

FILED: 7-18-2008

IN CHAMBERS

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
OCEAN COUNTY
VINCENT J. GRASSO, A.J.S.C.

John Paff Plaintiff(s)

vs.

DOCKET NO. OCN-L- 2105-07

Dover Township Defendant(s)

ORDER



THIS MATTER, having been brought before the Court, and the Court having ascertained that the following determinations are warranted and appropriate,

IT IS, on this 18th day of JULY, 2008

ORDERED as follows:

- DEFENDANT SHALL ENDEAVOR TO HAVE AT LEAST DRAFT MINUTES AVAILABLE TO THE PUBLIC BY DEFENDANT'S NEXT REGULARLY SCHEDULED MEETING, BUT IN ALL EVENTS DEFENDANT SHALL MAKE AT LEAST DRAFT MINUTES AVAILABLE TO THE PUBLIC NOT LATER THAN THIRTY DAYS AFTER THE SUBJECT MEETING OR THE SECOND MEETING AFTER THE SUBJECT MEETING, WHICHEVER COMES FIRST
- DEFENDANT, IN ITS MINUTES, SHALL NOT USE THE FORM "INDEX OF IDEAS NOT RELEASED" AND SHALL RELEASE ~~ALL~~ MINUTES OF ALL TOPICS DISCUSSED UNLESS ~~IS~~ PRIVILEGED OR OTHERWISE EXEMPT FROM DISCLOSURE
- TOPIC ONE IN THE 9/12/06 CLOSED SESSION MINUTES SHOULD HAVE BEEN DISCUSSED IN OPEN SESSION, AND DEFENDANT SHALL NOT DISCUSS MATTERS IN CLOSED SESSION UNLESS SUCH MATTERS ARE PRIVILEGED OR AUTHORIZED FOR DISCUSSION IN CLOSED SESSION.

THE UNDERSIGNED HEREBY CONSENT TO THE FORM AND ENTRY OF THIS ORDER.

PAGE 1 OF 2

Vincent J. Grasso, A.J.S.C.

Walter Paffenroder FOR PLAINTIFF
COUNSEL OR PRO SE SIGNATURE

COUNSEL OR PRO SE SIGNATURE

for defendant
COUNSEL OR PRO SE SIGNATURE

COUNSEL OR PRO SE SIGNATURE

NAME ON CASE: PAFF v. DEVER TOWNSHIP

DOCKET NO.: OCN-L-2165-07

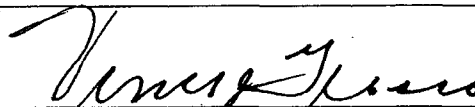
DATE: 7/18/08

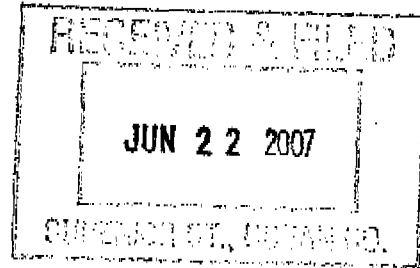
ORDER SUPPLEMENTAL PAGE 2 OF 2

THE COURT RESERVES DECISION ON PLAINTIFF'S APPLICATION FOR COSTS PENDING RECEIPT OF PLAINTIFF'S FORMAL APPLICATION AND DEFENDANT'S RESPONSE THERE TO.

Ct finds matters were technical violations and no finding of bad faith or willfulness

Ct 1 of complaint alleging O.P.R.A violation in para 12 is dismissed.


Vincent J. Grasso, P.J.Ch.



Walter M. Luers
Law Offices of Walter M. Luers, LLC
165 First Avenue
Atlantic Highlands, NJ 07716
Phone: 732-872-8088
Fax: 732-872-8044
Attorney for Plaintiff

JOHN PAFF,

Plaintiff,

vs.

DOVER TOWNSHIP COUNCIL a/k/a
TOMS RIVER TOWNSHIP COUNCIL
and DOVER TOWNSHIP RECORDS
CUSTODIAN a/k/a TOMS RIVER
TOWNSHIP RECORDS CUSTODIAN

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
OCEAN COUNTY
DOCKET NO. *L 2165.07*

Civil Action

COMPLAINT

Plaintiff John Paff, by way of Complaint against Defendants Dover Township Council a/k/a Toms River Township Council (hereafter "Defendant Council") and Dover Township Records Custodian a/k/a Toms River Township Records Custodian (hereafter "Defendant Custodian") states as follows:

General Allegations

1. Plaintiff John Paff is an individual who resides in Franklin Township, Somerset County, New Jersey and receives mail at P.O. Box 5424, Somerset, New Jersey 08875.
2. Defendant Council is a public body as that term is defined by N.J.S.A. 10:4-8(a).
3. The Court has subject matter jurisdiction pursuant to N.J.S.A. 10:4-15, 10:4-16, 10:4-17, and N.J.S.A. 47:1A-6. Venue is proper in this Court pursuant to *R.* 4:3-2(a)(2) because Defendants are located in Ocean County.
4. Defendant Custodian is the "Custodian of a government record" for the Township of Dover a/k/a the Township of Toms River as that term is defined by N.J.S.A. 47:1A-1.1.
5. On October 27, 2006, Plaintiff submitted a request to Defendant Custodian for, among other records, "any and all minutes of any nonpublic meetings held by Defendant Council on October 24, 2006, September 26, 2006 and September 12, 2006." A copy of Plaintiff's request, without enclosure, is attached as Exhibit 1.
6. By letter dated November 2, 2006 Defendant Custodian informed Plaintiff that the requested "minutes of the 'nonpublic' 'Executive Session' meetings do not exist as they have not yet been prepared and approved." A copy of Defendant Custodian's letter, without enclosures, is attached as Exhibit 2.
7. On March 29, 2007, Plaintiff submitted another request to Defendant Custodian for, among other records "any and all minutes of any nonpublic meetings

held by the council on October 24, 2006, September 26, 2006 and September 12, 2006." A copy of Plaintiff's request, without enclosure, is attached as Exhibit 3.

