



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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November 2, 2009

Hon. Terry Warrelmann, Mayor, and
Members of the South Bound Brook Borough Council
12 Main Street
South Bound Brook, NJ 08880

(via email only to DKazar@SouthBoundBrook.com)

Dear Mayor Warrelmann and Council Members:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project concerning the Borough Council's policy and practice regarding reviewing, approving and publicly disclosing its nonpublic meeting (i.e. Executive Session) minutes.

Factual Background:

1. On October 8, 2009, I submitted an OPRA request to Borough Clerk Donald Kazar for, among other records, "the minutes from the South Bound Brook Council Executive Sessions held on the following dates: April 11, 2006; June 13, 2006; April 10, 2007; June 5, 2007; July 10, 2007; March 4, 2008 and March 11, 2008."
2. On October 8, 2009, Mr. Kazar and I agreed to extend¹ until October 23, 2009 the date by which he would either grant or deny access to my request. On October 22, 2009, Mr. Kazar and I agreed to an additional extension to October 28, 2009.
3. On October 27, 2009, Mr. Kazar e-mailed me the minutes² from the Borough Council's April 11, 2006 and March 11, 2008 Executive Sessions. In his accompanying cover letter, Mr. Kazar stated that the April 11, 2006 and March 11, 2008 minutes "are the only executive sessions I have in my files concerning your OPRA request."
4. On October 28, 2009, I wrote to Mr. Kazar inquiring why the Borough did not have minutes from the five Executive Sessions for which minutes were not provided. In an

¹ Absent an extension, Mr. Kazar would have been required to either grant or deny access to the requested records within seven business days of his receipt of my request. N.J.S.A. 47:1A-5(i).

² The April 11, 2006 minutes were not redacted. However, several sentences were redacted from the March 11, 2008 minutes. The stated reason for these redactions was: "Redacted due to possible lawsuit by Mr. Verry."

October 28, 2009 e-mail and during my October 29, 2009 visit to his office, Mr. Kazar clarified that while he did have minutes of the five Executive Sessions in a handwritten, outline format, those minutes had not yet been typed up. During our October 29, 2009 meeting, I asked Mr. Kazar to either a) type up and provide me with the minutes of the five Executive Sessions for which minutes were not provided or b) provide me with the handwritten, outlines of those five Executive Sessions.

Observations:

The Borough Council apparently lacks two critical processes. First, it presently has no procedure that guarantees the public prompt access to the nonexempt portions of its Executive Session minutes. Second, it doesn't promptly review and approve its own executive session minutes.

Analysis:

Issue: Prompt availability of Executive Session minutes

N.J.S.A. 10:4-14 requires that "reasonably comprehensible minutes of all [a body's] meetings . . . shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12b]." (Emphasis supplied). The Supreme Court has interpreted this provision to require prompt availability of meeting minutes even when the public body, in accordance with the Open Public Meetings Act, has met in Executive Session. South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 493-494 (1991).

In order to guard against the premature release of sensitive material, the Supreme Court ruled that when full disclosure of Executive Session minutes would imperil a legitimate governmental interest or violate a person's privacy, the public body must balance the public's right to disclosure against the need for secrecy and then, when appropriate, redact from the minutes the "specific information that would undermine the [N.J.S.A. 10:4-12] exception." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997). It is "only the usual case" in which a public body may totally suppress, as opposed to redact, the minutes of an Executive Session. Id at 557.

In the present case, the Borough Council is unable (or is at least hesitant) to publicly disclose the nonexempt parts of its minutes from Executive Sessions held as early as June 13, 2006. Since the June 13, 2006 Executive Session was held more than three years ago, it cannot be plausibly argued that the Borough Council's present inability or hesitance to produce minutes from that meeting is consistent with the "promptly available" mandate of N.J.S.A. 10:4-14.

While no universal definition of "promptly available" has been determined by the courts, two fairly recent unpublished, trial court decisions may provide some guidance.

- Paff v. Keyport Borough Council et al, Monmouth County, Docket No. L-3317-07, which was decided by the Hon. Lawrence M. Lawson, on February 13, 2009 (Judge Lawson's three-page Order is attached).

- Paff v. Absecon Custodian et al, Atlantic County, Docket No. L-3392-08, which was decided by the Hon. Steven P. Perskie, J.S.C. Judge Perskie's June 26, 2009 (Judge Perskie's two-page Order is attached).

The Keyport and Absecon courts both ruled that the nonexempt portions of a Executive Session's minutes must be made public within thirty days after the meeting or prior to the next scheduled meeting, whichever comes first. (See, ¶ 2 of Keyport Order and the first page of the Absecon Order).

