



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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September 24, 2010

Board of Commissioners
Neptune Housing Authority
1810 Alberta Ave
Neptune, NJ 07753 *(via e-mail only to pced@tnha.org)*

RE: Compliance with the Open Public Meetings Act and Open Public Records Act

Dear Commissioners:

I write both individually and on behalf the New Jersey Libertarian Party's Open Government Advocacy Project to comment on the manner in which the Board of Commissioners attempts to comply with the Open Public Meetings Act and Open Public Records Act. In order that you can better understand my comments, I provided the following chronology:

- | | |
|---------------------|--|
| August 26, 2010: | I submit my records request (see Exhibit page 1 (without attachments)) |
| September 14, 2010: | After not having received a timely response to my request, I leave a voicemail for "Jean" at 732-774-7692 seeking a response. |
| September 15, 2010: | Voicemail received from Paul Caverly informing me that he has questions regarding my request. |
| September 15, 2010: | I return Mr. Caverly's call at 10:34 a.m. and am informed that the Commission "rarely holds executive sessions," that he recalls an executive session being held in June 2010, that it would be a substantial effort for him to locate the resolutions and minutes for the executive sessions for the two earlier executive sessions contained within my request, and that the |

minutes for the June 2010 public and executive meetings will not be approved until September 21, 2010. I agree to modify my request so that I am only seeking the resolution and minutes of the June 2010 executive session. I also inform Mr. Caverly that the fact that meeting minutes are not “approved” does not affect the Board’s duty to make them promptly available¹ to the public but nonetheless grant an extension until September 22, 2010.

- September 15, 2010: I sent a confirming e-mail to Mr.Caverly.
- September 23, 2010: I receive a voicemail from Mr. Caverly asking me asking me how I would like to “pick up” the responsive documents and how I propose to pay for them.
- September 24, 2010: I advise Mr.Caverly by e-mail that I do not wish to “pick up” the documents, rather I would like them e-mailed or faxed to me and requesting to know the fee for the copies.
- September 24, 2010: I receive a 5-page fax from Mr. Caverly (See Exhibit pages 2 through 6).

Open Public Records Act Violations:

1. Upon receipt of an Open Public Records Act request, the Housing Authority is required to either grant access, deny access or seek additional information or clarification within seven business days. Yet my request was not responded to at all until after I telephoned the Authority’s offices on September 14, 2010— which is much more than seven business days after I made my request. This is a violation of N.J.S.A. 47:1A-5(i) and I recommend that the Authority, going forward, obey this statute.

2. Mr. Caverly’s September 24, 2010 letter informs me that I am responsible for paying \$.75 per page for the records furnished. This per-page charge appears to ignore the Appellate Division’s decision in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010). In Smith, the Appellate Division held that beginning July 1, 2010, unless and until the Legislature amends OPRA to specify otherwise or some other statute or regulation applies, public agencies must charge requestors of government records no more than the reasonably approximated “actual costs” of copying such records. Is it the Authority's position that it costs \$.75 per page to fax a record? Please advise.

¹ For more information on what constitutes “promptly available’ please see <http://njopengovt.blogspot.com/2009/06/new-jersey-cases-regarding-prompt.html>

3. ¶ 2 of my request should have caused the Authority to provide me with the minutes of the June 28, 2010 *executive* session. But, the only responsive document is the minutes of the June 28, 2010 *public* session (Exhibit page 6). Accordingly, the Authority has violated OPRA by not either granting or denying access to ¶ 2 of my request even though more than seven business days have elapsed since my request was made. Please either grant or deny access to ¶ 2 of my request by no later than Wednesday, September 29, 2010.

Be advised that if I do not receive a timely grant or denial of ¶ 2 of my request, I will file a complaint against the Authority with the Superior Court or the Government Records Board of Commissioners without further notice.

Open Public Meetings Act Violations:

1. If there are no minutes of the September 28, 2010 executive session, the Authority is in violation of N.J.S.A. 10:4-14 which requires the Authority to keep “reasonably comprehensible” minutes of all its meetings, both public and executive.

2. The only apparent resolution responsive to ¶ 1 of my request is the motion to go into executive session set forth in the fourth paragraph of the June 28, 2010 public session minutes (Exhibit page 6). Yet, the Senator Byron M. Baer Open Public Meetings Act requires a public body, such as the Neptune Township Housing Authority, to publicly pass a resolution before excluding the public from a meeting. The statute that requires the resolution states:

N.J.S.A. 10:4-13—Closed meetings; resolution to conduct.

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. (10:4-12) until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

The simplistic motion set forth in the public minutes fails to satisfy N.J.S.A. 10:4-13 because it gives the public no real sense of what is being privately discussed².