8. By letter dated April 4, 2007, the Assistant Township Attorney informed Plaintiff that "the [requested nonpublic meeting] minutes are not available at this time as they have not yet been drafted or approved by the Defendant Council. A copy of that letter is attached as Exhibits 4 – 5.

9. On April 11, 2007, Plaintiff submitted a letter to the Dover Township Mayor and Council a) asserting that Plaintiff would sue the Township for not making "its nonpublic meeting minutes . . . promptly available as required by N.J.S.A. 10:4-14" unless the Township took "immediate steps to ensure" compliance with that statute; and b) requested the Defendant Council to discuss his anticipated lawsuit at its May 8, 2007 meeting and promptly correspond with Plaintiff so that he could "know that [his] position was being taken seriously." A copy of Plaintiff's April 11, 2007 letter, without enclosure, is attached as Exhibit 6.

10. Along with a cover letter dated May 9, 2007, Defendant Custodian provided Plaintiff with what are purported to be the minutes of Defendant Council's nonpublic meetings of September 12, 2006, September 26, 2006, October 24, 2006 and Defendant Custodian's certification that these minutes "were approved by the Township Council at its meeting of May 8, 2007." Copies of the letter, three sets of minutes and the certification are attached as Exhibits 7 – 14.

11. Upon information and belief, and based on the fact that Defendant Custodian's May 9, 2007 letter (Exhibit 7) does not address the demand made in

Plaintiff's April 11, 2007 letter (Exhibit 6) (i.e. that the "Council take immediate steps to ensure that its nonpublic meeting minutes are made promptly available"), Defendant Council, unless otherwise ordered by this Court, will continue to improperly withhold or delay public release of the nonexempt portions of its nonpublic meeting minutes in violation of N.J.S.A. 10:4-14.

12. On information and belief, the documents that Defendant Custodian purports to be minutes of Defendant Council's September 12, 2006, September 26, 2006, and October 24, 2006 nonpublic meetings (Exhibits 7 through 12), are not the actual minutes of those nonpublic meetings. Rather, they are summaries or versions of the minutes that were specifically prepared for public disclosure.

13. Many of the topics Defendant Council discussed during its September 12, 2006, September 26, 2006, and October 24, 2006 are not within the exceptions set forth in N.J.S.A. 10:4-12(b) and, accordingly, were not properly discussed while the public was excluded.

14. By way of example, and not limitation, the Defendant Council's a) September 12, 2006 discussion of the need to establish a position of Affordable Housing Administrator; b) September 26, 2006 discussion of the 2007 appointment process; and c) October 24, 2006 discussion of the need to appoint a Stormwater Management Coordinator, were required by N.J.S.A. 10:4-12 to have been discussed with the public present.

WHEREFORE, Plaintiff demands judgment:

A. Declaring that Defendant Council violated the Open Public Meetings Act, specifically N.J.S.A. 10:4-14, by not making the nonexempt parts of its September 12, 2006, September 26, 2006, and October 24, 2006 nonpublic meeting minutes “promptly available to the public.”

B. Establishing a time within which Defendant Council must make the nonexempt portions of its nonpublic meeting minutes promptly available to the public. *Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education*, 212 N.J. Super. 328 (Law Div. 1986).

C. Compelling Defendant Custodian, in accordance with N.J.S.A. 47:1A-6, to grant Plaintiff access to the actual minutes of Defendant Council’s September 12, 2006, September 26, 2006, and October 24, 2006 nonpublic meetings, redacted as necessary, if actual minutes indeed exist, or in the alternative, compelling Defendant Council, going forward, to prepare permanent minutes of its nonpublic meetings within a short time, to be fixed by the Court, after each nonpublic meeting.

D. Identifying those topics the Defendant Council wrongfully discussed in private during its September 12, 2006, September 26, 2006, and October 24, 2006 nonpublic meetings and declaring that those identified topics ought to have been discussed in public.

E. Enjoining Defendant Council from privately discussing topics that ought to be discussed in public.

F. Enjoining Defendant Council from failing or refusing to make its nonpublic meeting minutes, with any appropriate redactions properly explained available to the public within the time period established by ¶ B above.

G. Awarding Plaintiff his costs of suit and a reasonable attorney fee pursuant to N.J.S.A. 47:1A-6.

H. Such other relief as the Court deems equitable and just.

[continued on next page]

Designation of Trial Counsel

Plaintiff designate Walter M. Luers as trial counsel in this action.

Certification of No Other Actions

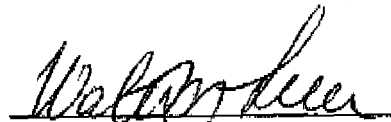
Pursuant to R.4:5-1, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of my knowledge and belief. A matter involving the same parties is pending before the Government Records Council (GRC Complaint No. 2007-72) alleging that Defendant improperly denied access to records other than nonpublic meeting minutes that are not the subject of this action. Also, to the best of my belief, no other action or arbitration proceeding is pending or contemplated. Further, other than the parties set forth in this pleading, I know of no other parties that should be joined in the above action. In addition, I recognize the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Respectfully submitted,

Law Offices of Walter M. Luers, LLC

Dated: June 21, 2007

By:



Walter M. Luers, Member
165 First Avenue
Atlantic Highlands, NJ 07716
Phone: 732-872-8088
Fax: 732-872-8044
Attorney for Plaintiff

EXHIBITS

John Paff

P.O. Box 5424

Somerset, New Jersey 08875-5424

E-mail – CJSC@pobox.com

October 27, 2006

Telephone – 732-873-1251

Fax – 908-325-0129

Custodian of Records
Dover Township

(via Fax only to 732-341-3586)

Dear Sir or Madam:

I cannot find Dover's Record Request Form on your website. Accordingly, I ask that you please accept this letter as my request for records under the Open Public Records Act and the common law. I would like to purchase photocopies of the following:

1. Attached is a November 17, 2005 letter from the NJ Sports and Exposition Authority to Vineland. I seek a copy of any similar letter from the Authority received by Dover.
2. Any and all resolutions passed during the October 24, 2006, September 26, 2006 and September 12, 2006 council meetings that authorized a nonpublic (i.e. closed or executive) meeting in accordance with N.J.S.A. 10:4-13.
3. Any and all minutes of any nonpublic meetings held by the council on October 24, 2006, September 26, 2006 and September 12, 2006.