Request: Regarding prompt release of minutes

Would the South Bound Brook Borough Council consider imposing a rule upon itself similar to that imposed by the Keyport and Absecon courts? Specifically, would the Borough Council commit to a policy that, absent unusual circumstances, requires:

- a. The public minutes of its Agenda Meetings, which are typically held on the first Tuesday of each month, as well as the nonexempt portions of the minutes of any Executive Session held in connection with that Agenda Meeting, to be publicly available by noon on the Monday that falls immediately prior to the next Agenda Meeting or within thirty days, which ever comes first, and
- b. The public minutes of its Regular Meetings, which are typically held on the second Tuesday of each month, as well as the nonexempt portions of the minutes of any Executive Session held in connection with that Regular Meeting, to be available by noon on the Monday that falls immediately prior to the next Regular Meeting or within thirty days, which ever comes first, and
- c. The public minutes of any other meeting (e.g. a Special Meeting) as well as the nonexempt portions of the minutes of any Executive Session held in connection with that meeting, to be available within thirty days after that meeting?

Issue: Approval of Executive Session Minutes

Mr. Kazar stated that the minutes of the Executive Sessions held on June 13, 2006; April 10, 2007; June 5, 2007; July 10, 2007; March 4, 2008 have not yet been typed and exist only in handwritten, outline form. If this is accurate, the Borough Council lacks a policy under which it promptly approves its Executive Session minutes for completeness and accuracy.

While nothing the Open Public Meetings Act requires a public body to promptly review and approve its meeting minutes, common sense dictates that it is beneficial for minutes of all meetings to be promptly reviewed and approved while the meetings' occurrences are still fresh in the members' minds.

For example, the Borough Council that met in Executive Session on June 13, 2006 consisted of some of the present members of Council as well as some who no longer serve

(e.g. Council members Murphy, Henry and Eickhorst). Thus, even if Mr. Kazar immediately types the minutes of the June 13, 2009 Executive Session and presents them for approval at the November 10, 2009 Council meeting, it will difficult or impossible for the Council to meaningfully review those minutes for accuracy and completeness.

Request: Regarding prompt review and approval of minutes

Would the South Bound Brook Borough Council consider a policy under which the minutes of all its meetings, including its Executive Sessions, typically be offered for review and approval at the following meeting?

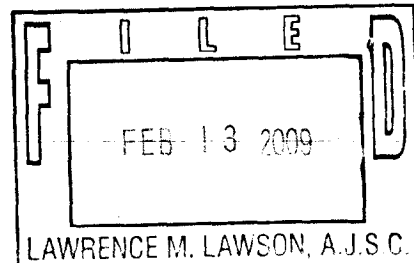
I appreciate your time considering this letter and look forward to receiving your response.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, stylized flourish above the name.

John Paff

WISNIEWSKI & ASSOCIATES, LLC
17 Main Street
Sayreville, New Jersey 08872
(732)651-0040
Attorneys for Defendant, BOROUGH OF KEYPORT
Our File No.: 152.10313



JOHN PAFF

Plaintiff(s)

vs.

**KEYPORT BOROUGH COUNCIL and
VALERIE T. HEILWEIL**

Defendant(s)

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO. L-3317-07**

CIVIL ACTION

ORDER

This matter having brought before the Court by John Paff, Plaintiff and tried before the Honorable Lawrence M. Lawson on August 12, 2008; by John Paff, Pro Se and Eric M. Winston, Esq. of Wisniewski and Associates, LLC on behalf of the Defendants Keyport Borough Council and Valerie T. Heilweil, and the Court having considered the Trial Briefs and Oral Argument presented by the parties and having issued a written Opinion on December 8, 2008.

It is on this 13 day of February, 2009 :

1) **DECLARED** that the Defendants violated N.J.S.A. 10:4-14 by not making the minutes of the Keyport Borough Council's April 10, 2007 and May 21, 2007 public meetings and the Keyport Borough Council's March 6, 2007, April 10, 2007, April 24, 2007, May 1, 2007 and May 21, 2007 nonpublic (i.e. executive or closed) meetings publicly available promptly.

2) **ORDERED** that the minutes of both public and nonpublic meetings of Defendant Keyport Borough Council shall be available to the public within thirty (30) days of the last held meeting or prior to the next scheduled meeting, whichever occurs

first.

3) **ORDERED** that nonpublic meeting minutes may be redacted as necessary.