² In January 2007, when I most recently litigated this issue, Middlesex County Superior Court Judge Alexander P. Waugh issued a written decision in which he agreed with other court decisions that "closed session resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest." Judge Waugh's decision and other case documents are on the Web at <http://ogtfarchive.org/OGTF/MonroeBOEWebready.pdf>

There, of course, can be no dispute that the Board of Commissioners often has legitimate reasons to meet in nonpublic session. Among these reasons is the need to prevent the adverse parties in litigation or contract negotiations from gaining an unfair advantage and to allow members of the Board to debate and deliberate personnel matters without public scrutiny or participation. But, the need to discuss matters privately should not prevent the public from being informed, as precisely as possible, of the topics that are being privately discussed.

For example, suppose that the Authority is being sued by a Mr. Jones who was injured after he slipped and fell on what he claims to be negligently maintained Authority property. Since the lawsuit is already a public record, there is no public purpose served by vaguely describing a private discussion of it as discussion involving “legal and personnel matters.” Rather, the resolution should at the very least describe the private discussion as “Discussion of slip and fall negligence suit, Jones v. Neptune Housing Authority, Docket No. MON-L-012345-10.” This way, the public has a very good sense of what the Board’s private discussion is about while the ability of the Board of Commissioners to develop its lawsuit strategy is not undermined.

Using the same example, suppose that Jones’ attorney sent the Board’s attorney an offer to fully settle the lawsuit upon the Board’s payment of \$20,000. While the Board of Commissioners would obviously need to discuss how to respond to the offer in private, lest Jones or his attorney would be in the audience witnessing the discussion, there is no reason why the public cannot be informed in the N.J.S.A. 10:4-13 resolution that the Board of Commissioners will meet in private to discuss “a settlement offer received from the Plaintiff in the slip and fall negligence suit known Jones v. Neptune Housing Authority, Docket No. MON-L-012345-10, in which the Plaintiff offers to settle the suit in exchange for the Board paying him \$20,000.” While it may initially seem that this would provide “too much” information to the public, this concern disappears once it is realized that the sole purpose of the exception³ that allows litigation matters to be discussed in private is to keep the adverse party to the litigation in the dark regarding the Board’s position.⁴ Since, in this example, the adverse party (i.e. Jones) already knows that he offered to settle the lawsuit for \$20,000, there is no legitimate reason why the public should not also know of the tendered settlement offer.

As another example, suppose that a personnel matter, such as whether or not a Mrs. Smith, an Authority employee, should be disciplined because of repeatedly arriving late to work, is to be discussed in closed session. In such a case, the amount of detail set forth in the N.J.S.A. 10:4-13 resolution should correspond to the amount of detail that the Board of Commissioners and its attorney predict will be publicly disclosed in the closed meeting’s minutes, when those minutes are made public.

³ N.J.S.A.10:4-12(b)(7) is to prevent adverse parties to litigation and contracts from learning the details of the public body’s negotiation tactics and litigation strategy.

⁴ See the discussion in Paff v. Washington Township, Docket No. MER-L-2205-07 and Nevin v. Asbury Park City Council, 2005 WL 2847974 (App. Div. November 1, 2005) which are on-line at <http://ogtfarchive.org/OGTF/Washington.pdf> (Nevin begins at page 44 of the PDF file at the link).

The standard that the Board of Commissioners is to use when determining how much information about a personnel matter is to be disclosed in the closed session's minutes is set forth in South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478 (1991). That standard is that a) the public needs information if it is properly fulfill its role of evaluating the wisdom of governmental action or a decision not to act, b) that New Jersey's strong public policy requires that a public body's actions and decisions to not act be disclosed in the body's closed meeting minutes along with sufficient facts and information to permit the public to understand and appraise the reasonableness of the body's determination, and c) to the extent a cognizable privacy interest may be compromised by the required disclosure, the extent of disclosure may be modified through redactions of the minutes, provided the public interest in disclosure is not subverted

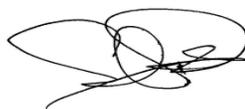
Thus, regardless of whether the Board of Commissioners disciplines Ms. Smith or chooses to not impose discipline due to her lateness, the outcome should be recorded in the closed meeting minutes. The question of whether that entry in the minutes should be redacted before the minutes are made public requires a balancing of Ms. Smith's interest in keeping the disciplinary matter private against the public's interest in effectively monitoring the Board of Commissioners. If the Board of Commissioners, with counsel's advice, determines after balancing these interests that the outcome will be published unredacted in the closed session's minutes (i.e. if the minutes will disclose to the public, e.g. that "Ms. Smith was suspended for three days on account of her habitual lateness"), then the exact nature of the matter (i.e. that "the Board of Commissioners will discuss disciplining Ms. Smith for excessive lateness") should be set forth in the closed meeting's N.J.S.A. 10:4-13 resolution. Inversely, if the Board of Commissioners determines that Ms. Smith's privacy interest exceeds the public's right to know, then less information (e.g. "the Board of Commissioners will discuss disciplining an employee for excessive lateness") should be set forth in the closed meeting's N.J.S.A. 10:4-13 resolution.