I authorize up to \$6 for fulfillment of this request. If the amount needed exceeds this amount, please contact me.

Thank you for your attention to this matter.

Sincerely,



John Paff

Exhibit 1

TOWNSHIP OF DOVER

County of Ocean

Toms River, New Jersey 08753

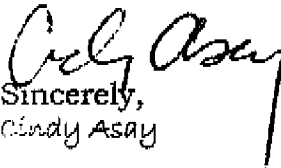
Reply To: Dover Township Clerk's Office
Ext. 8204

Telephone: (732) 341-1000
Fax Number: (732) 341-3586

November 2, 2006

Dear Mr. John Paff,

In reference to your recent O.P.R.A. Request regarding "Off- Track Wagering Correspondence, your first request is not requesting a "specific document" therefore, your request is not compliant with OPRA requirements. Also, at this time, minutes of the "nonpublic" "Executive Session" meetings do not exist as they have not yet been prepared and approved. Attached, is a resolution which you requested which authorizes a nonpublic meeting in accordance with N.J.S.A. 10:4-13.


Sincerely,
Cindy Asay

John Paff

Telephone – 732-873-1251

P.O. Box 5424
Somerset, New Jersey 08875-5424
E-mail – CJSC@pobox.com
March 29, 2007

Fax – 908-325-0129

Custodian of Records
Dover Township (via Fax only to 732-244-9883)

Dear Sir or Madam:

I cannot find Dover's Record Request Form on your website. Accordingly, I ask that you please accept this letter as my request for records under the Open Public Records Act and the common law. I would like to purchase photocopies of the following:

1. Any and all minutes of any nonpublic meetings held by the council on October 24, 2006, September 26, 2006 and September 12, 2006.
2. Attached is a copy of a page (p 92) from the September 12, 2006 public meeting minutes. I wish to purchase the page that immediately comes before that page (p 91?).
3. Any resolutions set forth within the minutes of the November 14, 2006; November 28, 2006; October 10, 2006 and January 10, 2006 public meetings that authorized a closed session in accordance with N.J.S.A. 10:4-13.

I authorize up to \$6 for fulfillment of this request. If the amount needed exceeds this amount, please contact me.

Thank you for your attention to this matter.

Sincerely,



John Paff

P.S. Until about mid-April, I will be receiving mail, temporarily, at

2106 S Cypress Bend Dr, Apt 102
Pompano Beach, FL 33069-4457

During this time, I would appreciate it if you would correspond with me at the Florida address instead of the New Jersey address in the letterhead. My fax number of 908-325-0129 and email address of paff@pobox.com will automatically forward to my Florida address. My voice number in Florida is 954-978-6054. Thank you.

Exhibit 3

TOWNSHIP OF TOMS RIVER
LAW DEPARTMENT
33 WASHINGTON STREET
TOMS RIVER, NEW JERSEY 08753



*R. Garry Mundy, Esq.,
First Assistant Township Attorney*

*Telephone: (732) 341-1000
Fax Number: (732) 244-9883*

April 4, 2007

VIA TELEFAX (908) 325-0129, AND REGULAR MAIL

John Paff
2106 S. Cypress Bend Drive, Apt. 102
Pompano Beach, FLA 33069-4457

Dear Mr. Paff:

This letter is in response to your OPRA requested date March 29, 2007. As you are aware, you currently have an action pending before the Government Records Council. The information you are seeking appears to be within the purview of that Council. As such, you should make such a request through your attorney, Drew Murray, Esq. I spoke with Mr. Murray on this issue, and after that conversation, agreed to proceed with your request. Mr. Murray also has a facsimile of your March 29, 2007, request. In the future, please have Mr. Murray process your OPRA request if it involves matters before the Government Records Council.

1. In reference to any and all minutes of any non-public meetings by the council on October 24, 2006, September 26, 2006 and September 12, 2006: the minutes are not available at this time as they have not yet been drafted or approved by the Council.
2. Page 91 from the September 12, 2006, Public Meeting Minutes: that page is available.
3. The resolution set forth within the minutes of November 14, 2006; November 28, 2006; and October 10, 2006 are available. The materials requested for January 10, 2006, are not available as they have not yet been drafted or approved.

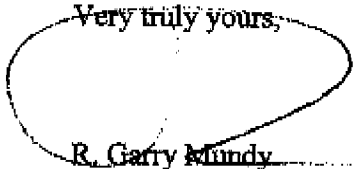
John Paff

2 of 2

April 4, 2007

There are a total of eleven pages at a cost of \$8.00. Please provide a check in the amount of \$8.00 made payable to, "Township of Toms River", and deliver the same to the Toms River Township Clerk's Office. By way of copy, I am providing this response to your attorney, Drew Murray, Esq.

Very truly yours,



R. Garry Mundy

First Assistant Township Attorney

RGM:lv

cc: Drew Murray, Esq.

Mark A. Troncone, Esq., Director of Law and Community Development

Mark Mutter, Township Clerk

Government Records Council, Trenton, New Jersey

Exhibit 5

John Paff

Telephone – 732-873-1251

P.O. Box 5424
Somerset, New Jersey 08875-5424
E-mail – CJSC@pobox.com
April 11, 2007

Fax – 908-325-0129

Hon. Paul C. Brush, Mayor and Council Members
Township of Dover
33 Washington St
Toms River, NJ 08753

RE: **Notice of Intent to Sue**

Dear Mayor Brush and Members of the Township Council:

I am an open government advocate and chair the Open Government Task Force of the New Jersey Libertarian Party. Please consider this letter "anticipated litigation . . . in which the [Township Council] may become a party" and discuss it, in accordance with N.J.S.A. 10:4-12(b)(7), during closed session at your next meeting, which I believe will be held on May 8, 2007.

Enclosed is a draft civil complaint prepared by my attorney. We stand ready to file the complaint in the Superior Court unless the Township Council takes immediate steps to ensure that its nonpublic meeting minutes are made promptly available as required by the Open Public Meetings Act, N.J.S.A. 10:4-14.