4) **DECLARED** that the Defendant Keyport Borough Council's April 10, 2007 nonpublic discussion of "Loitering of Day Workers" and its April 24, 2007 nonpublic discussion of "Proposed Ordinance – Smoking in Motor Vehicles with Children" and "K. Hovnanian" fell within the "anticipated litigation" exception of *N.J.S.A. 10:4-12(b)(7)* and thus did not violate the Senator Byron M. Baer Open Public Meetings Act.

5) **DECLARED** that the Defendant Keyport Borough Council's April 10, 2007 nonpublic discussion regarding "the need to find someone on a three-man shift" and its April 24, 2007 nonpublic discussion of a general question concerning Class I and Class II Specials fell within the "personnel" exception of *N.J.S.A. 10:4-12(b)(8)* and thus did not violate the Senator Byron M. Baer Open Public Meetings Act.

6) **DECLARED** that the first redaction within Paragraph 3 of the Keyport Borough Council's September 19, 2006 nonpublic meeting minutes (i.e. the redacted word between "Police Officers who become" and "and policies that can be set") would reveal "detailed medical or psychological information" that is not public information in accordance with *N.J.S.A. 47:1A-10*, the purpose of which statute is to protect an individual's right to privacy.

7) **DECLARED** that the Defendant Valerie T. Heilweil violated the Open Public Records Act by redacting the names of certain, disciplined Keyport officers and employees from the September 19, 2007 and October 17, 2007 nonpublic meeting minutes because the "personnel" exception embodied within *N.J.S.A. 10:4-12(b)(8)* does not exempt those names from disclosure.

8) **DECLARED** that within fourteen (14) days of the entry of this Order, Defendants will provide Plaintiff with a) an unredacted copy of the first page of the Keyport Borough Council's October 17, 2006 nonpublic meeting minutes and b) a copy of the first page of the Keyport Borough Council's September 19, 2006 nonpublic meeting minutes that is unredacted except for the redaction described in Paragraph 6 of this Order

9) **DECLARED** that the relief demanded in the Third Count of the Plaintiff's complaint for failing to provide a legally sufficient reason for redacting certain meeting minutes and denying access to certain emails and correspondence is time-barred because those demands were not asserted within forty-five (45) days as required by R. 4:69-6(a).

10) **ORDERED** that Plaintiff is the prevailing party and is entitled to costs in this action. Plaintiff shall file proof of his costs with the Clerk in accordance with R. 4:42-8(c).



Lawrence M. Lawson, A.J.S.C.

John Paff
P.O. Box 5424
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Tel. 732-873-1251
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Plaintiff

FILED

JUN 26 2009

Steven P. Perskie, J.S.C.

JOHN PAFF	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff,	:	ATLANTIC COUNTY
vs.	:	DOCKET NO. L-3392-08
	:	
ABSECON CUSTODIAN et al	:	Civil Action
	:	
Defendants	:	ORDER GRANTING SUMMARY
	:	JUDGMENT AS TO PORT REPUBLIC

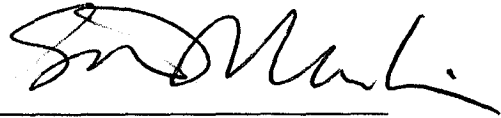
This matter was opened to the Court by John Paff, Plaintiff, and the Court having read and considered the Plaintiff's Notice of Cross-Motion, Supporting Certification, Responding Statement of Material Facts and Letter Brief and any opposition and reply papers filed and for good cause appearing it is on this 26 day of June 2009:

DECLARED that Defendants Port Republic City Custodian and Port Republic City Council violated N.J.S.A. 10:4-14 by not promptly disclosing the nonexempt portions of the City Council's January 8, 2008 and January 29, 2008 nonpublic (i.e. closed or executive) meetings.

ORDERED that going forward, Defendants Port Republic City Custodian and Port Republic City Council shall publicly disclose draft versions of the City Council's nonpublic meeting minutes, redacted as lawfully allowed, within thirty (30) days after the nonpublic meeting is held or prior to the City Council's next scheduled meeting, whichever occurs first.

ORDERED that Plaintiff is the prevailing party in this action and is thus entitled to his costs. Plaintiff shall file his proof of costs with the Clerk in accordance with R.4:42-8(c).

ORDERED that Plaintiff shall serve a copy of this Order upon Defendants within 7 days of its entry and return.



Steven P. Perskie, J.S.C.

This motion was (check one) Opposed Unopposed

Written / Oral (circle one) findings of fact and conclusions of law were rendered on _____, 2009, or

A statement of reasons why no findings of fact and conclusions of law were made is appended to this order.