In other words, if the officer or employee being discussed doesn't have a privacy interest sufficient to withstand a citizen's request for the executive session minutes, why should not the public know the topic of the executive session prior to it occurring?

Attached to this letter is a "model resolution" that I ask the Board of Commissioners to consider using going forward. Will the Board of Commissioners use this form, or will it otherwise increase the level of detail it puts in its N.J.S.A. 10:4-13?

Thank you very much for your attention to this matter. I look forward to your reply.

Sincerely,

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

John Paff

P.S. Be advised that it is my practice to submit another request, at a future date, for a resolution authorizing an executive session that occurred after your receipt of this letter. If I find at that time that the Board's resolution remains non-compliant, I will file a civil complaint in the Superior Court against the Authority in accordance with N.J.S.A. 10:4-16 without further notice. Please be guided accordingly.

**NEPTUNE TOWNSHIP HOUSING AUTHORITY
RESOLUTION NO. _____
AUTHORIZING EXECUTIVE SESSION**

WHEREAS, while the Sen. Byron M. Baer Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) requires all meetings of the Neptune Township Housing Authority Board of Commissioners to be held in public, N.J.S.A. 10:4-12(b) sets forth nine (9) types of matters that may lawfully be discussed in “Executive Session,” i.e. without the public being permitted to attend, and

WHEREAS, the Neptune Township Housing Authority Board of Commissioners has determined that _____ (insert number) issues are permitted by N.J.S.A. 10:4-12(b) to be discussed without the public in attendance shall be discussed during an Executive Session to be held on _____, 20____ at _____ P.M, and

WHEREAS, the nine (9) exceptions to public meetings set forth in N.J.S.A. 10:4-12(b) are listed below, and next to each exception is a box within which **the number** of issues to be privately discussed that fall within that exception shall be written, and after each exception is a space where additional information that will disclose as much information about the discussion as possible without undermining the purpose of the exception shall be written.

“(1) Any matter which, by express provision of Federal law, State statute or rule of court shall be rendered confidential or excluded from public discussion.” The legal citation to the provision(s) at issue is: _____ and the nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(2) Any matter in which the release of information would impair a right to receive funds from the federal government.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(4) Any collective bargaining agreement, or the terms and conditions of which are proposed for inclusion in any collective bargaining agreement, including the negotiation of terms and conditions with employees or representatives of employees of the public body” The collective bargaining contract(s) discussed are between the Council and _____
_____;

“(5) Any matter involving the purchase lease or acquisition of real property with public funds, the setting of bank rates or investment of public funds where it could adversely affect the public interest if discussion of such matters were disclosed.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is

_____;

“(6) Any tactics and techniques utilized in protecting the safety and property of the public provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____

_____;

“(7) Any pending or anticipated litigation or contract negotiation in which the public body is or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.” The parties to and docket numbers of each item of litigation and/or the parties to each contract discussed are _____ and

nature of the discussion, described as specifically as possible without undermining the need for confidentiality is _____

_____;

“(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance, 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 individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” Subject to the balancing of the public’s interest and the employee’s privacy rights under South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, the employee(s) and nature of the discussion, described as specifically as possible without undermining the need for confidentiality are _____

_____;

“(9) Any deliberation of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act of omission for which the responding party bears responsibility.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is

_____;

WHEREAS, the length of the Executive Session is estimated to be _____ minutes after which the public meeting of the Council shall (circle one) reconvene and immediately adjourn or reconvene and proceed with business.

NOW, THEREFORE, BE IT RESOLVED that the Neptune Township Housing Authority Board of Commissioners will go into Executive Session for **only** the above stated reasons;

BE IT FURTHER RESOLVED that the Council hereby declares that its discussion of the aforementioned subject(s) will be made public at a time when the public's interest in disclosure is greater than any privacy or governmental interest being protected from disclosure. For each of the above items, the estimated date by which such disclosure can be made and/or the occurrence that needs to take place before disclosure can be made are listed below (attach separate sheet if necessary)

Subject of Discussion	Estimated Date	Necessary Occurrence

BE IT FURTHER RESOLVED that the Clerk, at the present public meeting, shall read aloud enough of this resolution so that members of the public in attendance can understand, as precisely as possible, the nature of the matters that will privately discussed.

BE IT FURTHER RESOLVED that the Clerk, on the next business day following this meeting, shall furnish a copy of this resolution to any member of the public who requests one at the fees allowed by N.J.S.A. 47:1A-1 et seq.