So that I know that my position is being taken seriously, I ask that Mr. Mundy, who is receiving a copy of this letter, or someone else on the Council's behalf, relate the Council's position on this matter to me by fax to 908-325-0129 within a few days after the May 8, 2007 meeting.

Thank you for your attention to this matter.

Sincerely,



John Paff

cc. R. Garry Mundy, Esq., First Asst Township Attorney (*via Fax to 732-244-9883*)
Walter M. Luers, Esq. (*via Fax*)
Chairman, New Jersey Libertarian Party (*via PDF email attachment*)
(*all with enclosures*)

Exhibit 6

TOWNSHIP OF DOVER
County of Ocean
Toms River, New Jersey 08753



Reply To: Office of Township Clerk

Telephone: (732) 341-1000
Fax Number: (732) 341-3586

May 9, 2007

John Paff
P.O. Box 5424
Somerset, N.J.
08875-5424

REGULAR MAIL
AND VIA FAX:
908-325-0129

RE: Executive Session Minutes:
September 12, 2006; September 26, 2006; October 24, 2006

Dear Mr. Paff:

Enclosed, please find approved Executive Session Minutes of the Township Council for the meetings of September 12, 2006, September 26, 2006, and October 24, 2006 that were approved by the Township Council at its meeting of May 8, 2007.

Very truly yours,

J. Mark Mutter, RMC

JMM:jmm

CC: Mayor; Council; R. Garry Mundy, Esq.; Walter M. Luers, Esq.

DOVER TOWNSHIP COUNCIL
EXECUTIVE SESSION MINUTES
SEPTEMBER 12, 2006—9:05 PM

Present: G. McGuckin, John Sevastakis, Mike Fiure, Brian Kubiel, Garry Mundy, Mo Hill, Mark Tronccone, Paul Brush, Alison Newman, Fred Ebenau, Chris Manolio, Maria Maruca, Carmine Inteso, Mark Mutter

Absent:

1. Discussion regarding CAP-rate ordinance: explanation by Fred Ebenau and Chris Manolio, and need to enact tonight. Ms. Manolio departed after this matter was reviewed.
2. Bayside Terrace: street vacation request. Discussion. Mark Tronccone and Maria Maruca to conduct site inspection.
Robert Chankalian enters meeting at 9:12 PM.
3. Golf course irrigation: bid numbers reviewed and low firm to get award: P.D.S. of T.R. Consensus: Sept. 26 meeting. Discussion when to award. Tonight—conditional upon certification of funds and pay-to-play legal requirements.
4. G.I.S. system: Robert Chankalian gives briefing regarding Township-MUA joint agreement, and he advises he wants to proceed. Consensus: okay.
5. Pa. General Ins. Co. bond: it will "walk away" from cash bond if we settle lawsuit. Estimated cost of work is \$12-14,000.00. Consensus: OK.
6. Affordable housing administrator: need to establish position @ about \$10-15,000.00; and deputy @ \$2500-5000. All money to come from housing trust fund. Appoint Jay Lynch as administrator and Tony Parisi as deputy. OK: draft ordinance.
9. Records Manager Personnel: meeting scheduled next week to select candidate of the administrative sub-committee of the Council: McGuckin, Fiure, Kubiel, and Mutter.
10. Discussion re status of Carmine Inteso's Council seat: discussion held regarding Carmine Inteso's recent absences from Council meetings; re the N.J. Municipal Vacancy Law; re the effort of Carmine Inteso to contact the Law Department on August 22nd re the Aug. 22nd meeting; re family illness on that date that prohibited him from attending the August 22nd meeting; and re Mark Tronccone's legal opinion as to Carmine Inteso's status.

Motion to reconvene into public session at 10:50 PM by Brian Kubiel, and seconded by Mike Fiure. Voice vote: all in favor.

****INDEX OF ITEMS NOT RELEASED****

7. Anchor Reef Marina: Matter involving the purchase, lease, or acquisition of real property involving public funds. N.J.S.A. 10:4-12 (b)(5).

8. Master Plan Invoices: Jay Lynch, now present—9:40 PM. Anticipated litigation in which the public body may become a party. N.J.S.A. 10:4-12 (b)(7).

Motion to reconvene into public session at 10:50 PM by Brian Kubiak, and seconded by Mike Fiore. Voice vote: all in favor.

DOVER TOWNSHIP COUNCIL
EXECUTIVE SESSION MINUTES
SEPTEMBER 26, 2006—8:15 PM

Present: Mark Troncone, Garry Mundy, Frederick Ebenau, Greg McGuckin, Carmine Inteso, Maria Maruca, Mo Hill, Mark Mutter

Absent: Brian Kubiel, Paul Brush, John Sevastakis, Mike Fiure

1. Pinelli/Valentini v. Dover Township litigation: litigation is settled and payment bill is on next bill list. Consensus: okay. Proceed to settle.
2. Whitesville Meadows/Block 298, Lot 5: utility easement coming regarding this matter. Consensus: okay.
5. Stormwater management coordinator: Mark Troncone recommends Robert Chankalian for this position; at additional stipend of \$15,000.00. Ordinance needs to be enacted re this position.
Lori Grifa now present, 8:25 PM.
8. Crossing Guards Contract: presentation by Alison Newman. Consensus: OK to approve, per her presentation.
9. Pay-to-play appointments for 2007: discussion re appointment process to be used for 2007. What process should we use in 2007? Greg McGuckin wants to know Paul Brush's recommendation first.
12. Name change effective date/attorney client advice: Mark Troncone to give legal opinion as to effective date if question passes.

Motion to reconvene into public at 9:10 PM by Carmine Inteso, seconded by Maria Maruca, voice vote, all in favor.

**** INDEX OF ITEMS NOT RELEASED****

3. Winding River Ice Rink status of construction/contractual issues: Anticipated litigation in which the public body may become a party. N.J.S.A. 10:4-12 (b)(7).
4. Affordable housing administrator: Matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body. N.J.S.A. 10:4-12 (b)(8).
6. Inter-local contract with Lavallette Borough: Contract negotiation other than in subsection b (4) in which the public body may become a party. N.J.S.A. 10:4-12 (b)(7).
7. Ciba Geigy litigation: Pending litigation matter in which the public body is a party. N.J.S.A. 10:4-12 (b)(7).

