

Superior Court of New Jersey Camden Vicinage

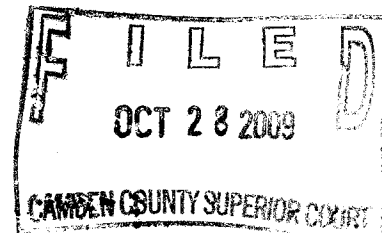


Chambers of
LOUIS R. MELONI
Judge

CAMDEN COUNTY HALL OF JUSTICE
101 SOUTH FIFTH STREET
CAMDEN, NEW JERSEY 08103-4001

October 28, 2009

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RE: Thomas Cassel v. Township of Haddon and Denise P. Adams
Docket No. L-1426-09

Dear Counsel:

This matter was initiated by the Plaintiff against the Defendant, Township of Haddon and Denise P. Adams, in her official capacity as Township Clerk and Records Custodian.

By Order to Show Cause, the Plaintiff brings this action alleging (1) Defendants have violated the Open Public Meeting Act (OPMA) by holding secret meetings between a quorum of Defendant's elected officials and the Township Attorney; (2) Defendant violated the Open Public Records Act (OPRA) by redacting specific sections of executive session minutes from 2007 and by overcharging Plaintiff for the audiotape; (3) Defendant violated OPMA by beginning a public meeting at 6:20 p.m. when the notice stated the meeting would begin at 7:00 p.m.

Beginning with the last allegation first, the facts are not in dispute. The Township published notice of "Special Meeting" that was to be held on February 3, 2009. The closed session was to be held at 6:00 p.m. and the "Regular Session" to convene at 7:00 p.m.

The Regular Session began at 6:20 p.m., forty minutes before the noticed time, which deprived the Plaintiff and the public of the opportunity to be present.

The Township admits that they may have strayed from the Public Notice Agenda for the February 3, 2009 meeting, but contend that there were no decisions made or resolutions passed.

However, as the Plaintiff points out, there were discussions between the elected officials and various department heads.

N.J.S.A. 10:4-8 defines "Meeting" to include the gathering of a public body to "discuss, or act as a unit upon specific public business of that body."

N.J.S.A. 10:4-7 declares it to be the public policy of our State to have adequate and advanced public notice of such meetings. Starting the public meeting forty minutes prior to the advertised start time of 7:00 p.m. was a violation of the OPMA and I so find.

The Plaintiff requests that the Court enter a restraining order against the Township from future violation. That request is denied. There is no evidence that there was ever a recurring problem or that this situation had ever occurred before or after the February 3, 2009 meeting. There were some members of the public present, minutes and the audio recordings were made and available to the public. Under such circumstances and being mindful that any non-compliance in the future would subject the Township to another violation, I feel injunctive relief would be inappropriate.

The parties agree that the issue as to whether the Township violated OPRA by too broadly redacting sections of executive session minutes from 2007, has been resolved by the Township's supplying either un-redacted or more narrowly redacted minutes than were previously supplied to the Plaintiff.

Plaintiff further contends that the Defendant violated the OPRA by charging \$5.00 for a copy of the CD of the public meeting, when the actual cost was \$.88.

The Township relies upon N.J.S.A. 47:1A-1 which provides in part that the record custodian shall provide a copy or copies of a requested government record, to any person upon payment of the fee "prescribed by law or regulation." The Defendant had charged the Plaintiff the amount prescribed by Ordinance Section 111-3.

Defendant's position is that pursuant to N.J.S.A. 47:1A-5(b) it is only if the fee is not prescribed by law or regulation that the charge should be the actual cost provided the fee is not facially inordinate.

Both parties have cited Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super 136 (App. Div. 2006). In that case Plaintiffs sued the Township's Custodian of records, alleging that the Township's \$55 fee for a computer diskette containing the minutes of the Township Council Meetings was excessive and violated N.J.S.A. 47:1A-5(b).

The Appellate Division agreed and held that the fee established by Township Ordinance was facially inordinate and created an unreasonable burden upon the Plaintiff's right of access and was not rationally related to the actual cost of reproducing the records.

Plaintiff argues two final decisions of the Government Records Council (GRC), O'Shea v. Madison Public School District, Complaint No. 2007-185 and Renna v. Township of Warren, Complaint No. 2008-40. Both of these cases focus on whether the special service charge assessed by the custodian was warranted and reasonable and that the actual cost of the CD should be added to whatever the appropriate special service charge was determined to be. That is not the issue in this case; there was no special service charge.

