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March 23, 2007

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

Hall of Justice

101 S Fifth St – Suite 670

Camden, NJ 08103

(via Overnight Mail)

RE: Paff v. Lawnside Borough Council

Docket No. L-7027-06

Returnable: March 30, 2007

Dear Judge Orlando:

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

LEGAL ARGUMENT

Point 1: Defendant's Counterstatement of Material Facts should be disregarded.

Defendant's Counterstatement of Material Facts sets forth no facts. Rather, it refers the Court to the two certifications that Defendant submitted in opposition to Plaintiff's motion and informs the Court that the Defendant "relies upon" those certifications.

R.4:46-2(b) permits a party opposing a summary judgment motion to include "additional facts that the party contends are material and as to which there exists a genuine issue," but requires each such fact to "be stated in separately numbered paragraphs together with citations to the motion record." Since Defendant's Counterstatement does not meet the rule's requirement, the Court should disregard it.

Point II: Mr. Wieliczko's certification should be disregarded.

R.1:6-6 requires affidavits and certification submitted in support of or in opposition to motions to be “made on personal knowledge” and to set forth “only facts which are admissible in evidence to which the affiant is competent to testify.”

The only paragraph in the Certification of Counsel, Matthew B. Wieliczko that meets this requirement is the first paragraph in which Mr. Wieliczko certifies that he is an attorney at law and employed by the law firm that represents the Defendant in this matter. All other statements in Mr. Wieliczko's certification are based upon his reading of meeting minutes or derived from the Certification of Jessie Harris. Indeed, the public meeting minutes attached to Ms. Harris' Certification reveal that Mr. Wieliczko did not attend any of the meetings that he refers to in his Certification.

Affidavits by attorneys of facts not based on their personal knowledge but related to them by and within the primary knowledge of their clients constitute objectionable hearsay. Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169 (App. Div. 1986). Accordingly, the Court should disregard the Certification of Counsel, Matthew B. Wieliczko.

Point III: Defendant's claim, set forth in Point III of its Memorandum of Law, that Plaintiff's suit is “untimely” is incorrect.

The 45-day limitation period set forth in N.J.S.A. 10:4-15, the statute cited in Defendant's Memorandum of Law, applies only when a litigant seeks to void a specific act taken by a public body in violation of the Open Public Meetings Act. Plaintiff seeks no such relief here. Rather, he seeks “injunctive orders or other remedies,” specifically declaratory relief, “to insure compliance with” the Open Public Meetings Act as authorized by N.J.S.A. 10:4-16. Accordingly, Defendant's argument that Plaintiff's suit is time barred is incorrect.

Point IV: Defendant’s recent disclosure of some of its redacted executive session minutes or notes moots only one aspect of Plaintiff’s suit.

¶ G of Plaintiff’s Complaint (Paff Cert., January 30, 2007, Exhibit P-4) seeks an Order

Requiring Defendant to promptly provide Plaintiff with access to Defendant’s January 23, 2006; February 1, 2006; February 22, 2006; March 7, 2006; March 8, 2006; March 14, 2006; March 27, 2006; April 5, 2006; April 24, 2006; May 31, 2006; June 7, 2006 and August 28, 2006 nonpublic meeting. The Order shall, however, allow Defendant to redact portions of those minutes, only as permitted by law, provided that Defendant gives Plaintiff a written explanation of its reasons for each redaction in a manner that conforms to the standard set forth in Paff v. New Jersey Department of Labor, 379 N.J. Super. 346, 354 (2005).

Since redacted versions of all but one set of the requested closed session minutes have been released, Plaintiff agrees with Defendant that the relief sought in the first sentence of ¶ G is moot, except as that sentence pertains to the June 7, 2006 nonpublic meeting minutes.¹

Point V: Plaintiff is entitled to summary judgment on the relief sought in his Complaint under ¶¶ F and H.

¶ F of Plaintiff’s Complaint seeks a declaration that Defendant, by “categorically and completely suppressing and disallowing access to” even redacted versions of the requested nonpublic meeting minutes “violated Plaintiff’s rights under the Open Public Meetings Act, Open Public Records Act and common law.” Paff Cert., January 30, 2007, Exhibit P-4. While Defendant eventually² provided Plaintiff with redacted versions of the requested notes or minutes, nothing in Defendant’s submission indicates its willingness to promptly

¹ In a footnote on Page 5 of its Memorandum of Law, Defendant argues that it “continues in its effort to locate the record from the June 7, 2006” nonpublic session. The facts upon which this argument is based, however, is not supported by the Harris, Cert.

provide the notes and minutes from its other nonpublic to members of the public who request them. Accordingly, it would be appropriate for this Court to grant Plaintiff a declaration, pursuant to the Uniform Declaratory Judgments Law (N.J.S.A. 2A:16-51 et seq.) so that the Defendant's duty to promptly grant the public access to its nonpublic meeting minutes is clear and indisputable.