Alison Newman now present at 8:27 PM.

10. Grone's Wrecker Service v. Township of Dover: Pending litigation matter in which the public body is a party. N.J.S.A. 10:4-12 (b)(7).

11. North Pointe Hollow—3005 Norma Court COAH Unit foreclosure action: Pending litigation matter in which the public body may become a party. N.J.S.A. 10:4-12(b)(7).

Motion to reconvene into public at 9:10 PM by Carmine Inteso, seconded by Maria Maruca, voice vote, all in favor.

DOVER TOWNSHIP COUNCIL
EXECUTIVE SESSION MINUTES
OCTOBER 24, 2006—10:05 PM

Present: Greg McGuckin, Brian Kubiel, Mike Fiure, Mo Hill, John Sevastakis, Garry Mundy, Frederick Ebenan, Maria Maruca, Paul Brush, Bill McGuire, Mark Troncone, Carmine Inteso (present at 10:25 PM), Mark Mutter

Absent: Alison Newman

2. Harvey Langer employee grievance: Bill McGuire gives update. Since hiring, no pay raise, even though member of union. Review of his pay by Mark Troncone. Discussion re salary range.; that union says after his hiring, he should have been a member of the union. Consensus: do an ordinance to increase salary, in light of grievance, to address grievance amount.
3. Frank Schilling property/Block 920.08, Lot 55: Route 35 property. Review by Mark Troncone. Consensus: have Joseph Coronato brief Council on Nov 14 and have draft ordinance ready for that Executive Session to review—to resolve.
5. Appointment of Stormwater Management Coordinator: Mark Troncone says Council needs to act on this.
6. Nottingham Manor: drainage fee assessment for existing developments. Draft ordinance prepared by Mark Troncone; discussion re ordinance's workings. Mark Troncone to submit draft.
8. Mark Properties-McPherson parcel: question re legal notice. Update by Mark Troncone re notice process; he says in his legal opinion, the process was done properly. Consensus: this concludes Township review.
9. Berkeley Township Litigation re OTW: Mark Troncone advises that the Planning Board is being sued and Guy Ryan is in conflict. So, the Board needs an attorney. The Township Corporation is not a defendant. Mark Mutter advises that we also received an OPRA request on this issue, and that since there now is litigation, he will need guidance from Mark Troncone on its processing.
11. Tax Assessor stipend: Glenn Seelhorst wants more pay due to the re-valuation work he must undertake. Discussion. Consensus: \$12,500.00 additional, for two years.
12. Vacation of portion of Coolidge Avenue: issues of public safety and ramp discussed. Further report by Mark Troncone to be provided.
13. MON-OC Micu agreement: review by Garry Mundy re contract. Consensus: keep pressure on MON-OC.
15. Pay-to-play 2007 appointments: review by Garry Mundy. Consensus: use public bid process.

Motion to re-convene at 11:14 PM by Greg McGuckin, seconded by Mike Fiure, voice vote, all in favor.

****INDEX OF ITEMS NOT RELEASED****

1. *United Water-Toms River litigation: Pending litigation matter in which the public body is a party. N.J.S.A. 10:4-12(b)(7).*
4. *Ciba Geigy litigation: Pending litigation matter in which the public body is a party. N.J.S.A. 10:4-12(b)(7).*
7. *Bay Beach Way Secession: Anticipated litigation in which the public body may become a party. N.J.S.A. 10:4-12(b)(7).*
10. *Acquisition of Joey Harrison's Surf Club: Contract negotiation other than in subsection b (4) in which the public body may become a party. N.J.S.A. 10:4-12(b)(7).*
14. *DMUA Agreement: Contract negotiation other than in subsection b (4) in which the public body may become a party. N.J.S.A. 10:4-12(b)(7).*

Motion to re-convene at 11:14 PM by Greg McGuckin, seconded by Mike Fiure, voice vote, all in favor.

Plaintiff John Paff, by way of counsel, hereby submits this Brief in Opposition to Defendants' Motion for Summary Judgment and in support of his Cross-Motion for Summary Judgment.

This action was brought because, based on evidence that cannot reasonably be disputed, Defendants Dover Township and its Records Custodian are not complying with two elements of New Jersey's Open Public Meetings Act, *N.J.S.A. 10:4-6, et seq.* ("OPMA"): (1) minutes of all meetings must be made available promptly to the public; and (2) all topics discussed by a public agency must be in open session, unless a specific OPMA exemption applies.

The manner in which Defendants are producing the minutes violates OPMA. As the minutes here show, rather than create minutes that address all topics discussed in closed session and redacting those topics that are properly exempt, here Defendants simply omit discussions of allegedly exempt topics, rather than make appropriate redactions. This also violates OPMA, which requires that minutes be "reasonably comprehensible." *N.J.S.A. 10:4-14.*

Therefore, Plaintiff Paff requests that the Court declare that Defendants have violated the OPMA, order Defendants to produce reasonably comprehensible minutes for its September 12, September 26, and October 24, 2006 meetings, enjoin Defendants from violating the OPMA in the future, and requiring Defendants to make all meeting minutes available to the public not later than three business days before their next regularly scheduled public meeting.¹

¹ Because Defendants have certified that the meeting minutes produced by them in response to Mr. Paff's OPRA request are the actual minutes, Plaintiff hereby withdraws his claims based on OPRA.

PROCEDURAL HISTORY

Plaintiff initiated this action by way of Complaint on June 22, 2007. On August 16, 2007, Defendants filed their answer. No discovery has been conducted. On May 29, 2008, Defendants filed a motion for summary judgment.

STANDARD OF REVIEW

On a motion for summary judgment pursuant to *R. 4:46-2*, the Court must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Ins. Co.*, 14 N.J. 520, 540 (1995); *J.H. v. Mercer County Youth Detention Center*, 396 N.J. Super. 1, 6 (App. Div. 2007); *Prudential Property & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div. 1998). “[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law,” a motion for summary judgment must be granted. *R. 4:46-2*.

