



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251 - Fax: 908-325-0129

Email: lpsmc@pobox.com

August 18, 2009

Hon. Jerry Fried, Mayor and members of the
Montclair Township Council
205 Claremont Avenue
Montclair, NJ 07042 (via e-mail only to lwanaat@montclairnjusa.org)

Dear Mayor Fried and Council Members:

I write both individually and in my capacity of Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project to question the propriety of the Council's August 4, 2009 nonpublic (i.e. closed or executive) session.

A local news article¹ informs me that the Council met "with a representative from a municipal manager's association" "to discuss its search for a new township manager." Apparently, no specific candidate for the manager's position was discussed. Rather, the closed meeting was called so that the association's representative could "describ[e] for the council the process of finding a new chief administrator."

Later in the article, Mayor Fried said that the closed meeting was justified by the "personnel exception" embodied within N.J.S.A. 10:4-12(b)(8). I disagree.

The Senator Byron M. Baer Open Public Meetings Act intends to ensure that the "public [is allowed] 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." N.J.S.A. 10:4-7. The Act says that such is "vital to the enhancement and proper functioning of the democratic process" and "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." Id.

Accordingly, the Act sets up a general rule that **all** meetings of a public body must be open to the public, but sets forth nine specific exceptions that allow the body to meet in private. The Act requires those nine exceptions to be "strictly construed" against closure and in favor of open, public meetings. Rice v. Union County Regional High School Teachers Ass'n, 155 N.J. Super. 64, 70 (App.Div.1977), certif. denied, 76 N.J. 238 (1978).

¹ "Behind closed doors, the manager search begins," by Terrence T. McDonald, August 17, 2009 Montclair Times.

The "personnel exception" that the Council relied upon to close the August 4, 2009 meeting to the public, states that a meeting may be conducted privately if it involves

Any 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, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

N.J.S.A. 10:4-12(b)(8)

In South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478, 493 (1991), the New Jersey Supreme Court ruled:

Unlike other provisions authorizing exclusion of the public, the apparent objective of which is to preserve the secrecy of confidential information, see, e.g., N.J.S.A. 10:4-12(b)(1) and (2), the personnel exemption focuses on free and uninhibited discussion about matters relating to the hiring, firing, performance, compensation, and discipline of public employees. Such discussions necessarily involve subjective comments and evaluations of employees by members of the public body, and their willingness to comment openly and freely about such matters would obviously be inhibited if the discussion were to be conducted publicly. The statutory exemption for personnel matters, recognizing the potentially-inhibiting effect of public debate about the qualifications, performance, merit, and shortcomings of specific employees, allows that debate to occur in executive session.

As you can see, the purpose of the "personnel exception" is to allow the Mayor and Council to have a frank and uninhibited discussion about "the qualifications, performance, merit, and shortcomings of *specific* employees." For example, if a Township officer or employee had a drinking problem, the "personnel exception" would allow the Council to meet in closed session to frankly discuss that problem.

Since there is no "specific prospective employee" at issue (i.e. no candidates for the manager's position are currently identified), the Mayor's and Council's reliance on the "personnel exception" is wholly misplaced. In sum, the August 4, 2009 private discussion ought to have been held in public.

I would like to learn the Council's viewpoint on this issue.

Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, sweeping flourish that loops back under the name.

John Paff