Since there is an actual controversy between the parties (i.e. whether the Borough of Lawnside is under an ongoing duty to promptly release at least redacted copies of its nonpublic meeting minutes to a requesting member of the public), this "situation clearly [comes] within the orbit of Uniform Declaratory Judgments Act . . . which was designed to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Union County Bd. of Chosen Freeholders v. Union County Park Commission, 41 N.J. 333, 336 (1964). Any judicial hostility to using the Act "is a thing of the past for the act is now well-recognized as remedial in nature and entitled to liberal construction and administration." Id.

Without the declaration sought, future requests for nonpublic session minutes might be denied, thus requiring the requesting citizen to again litigate this issue. See Hartford Accident and Indemnity Co. v. Selected Risks Indemnity Co., 65 N.J.Super. 328, 331-32 (App.Div.1961) ("[The Act is a] remedial device designed to expedite the definitive establishment of private rights and duties and thereby forestall the emergence of costly and cumbersome trial proceedings.") Clearly, the legislative intent behind the Open Public Meetings Act, as expressed in N.J.S.A. 10:4-7, would be frustrated if citizens need to sue time and time again in order to access public records to which they are entitled.

² Plaintiff first saw those records on Wednesday, March 21, 2007—more than six months after he first requested them on September 5, 2006. (Paff Cert. March 23, 2007, ¶ 1, Paff Cert., January 30, 2007, ¶ 4,

Similarly, ¶ H of Plaintiff's Complaint seeks to enjoin Defendant from denying Plaintiff and others access to its nonpublic meeting minutes in the future. Given Defendant's conduct so far (i.e. refusing to provide even redacted versions of its closed session note or minutes until sued by a citizen, and then only shortly before the return date of a motion for summary judgment), an injunction is necessary.

Point VI: Plaintiff is entitled to summary judgment on the relief sought in his Complaint under the part of ¶ G that has not been mooted.

Plaintiff still has not received the minutes from the Defendant's nonpublic session of June 7, 2006. If those minutes exist, Plaintiff is entitled to them. If they have been lost, Plaintiff is entitled to a statement indicating why they cannot be provided.

Also, Plaintiff is entitled to relief under that part of ¶ G that seeks an order allowing "Defendant to redact portions of those minutes, only as permitted by law, provided that Defendant gives Plaintiff a written explanation of its reasons for each redaction in a manner that conforms to the standard set forth in Paff v. New Jersey Department of Labor, 379 N.J. Super. 346, 354 (2005)."

Most if not all the minutes provided (See Harris Cert., Exhibits, 2, 4, 6, 8, 10, 12, 14, 16, 18, 20 and 23) appear to have a) been redacted too broadly, b) not captured enough detail of the discussion to meet the "reasonably comprehensible" standard of N.J.S.A. 10:4-14, or c) a combination of both.

For example, Defendant has redacted from its May 31, 2006 executive minutes (Harris Cert., Exhibit 20) all meaningful information under the "Personnel matter," "Litigation" and "Ordinance" subheadings. Since the "litigation" discussed was apparently a pending lawsuit, the case file of that lawsuit is public information that any citizen could

Exhibits P-7, P-13 to P- 15).

access by a visit to the courthouse. R.1:38. Why then, is no information available informing the public of at least the identity of the case under discussion? Further, it's not clear exactly why the "ordinance" needed to be discussed in private session, nor is it known why the details of that private discussion cannot now, some ten months later, be revealed.

As stated in Plaintiff's earlier Letter Brief, the Supreme Court held in Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 557 (1997) that total suppression of closed session minutes is "the unusual case" and that "few cases will require partial nondisclosure." Yet, the only information revealed in the May 31, 2006 nonpublic minutes is the date of the meeting, the attendees present and the fact that a personnel matter, litigation and an ordinance were discussed. Given the Court's pronouncement that making nonpublic meeting minutes as transparent as possible fosters "the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies," Id. how can the May 31, 2006 minutes, which approach a "total suppression" of information, be justified?

Plaintiff cannot be expected to know whether the redactions are too broad or if the minutes were not "reasonably comprehensible" given the information presently available. Plaintiff's difficulty is attributable to Defendant's failure to explain³ why the material was redacted as required by the Open Public Records Act. See N.J.S.A. 47:1A-5g (requiring the custodian of a record to "indicate the specific basis" for the denial of a request and requiring redaction of documents that include exempt and non-exempt information).

In explaining each redaction, Defendant was supposed to have been "guided by the standard included in R.4:10-2(e), which permits a party claiming privilege to 'describe the

nature of the documents ... not produced or disclosed in a manner that, **without revealing information itself privileged or protected**, will enable other parties to assess the applicability of the privilege or protection.” Paff v. New Jersey Department of Labor, 379 N.J. Super. 346, 354 (2005).⁴ (Emphasis in original). Yet, Defendant provided no such explanation. Accordingly, Defendant should be required to justify each of its redactions in the manner required by Paff.