STATEMENT OF FACTS

Plaintiff will briefly recite the relevant material facts. On October 27, 2006, Mr. Paff made an OPRA request to Defendants asking for, among other things, copies of “any and all minutes of any nonpublic meetings held by the council on October 24, 2006; September 26, 2006 and September 12, 2006.” (Defendant’s Statement of Facts and Legal Argument in Support of Motion for Summary Judgment, Exh. 1).² On November 2, 2006, Defendant admitted that the

² Although one of the versions of Defendants’ Statement of Facts and Legal Argument refers to its attached exhibits as identified by letter, the exhibits themselves are identified by number, and we refer to them using their numbers. We also note that, at least in the version received by this office, the Statement of Material Facts was not

minutes for those three nonpublic meetings had not yet been prepared. (*Id.*, Exh. 2.). On March 29, 2007, Plaintiff again asked for those minutes, expecting that in the intervening five-month period that the minutes would have been prepared. (*Id.*, Exh. 3). Again, Defendant admitted that the minutes had not yet been prepared. (*Id.*, Exh. 4.) On May 9, 2007, Defendant provided the minutes to Plaintiff, revealing for the first time the extensive list of topics that were discussed in these minutes, including some topics that should have been discussed in open session. (*Id.*, Exh. 5). In a separate action before the Government Records Council, Defendants submitted a schedule showing that, as of March 27, 2007, Defendant had not finalized meeting minutes for 14 meetings in 2006 by the next month. (Exh. 1 to Certification Walter M. Luers, dated June 23, 2008).

LEGAL ARGUMENT

First, we will discuss why summary judgment should be granted for Plaintiff John Paff. Next, we will discuss why Defendant's motion for summary judgment should be denied regarding all of Mr. Paff's OPMA claims.

Plaintiff's Motion for Summary Judgment

Plaintiff's motion for summary judgment should be granted because (1) Defendants are not creating or making available to the public its meeting minutes "promptly;" (2) Defendant Council is discussing matters in closed session that should be discussed in open session; and (3) Defendants are not maintaining reasonably comprehensible meeting minutes.

signed by counsel of record and the exhibits were not submitted with a supporting certification. Nonetheless, we have no objection to the Court's consideration of the documents attached to Defendants' papers.

Prompt Availability of Minutes

“[S]trict adherence to the letter of the [Sunshine] law is required in considering whether a violation of the Act has occurred.” *Polillo v. Deane*, 74 N.J. 562, 578 (1977). This action seeks, among other things, prospective injunctive relief. Plaintiff is concerned that, going forward, the Borough comport itself with the law. *Matawan Regional Teachers Ass’n v. Matawan-Aberdeen Regional Board of Education*, 212 N.J. Super. 328, 334 (Law Div. 1986) (holding that injunctive relief is appropriate where concern is future compliance).

Minutes must be “made available to the public promptly”. *N.J.S.A. 10:4-14*.

While OPMA itself contains no definition of “promptly,” Courts have held that minutes should be made available prior to the next meeting of the public body, even if the minutes are draft or unapproved minutes. *Libeskind v. Mayor and Municipal Council of Bayonne*, 265 N.J. Super. 389, 394, 395 (App. Div. 1993); *Matawan Regional Teachers Ass’n v. Matawan-Aberdeen Regional Board of Education*, 212 N.J. Super. 328, 334 (Law Div. 1986).

Here, Defendants prepared the minutes for its September 12, September 26, and October 24, 2006 nonpublic meetings on May 8, 2007 – fully six months after the meetings occurred. Defendants offer no justification for this delay. In fact, according to the record, the only reason these minutes were prepared was because Mr. Paff threatened to sue Dover and requesting that Dover “take[] immediate steps to ensure that its nonpublic meeting minutes are made promptly available as required by the Open Public Meetings Act, N.J.S.A. 10:4-14. (*See* Defendants’ Statement of Facts and Legal Argument in Support of Motion for Summary Judgment Exh. 5). The minutes were approved at the very next meeting of Dover’s Council. (*Id.*, Exh. 14.)

The six-month delay in publicly releasing these minutes is not an isolated problem. Rather, it appears throughout 2006. As shown by the schedule attached to Defendants' filings in a Government Records Council action also initiated by Mr. Paff, Defendants have been chronically late in preparing public session meeting minutes. As of March 27, 2007, Defendant had failed to prepare any meeting minutes for four meetings; and did not approve minutes until after the next meeting on 16 occasions. Therefore, for 20 of 28 meetings in 2006, Defendants did not meet the *Matawan Regional* standard, which is that the meeting minutes should be available by the next public meeting.

Therefore, regarding whether Defendants have made meeting minutes available promptly, the Court should declare that Defendants violated OPMA, enjoin them from violating OPMA in the future, and set a timeframe for when minutes should be available to the public.

Private Discussion of Public Topics

OPMA mandates that all topics, unless they are specifically exempted, must be discussed in public session. This issue is also covered by Point IV of Defendants' brief. Defendants' minutes show that several topics have been discussed in closed session that should have been discussed in open session. The personnel exemption available under *N.J.S.A. 10:4-12(b)(8)* is only applicable to a "specific prospective public officer or employee." The discussion of a salary range does not concern a specific employee and, therefore, at least that portion of the meeting should have been held in public. *Oughton v. Board of Fire Com'rs*, 178 N.J. Super. 633, 642-43 (Law Div. 1980), *aff'd in part, rev'd in part*, 178 N.J. Super. 565 (App. Div. 1981) (*per curiam*) (reversing award of attorneys fees and costs to plaintiff and affirming on all other issues).

- On September 12, 2006, Dover Council discussed the “CAP-rate ordinance: explanation by Fred Ebenau . . . and need to enact tonight.” This description, to the extent its intelligible, does not fall within any OPMA exemption.

- Also on September 12, 2006, Dover Council discussed establishing an “affordable housing administrator” at a certain salary range. This matter should have been discussed in open session.

- On September 26, 2006, Dover Council discussed the appointment process for “Pay-to-play appointments in 2007”. This matter should have been discussed in open session.

