhibits P-50 to P-51)

Mr. Pane is considered an authority on local government law. While certainly not binding upon this Court, his statement that closed session resolutions should “contain as much information as is consistent with full public knowledge without doing any harm to the public interest” should be considered persuasive.

Finally, a conclusion similar to those in New Jersey was reached by the Mississippi Supreme Court when it held that

A meaningful reason is of sufficient specificity that the audience will at some later date be able to check it out. Did the Board in fact discuss that particular matter, or confine its executive session to that particular matter?

A board which only announces "litigation" or "personnel matters" for going into executive session has said nothing. It might as well have stated to the audience, "Ladies and gentlemen, we are going into executive session," and stopped there. The Act requires that a board cannot use its statutory authority to go into executive session upon certain matters as a device to circumvent the very purposes for which it is under the Open Meetings Act. The purpose of the Act is that the business conducted at all meetings of public boards be wide open.

Here the minutes reveal the Board failed woefully to comply with the Act. Had the Board, as required by the Act, first closed its meeting to discuss a need to go into executive session at all on these various matters, the Board president could quite easily have given the audience a reason with some particularity, some specificity and some meaning.

Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 114 (MS 1989).

B. Defendant’s motions, which give no information on “the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public” violate N.J.S.A. 10:4-13(b).

When the Legislature enacted N.J.S.A. 10:4-13(b), it intended for public bodies to inform the public, as precisely as possible of “the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.” Since Defendant’s closed session motions give absolute no information on future disclosure dates, those motions violate N.J.S.A. 10:4-13(b).

Point III: The Court should declare the minimum amount of specificity required in Defendant’s closed session resolutions and enjoin defendant from excluding the public from future meetings unless a resolution containing the prescribed level of specificity is passed.

N.J.S.A. 10:4-16 states:

Injunctive relief. Any person, including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to insure compliance with the provisions of this act, and the court shall issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of this act.

This statute, which “contemplate[s] maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business,” makes it “entirely proper to consider the nature, quality and effect of the noncompliance of the particular offending governmental body in fashioning the corrective measures which must be taken to conform with the statute.” *Polillo v. Deane*, 74 N.J. 562, 57 (1977). Here, the effect of Defendant’s noncompliance with N.J.S.A. 10:4-13 has been to deny the public of knowing, even in the most general terms, the topics of Defendant’s private conversation and when, if ever, those discussion will be publicly disclosed. Given the paramount importance of the public’s right to monitor its government, as set forth in N.J.S.A. 10:4-7, this Court should not hesitate to provide Plaintiff with the declaratory and injunctive relief requested, as well as any other relief the Court may deem appropriate.

Point IV: Plaintiff is entitled to receive at least redacted copies of the minutes or notes taken at the Defendant’s nonpublic meetings within the scope of Plaintiff’s records request.

The law is clear. Defendant is *required* to release its nonpublic minutes to the extent that disclosure will not undermine the basis for excluding the public from the closed meetings.

In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.

Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997).

Since a set of meeting minutes, including those from nonpublic meetings, is a “document . . . made, maintained, kept file in the course of . . . official business,” it is a “government record” as defined by the Open Public Records Act. N.J.S.A. 47:1A-1.1. A government record must be disclosed to a member of the public, upon request, unless it is exempt from access, in which case access may be denied.

N.J.S.A. 47:1A-6 burdens a record custodian with proving that every denial is lawful, and N.J.S.A. 47:1A-5(g) requires a custodian to “indicate the specific basis” for any denial of access. Beyond stating the “specific basis” for its redactions, a record custodian is also required to “produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). Finally, N.J.S.A. 47:1A-5(g) requires record custodians who assert “that part of a particular record is exempt from public access [to] delete or excise

from a copy of the record that portion which the custodian asserts is exempt from access and [to] promptly permit access to the remainder of the record.”

In this case, Defendant’s counsel does not meet his burden. In his September 11, 2006 letter (Exhibits P-16 through P-18) Counsel merely states that the requested minutes “are not being supplied because [they] are not public records as provided by law and are exempt from access by [the Open Public Records Act] and other statutes and regulations including [the Open Public Meetings Act].” Counsel does not address, however, the Payton Court’s holding, quoted above, nor does he address N.J.S.A. 10:4-14 which states:

Minutes of meetings. Each public body shall keep reasonably comprehensible minutes of **all its meetings** showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, **which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent [N.J.S.A. 10:4-12]**. (Emphasis supplied)

Further, Counsel does not even address why his client could not obey N.J.S.A. 47:1A-5(g) and “delete or excise” exempt material from the nonpublic meetings and “permit access to the remainder of the record.”

The Open Public Meetings Act and Open Public Records Act are not the only legal bases requiring disclosure of properly redacted nonpublic meeting minutes. Such minutes are also records subject to disclosure under the common law.

A common-law record is 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. Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46, (1995). A person seeking access to such records must "establish that the balance of [his or her] interest in disclosure against the public interest in maintaining

confidentiality weighs in favor of disclosure." Home News v. State Dep't of Health, 144 N.J. 446, 454 (1996). Where the government's interest in confidentiality is "slight or non-existent," the requestor's standing alone will be sufficient to require disclosure to advance a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 105 (1986)

Since the closed session notes or minutes at issue were recorded by the Borough Clerk or other Borough official and placed on file in the Borough's offices, they meet the definition of a common-law record. Since Plaintiff, like any citizen, has a legitimate interest in reviewing Defendant's minutes, he has a common law right to access unless the government asserts a countervailing interest in confidentiality, in which case Plaintiff's right to access needs to be balanced against Defendant's need for secrecy.

Defendant has not asserted any public need for keeping redacted versions of its nonpublic meetings confidential. Accordingly, this Court should find that Plaintiff is entitled to properly redacted versions of the requested nonpublic minutes in accordance with the common law as well as the Open Public Meetings Act and Open Public Records Act.

Point V: The Court should enjoin Defendant from denying future requests for access to its nonpublic meeting minutes except when denying access is authorized by law and properly explained to the requestor.

In 1991, the New Jersey Supreme Court considered whether the provision of the Open Public Meetings Act that allowed government bodies to privately discuss personnel matters also allowed those bodies to keep the minutes of those discussion secret. The Court held that "it would be anomalous to interpret the Open Public Meetings Act, enacted by the Legislature to enhance the public's access to and understanding of the proceedings of governmental bodies, in a manner that foreclosed the public's right to obtain material and

information vital to its ability to evaluate the wisdom of governmental action." South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 493-94 (1991).

In this case, Defendant is not only suppressing minutes of closed session where personnel matters were discussed, but has issued a blanket denial to all of its closed session minutes. To make matters worse, Defendant's closed session motions are so vague (see, Point II, supra), that the public doesn't even know what types of private discussions that it is being denied access to.

Again, this Court is called upon to take "corrective measures" so that Defendant will "conform with the statute" in the future. Polillo v. Deane, supra. Another court, faced with delayed production of public meeting minutes, issued an injunction requiring the public body to produce its minutes in accordance with a schedule established by the Court. Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J. Super. 328, 334 (Law Div. 1986). The same type of remedy is appropriate here.

Respectfully,

John Paff