Point VII: Plaintiff is entitled to summary judgment on the issue of whether the motions passed by Defendant prior to going into nonpublic session violated N.J.S.A. 10:4-13.

On the issue of Defendant’s compliance with N.J.S.A. 10:4-13, the contested facts, viewed in a light most favorable to Defendant, suggest that:

1. In some cases, the public meeting minutes contain no information on the matters that were to be discussed in closed session (See, e.g. the February 1, 2006 minutes, Exhibit 3, Page 6. “A motion was made. . . to Close Caucus.”)
2. In other cases, the public meeting minutes contain information, although not in the closed session motion itself, of at least some of the matters that were to be discussed in closed session. (See, e.g. the January 23, 2006 minutes, Exhibit 1, Page 2, “Todd Poole . . . stated that he will give the Mayor and Council a report in closed caucus.”)
3. In still other cases, the closed session motion itself identifies some of the matters that will be discussed in closed session. (See, e.g. the May 31, 2006 minutes, Exhibit 19, Page 3, “A motion was made . . . to Close for a Personal Matter.” (Defendant concedes that this is a typo—it should be “Personnel Matter.”))
4. In every case, however, a statement was made after the closed session ended “summarizing the nature of the business discussed during executive session” even though the public meeting minutes do not record any details of these summaries. Harris Cert., ¶¶ 27 and 28.

³ Defendant’s only attempt to explain the redactions is set forth in Point VI of its Memorandum of Law. That point, however, only discussed the various privileges generally. It does not justify or explain the reason for any particular redaction.

⁴ Even though the custodian in Paff was withholding entire documents instead of redacting documents, as is the case here, the same logic should apply.

5. In every case, however, the administrator’s recollection is that Defendant would not “move in 2006 to adjourn into executive session until a statement was placed on the record detailing the purpose of the executive session and the nature of the matter to be discussed at executive session” even though the details contained within these statements are not reflected in the public meeting minutes. Harris Cert., ¶¶ 27 and 28.

Under this indulgent view of the facts, Defendant argues that it abided by N.J.S.A. 10:4-13 because those who attended the public meeting knew the “general nature” of the topics discussed during closed session because those topics were verbally disclosed at the time the closed session motion was passed as well as in the post-session summary.

Defendant’s Memorandum of Law, Point IV.

The problem with Defendant’s argument, however, is that while those who attended and paid close attention at each of Defendant’s public meetings would have been informed—verbally—of the matters privately discussed, those citizens of Lawnside that did **not** attend each meeting would not know what matters were privately discussed even if they read the published meeting minutes.

Defendant’s argument, in essence, is that the benefits of the Open Public Meetings Act are conferred only upon those citizens who scrupulously attend each and every meeting of a public body and that a citizen who missed one meeting, due to illness or a prior engagement, forfeited his or her right to be informed of nature of the matters privately discussed during that meeting.

Another problem with Defendant’s argument is that N.J.S.A.10:4-13 requires the Defendant to “adopt a resolution” before going into closed session, and not to simply make a verbal pronouncement that may or may not be recorded in the meeting minutes.

Given the salutary and remedial purposes of the Open Public Meetings Act and the

Legislature's command that it be liberally construed to effectuate those purposes, Defendant's argument cannot be sustained. The proper construction of the Act requires that this Court disapprove of the careless⁵ manner in which Lawnside Borough Council prepares and records its closed session resolutions and grant Plaintiff the declaratory and injunctive relief he seeks.

Respectfully,

John Paff

⁵ For an example of Defendant's careless procedure, compare the closed session motion on page 3 of the May 31, 2006 public meeting minutes (Exhibit 19) with the closed session minutes of the same date (Exhibit 20). While the motion states that only a "personnel matter" (accepting the fact that a typo was made) would be discussed, the minutes themselves reveal that a "litigation" matter was also discussed.

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Plaintiff

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff	:	CAMDEN COUNTY
vs.	:	DOCKET NO. L-7027-06
	:	
LAWNSIDE BOROUGH COUNCIL	:	Civil Action
	:	
Defendant	:	CERTIFICATION OF JOHN PAFF
	:	
	:	

John Paff certifies as follows:

1. I am the Plaintiff in this action and am fully and personally familiar with the facts of this case.
2. I first saw the redacted notes of the Defendant's 2006 nonpublic (executive or closed) meetings on Wednesday, March 21, 2006, which is the day that I was served with the Certification of Jessie Harris and Defendant's other paperwork in opposition to my summary judgment motion.

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: March 23, 2007

John Paff