- On October 24, 2006, Dover Council discussed the “need[] t act” on an “Appointment of Stormwater Management Coordinator” and a “drainage fee assessment for existing developments.” These matters should have been discussed publicly. (*See Defendants’ Statement of Facts and Legal Argument in Support of Motion for Summary Judgment Exhs. 8-14*).

None of the foregoing topics fit into the exceptions set forth in N.J.S.A. 10:4-12(b). The Sept. 26, 2006 discussion of the “pay-to-play” appointment process does not identify or discuss a specific employee. Therefore, the Court should declare that Defendants have violated OPMA and enjoin them from future violations.

Lack of Reasonably Comprehensible Minutes

Defendants have violated OPMA, which requires that minutes be “reasonably comprehensible.” *N.J.S.A.* 10:4-14. Normally, meeting minutes must contain descriptions of all topics discussed and, if a particular topic cannot be disclosed, that information is redacted. Here, rather than follow that procedure, Dover has created minutes that do not contain descriptions of Dover’s discussions. Rather, they just identify omitted topics and contain boiler plate reasons for

why the information was withheld. Because the minutes contain no description of several topics, they are not “reasonably comprehensible.” Defendants provide no reason why the information was not provided.

Therefore, Dover should be ordered to produce minutes that are “reasonably comprehensible” and that contain redactions permitted by OPMA.

Defendant’s Motion for Summary Judgment

Point I of Defendant’s brief is directed at Plaintiff’s OPRA claims. We do not agree with Defendant’s argument or analysis. However, because Defendant has proffered a certification stating that the minutes attached as Exhibits 8-14 to Defendant’s moving papers are the genuine minutes, we accept that and withdraw our OPRA claim only.

Point II of Defendant’s brief seems to argue that the Complaint should be dismissed because it was not filed as an action of lieu of prerogative writs. Defendants cite no authority for this proposition. In any event, because this action contained both OPRA and OPMA claims, it was correctly filed as an “802 Open Public Records Act” proceeding. Finally, to dispel any doubt, Defendants’ own Answer also characterized this action as an 802 proceeding and did not object to the Track Assignment, even though they had the opportunity to do so.

As Point III discusses our withdrawn OPRA claim, we will not present further argument on it.

Our response to Point IV is discussed above, and we will not repeat it here.

In Point V, Defendants claim the complaint should be dismissed on the grounds of laches. This argument should be dismissed because laches was not one of the several affirmative defenses raised by Defendants in their answer. Even if they had, this case is not about voiding

prior public acts. Rather, this case is focused on declaring that prior Town Council actions did not comply with OPMA, and that going forward Defendants should comply with law.

CONCLUSION

For the foregoing reasons, Defendants' motion should be denied and Plaintiff's cross-motion granted.

Dated: June 23, 2008

THE LAW OFFICES OF
WALTER M. LUERS, LLC

By: _____

Walter M. Luers, Member
105 Belvidere Avenue
P.O. Box 527
Oxford, New Jersey 07863
Telephone: 908.453.2147
Facsimile: 908.453.2164

STEPHEN A. PEPE
 Attorney at Law
 108 North Green Street
 PO Box 1128
 Tuckerton, New Jersey 08087
 Telephone: 609 294 8300
 Attorney for the Defendants Dover Township
 Council aka Toms River Township Council et al.

John Paff,

Plaintiff,

vs.

Dover Township Council aka Toms
 River Township Council et al.

Defendants

Superior Court of the State of New Jersey
 Law Division
 Ocean County

Docket No. OCN L 2165 07

Civil Action

**Brief in Opposition to Plaintiff's
 Motion for Summary Judgment,
 and in Response to Plaintiff's
 Brief in Opposition to
 Defendant's Motion for Summary
 Judgment**

Point One

The Plaintiff's request for an injunction is premature and based upon speculation

Both the Matawan Board of Education and the Liebeskind v. Mayor and Municipal Council of Bayonne cases cited by the plaintiff are but Superior Court Law Division cases and not binding on this Court. In any event, what the plaintiff refers to as "the *Matawan Regional* standard" (p. 5 of his brief) was not promulgated as a "standard" to which all municipal bodies and subdivisions were to be held but was a unique response to the particular facts of the Matawan case. It remains for the Court to determine if, first, the minutes were indeed not made available "promptly" and second, if the same time frame stated in Matawan, supra., should apply to Toms River Township.

The plaintiff's brief at page 5 refers to some 20 out of 28 allegation of late publication of

public minutes; his complaint, however, refers to only the three executive session meetings now before the Court. As to the circumstances behind the preparation of the minutes for these three dates, annexed hereto is an affidavit from M. Mark Mutter, Clerk of Toms River Township, regarding the unprecedented and extraordinary demands upon the Office of Clerk occasioned by the Dover/Toms River Township name change in the August and September of 2006.

The Matawan decision is silent as to any particular stress on the Board of Education; here, the Township was confronted by an event which had not occurred since the Township's founding in 1767. The rule of law must be tempered by reason and it would seem unnecessarily punitive to impose an injunction or other sanction upon the Township under these circumstances. Though certainly not as severe, as far as the Clerk's office was concerned the name change application was at least akin to the state of emergency invoked in July of 2006 on account of the Legislature's failure to reach a budget agreement or to the periodic closures of our State Government on account of flooding of the Delaware River in Trenton. See, e.g., New Jersey Builder's Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 182 (App. Div., 2007), cert. den. 190 N.J. 394 (2007) (COAH's production of OPRA documents one day late on account of flood-induced government shutdown a "reasonable solution" under N.J.S.A. 47:1A-5(g)).

Finally, the plaintiff's motion is based in part upon his allegation at paragraph 11 of his complaint that "on information and belief" the Council will, unless otherwise ordered by the Court, continue to improperly withhold or delay the minutes etc. Such relief is based upon the mere speculation that the Township will be dilatory in producing minutes should they be requested in the future and is incompetent to support an application for summary judgment. See, e.g., Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 77 (App. Div., 2004) cert. den. 183 N.J. 213, 214 (2004)(party cannot rely upon speculative evidence in support motion for summary judgment).