A third case decided by the GRC and submitted by Plaintiff, O'Shea v. Township of Vernon, Complaint No. 2007-207, the GRC was faced with a Township Ordinance which set fees for copies of sound recordings at \$35 for the first 90 minutes and \$25 for each additional 90 minutes or part thereof. The GRC analyzed the statute and existing case law and while recognizing that it did not have the authority to invalidate the Township Ordinance, determined the fee for an audio recording to be in violation of N.J.S.A. 47:1A-5(b) and directed the Custodian to provide the records at the actual cost.

Here the Township of Haddon by ordinance set the fee for duplication of the audio disc at \$5.00. Certainly, N.J.S.A. 47:1A-5(b) envisions a public body doing so when it states that a person may acquire copies of public records "upon payment of the fee prescribed by law or regulation." As stated by the Appellate Division "municipal ordinances are presumed valid and the burden of proof to establish they are arbitrary and unreasonable rests on the party seeking to overturn them." DeFalco Instant Towing Inc. v. Borough of New Providence, 380 N.J. Super. 152, 155-56 (App. Div. 2005).

A fair reading of the statute, Libertarian Party of Central New Jersey, Super., Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005) leads to the conclusion that the fee set by the Township for the CD of the meeting must be the actual cost of duplication, not to include labor. The agreed upon cost of the CD is eighty-eight cents (\$.88). There is no suggestion that there are any extraordinary circumstances that would justify a special service fee. It therefore follows that the Township charge of \$5.00 for the CD is unreasonable and in violation of N.J.S.A. 47:1A-5(b).

As the Township points out, the \$5.00 cost for the CD is a far cry from the \$55 charge in Libertarian and is far less likely to be an unreasonable burden on Plaintiff's right to access but none the less it is not in compliance with the statute or established case law.

Accordingly, Plaintiff's request that the Defendants reduce the copying fee for the audio recordings to "actual cost" and refund to the Plaintiff prior charges paid by him is granted.

Lastly, the Plaintiff contends that the Township conducted "secret meetings" between the Solicitor and Members of the Township Governing Body without giving notice or keeping minutes as required by the OPMA. Plaintiff asks that the Court declare the Defendants violated the OPMA, that minutes of the meeting be prepared by a date certain and that the Defendants be enjoined from future violations of the OPMA.

Plaintiff's contentions are based upon the following: the colloquy between the Plaintiff and the Mayor at the February 3, 2009 meeting; invoices submitted by the Solicitor; and the Solicitor's February 18, 2009 letter to the Plaintiff. In opposition to Plaintiff's initial application, the Township Solicitor, Mr. Klineburger, submitted a Certification which specifically denied that there had been any secret meetings. It became at that point a question of credibility and the Court requested that testimony be presented. The only witness to testify was Mr. Klineburger. With respect to the statements made by the Mayor during the meeting of February 3, 2009, I do not give them much weight. They are unsworn statements made in the mist of what appeared to be a heated discussion between the Mayor and the Plaintiff.

As to the Solicitor's invoices which indicate meetings with the commissioners on various dates, Mr. Klineburger testified that when he took over as Solicitor, there was a great amount of work to be reviewed. Since there were volumes of files and documents, he felt it more expedient to review those documents at the Municipal Building. He further explained that the billing program he used at the time lumped all the time he spent at the building as "Haddon Township time." He stated that he would meet with commissioners from time to time at the Municipal Building to review various files. He also testified that he never met with more than one commissioner at a time, although it may not appear that way in his invoices, which was the nature of the billing system he used.

As to the February 18, 2009 letter, he responded to what he perceived to be an OPRA request and not an admission that he was having any secret meetings.

At the time of his testimony, he specifically denied having ever met with members of the governing body in a manner that would constitute a violation of the OPMA. I find Mr. Klineburger's testimony to be credible. His explanation of the billing system is reasonable, he seemed sure of his recollection, I did not find him evasive nor was there any unwillingness or reluctance to answer the questions posed.

Accordingly, I accept his testimony and do not find that there is a violation of the OPMA and deny Plaintiff's relief in that regard.

Plaintiff's counsel is to prepare an Order in accordance with this Letter Decision and submit the same under the Five-Day Rule.

In light of this Letter Decision, the hearing scheduled for November 9, 2009 is canceled.

Very truly yours,



LOUIS R. MELONI, J.S.C.

LRM:tls