In view of the foregoing it is respectfully submitted that the evils sought to be avoided has been repaired, that the Township was afflicted by a unique set of facts which are quite unlikely to recur, that in any event that fact questions remain as to whether an injunction should issue and that the plaintiff's motion should be denied. Brill v. Guardian Life Ins. Co., 12 N.J. 520 (1995).

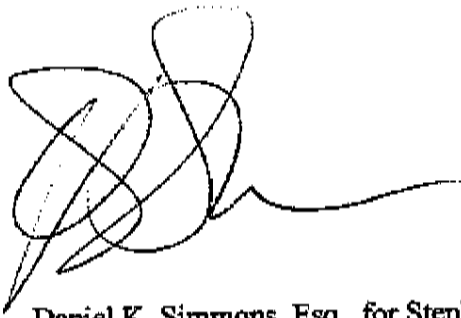
Point Two

There was no lack of reasonably comprehensible minutes

N.J.S.A. 10:4-14 provides only that minutes of public meetings be reasonably comprehensible and that they contain the time and place of the meeting, who was present, the subjects considered, the actions taken and the vote of each member. There is no requirement for a verbatim record, see, e.g., Hudanich v. Bourough Council of Bourough of Avalon, 183 N.J. Super. 244, 258 (Law Div. 1981) (Lack of verbatim or stenographic record did not render meeting void).

A review of the minutes reveals that such information as is required was provided and that the plaintiff's motion for summary judgment on this point should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Daniel K. Simmons", written in a cursive style.

Daniel K. Simmons, Esq., for Stephen A. Pepe, Esq.

STEPHEN A. PEPE

Attorney at Law
108 North Green Street
PO Box 1128
Tuckerton, New Jersey 08087
Telephone: 609 294 8300
Attorney for the Defendants Dover Township
Council aka Toms River Township Council et al.

John Paff,

Plaintiff,

Superior Court of the State of New Jersey
Law Division
Ocean County

vs.

Docket No. OCN L 2165 07
Civil Action

Dover Township Council aka Toms
River Township Council et al.

**Supplemental Affidavit of J. Mark Mutter,
Clerk of the Township of Toms River**

Defendants

J. Mark Mutter, of full age, upon his oath deposes and says:

1. I am the Clerk of the Township of Toms River and I served in that capacity at all relevant times mentioned herein.

2. As of the date of this affidavit the executive session minutes are current through May 27, 2008.

3. On August 8, 2006, my office received a 1,546 page petition from the Dover Township Name Change Committee. The petition contained what purported to be the signatures and addresses of registered voters of Dover Township who desired the name of the Township to be changed to Toms River Township.

4. By August 16 an additional ten pages of the petition were filed, bringing the total to 1,556 pages of such signatures and addresses.

5. Pursuant to the statute (N.J.S.A. 40:43-3) my office had to certify within 30 days that at least 8,312 of these signatures were genuine and were in fact those of registered voters in the Township.

6. Many of the signatures and addresses were wholly or partially illegible. Many of the persons purporting to be registered voters were not. To certify these signatures demanded basically the entire resources at my command, in addition to employees on loan from other Township Departments. One person was left in the Clerk's office to handle immediate business. The rest of the employees I took either to the County Election Board or to what is now known as "The Lomell Meeting Room" at the Town Hall in order to devote our entire energies to certifying the required signatures within the statutory time.

7. I put off any matters other than the immediate and emergent. When we finally certified the results on September 8 there was a monumental pile of mail and phone messages to be answered. This disruption in the routine matters of the Clerk's office was felt for months afterwards. To complicate the situation, the employees in my office earned 310.75 hours of compensatory time, which was taken through the balance of 2006 and even into 2007. This placed an additional strain upon our resources.

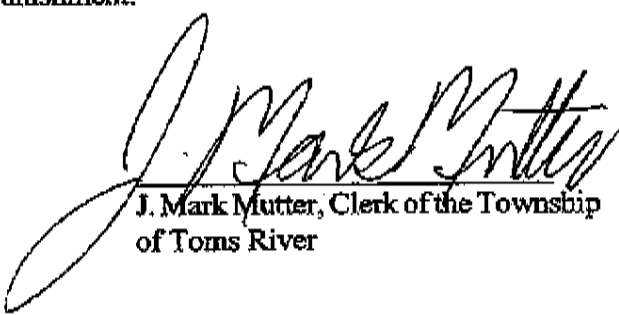
8. One of the casualties was the preparation and approval of the minutes of public and non public meetings. At the time of Mr. Paff's request my normal and methodical preparation of minutes had been interrupted by the events connected with the name change. In addition, at the time of Mr. Paff's request I had as a confidential assistant only one, part time employee, the former Clerk-Administrator, L. Manuel Hirshblond, who does not type. This left to me the obligation of typing executive session minutes and I am not a particularly good typist. As a consequence the minutes were backed up for some months.

9. In the latter half of 2007 the Township hired a part time confidential secretary to assist in the preparation of non public minutes. In addition, the Township just last month week hired a full time deputy clerk, a confidential employee who can also assist with the preparation of the minutes. We are prepared to handle any request for minutes of meetings.

10. As to Mr. Paff's allegation that the minutes are not "reasonably comprehensible," the minutes need not contain descriptions of discussions. The minutes are a record of what was done, not what was said, and I respectfully direct the Court's attention to the annexed pages of the Municipal Clerks' Association Study Guide, which was provided to me by Rutgers University as a study guide for the Municipal Clerk's test given to me by the State of New Jersey, Division of Local Government Services.

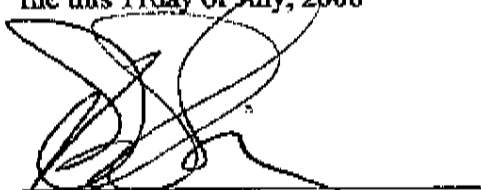
11. The foregoing statements made by me are true. I am aware that if any of the foregoing is found to be wilfully false that I am subject to punishment.

Dated: July 11, 2008



J. Mark Mutter, Clerk of the Township
of Toms River

Sworn to and subscribed before
me this 11 day of July, 2008



Daniel K. Simmons, an attorney at
law of the State of New Jersey