Chairman

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE RESOLUTION APPROVED BY THE NEPTUNE TOWNSHIP HOUSING AUTHORITY BOARD OF COMMISSIONERS AT ITS PUBLIC MEETING HELD ON _____ 20__.

Clerk

OPRA Request

Housing Authority of Neptune Township

Submitted on 08/26/10 via Fax to 732-774-9456

To the Custodian of Records: Please accept this as my request for government records. Please note that the Open Public Records Act (OPRA) is not the only basis for my request. I claim entitlement to the records sought under both OPRA and the Common Law right of access.

Requestor's Name: John Paff
Address: DO NOT use regular mail either for replying to this request or or sending me the responsive records.
Please use e-mail or fax instead.
Phone: 732-873-1251
Fax: 908-325-0129
E-Mail: paff@pobox.com

Records Requested:

1. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the three most recently held non-public (i.e. "closed" or "executive") meetings held by the Housing Authority. If the resolutions are spread out in full in the public meeting minutes, please provide only the relevant pages.
2. The minutes of any meetings, redacted as necessary, authorized by the resolutions responsive to #1 above.
3. The detailed legal invoices submitted to the Authority by any attorney who did work for or on behalf of the Authority. I am interested in receiving those invoices only for legal services rendered during the months of March, April and May 2010. I've attached samples of the types of invoices I'm seeking so that you know what I want.

To John Paff
From Paul Cavally
DATE 9-27-10

4 Pages

Please make check to Township of
Neptune Housing Authority

3 pages @ .75 = \$2.25

Thank you

Paul Cavally

Bart J. Cook, Esq.
713 Bangs Avenue P.O. Box
Asbury Park, New Jersey
(713) 774-6728 Fax (732) 774-6783

The Neptune Housing Authority
1810 Alberta Avenue
Neptune, New Jersey 07753
(732) 774-7692

Supplement to March 2010 Invoice

March 3, 2010

Telephone conf established meeting dates.

10 minutes

March 5, 2010

Personnel committee meeting with Howard O'Neal and Lois Lawson. Outlined the scope and provisions of the executive director contract.

2 hrs

March 5, 2010

Drafted proposed director contract.

2 hrs

March 8, 2010

Personnel committee meeting with Howard O'Neal and Lois Lawson. Reviewed the proposed executive director contract.

50 mins

Bart J. Cook Esq.

713 Bangs Ave P.O. Box 1082
 Asbury Park, New Jersey 07712
 (732) 774-6728 fax (732) 774-6783

Invoice No.

INVOICE

Customer

Name The Housing Authority
 Address 1810 Alberta Avenue
 City Neptune State NJ ZIP 07753
 Phone 732-774-7692

Date February-10
 Order No. _____
 Rep _____
 FOB _____

Qty	Description	Unit Price	TOTAL
1	February retainer agreement	\$1,125.00	\$1,125.00
5	filed tenancies	\$36.00	\$180.00
2	Nick Williams (telephone Conferences) 2 Hrs	\$150.00	\$300.00
1	Paul Caverly (telephone Cnfr 1 Strike) 1/2 Hr	\$150.00	\$75.00
1	Office Conf Personnel Com 2Hrs	\$150.00	\$300.00
	Copies @ .27 per copy		\$23.00

Payment Details

Cash
 Check
 Credit Card

Name _____
 CC # _____
 Expires _____

SubTotal	\$2,003.00
Shipping & Handling	\$0.00
Taxes State	
TOTAL	\$2,003.00

Office Use Only

Insert Fine Print Here

Insert Farewell Statement Here

Bart J. Cook Esq.

713 Bangs Ave P.O. Box 1082
 Asbury Park, New Jersey 07712
 (732) 774-6728 fax (732) 774-6783

Invoice No.

INVOICE

Customer		Date	April-10
Name	The Housing Authority	Order No.	
Address	1810 Alberta Avenue	Rep	
City	Neptune State NJ ZIP 07753	FOB	
Phone	732-774-7682		

Qty	Description	Unit Price	TOTAL
1	March Retainer Agreement	\$1,125.00	\$1,125.00
3	Eviction Tenancies Filed	\$36.00	\$108.00
2	Letters Notice to Quit	\$50.00	\$100.00
8	Small Claims	\$85.00	\$680.00
14	Tenancies	\$85.00	\$1,190.00
1	Consultation Director's Cont raot	\$150.00	\$150.00
4	Trips to and from Freehold @ .325 per mile Copies @ .27 per copy		\$60.00 \$23.00

Payment Details

Cash
 Check
 Credit Card

Name _____

CC # _____

Expires _____

SubTotal	\$3,436.00
Shipping & Handling	\$0.00
Taxes State	
TOTAL	\$3,436.00

Office Use Only

Insert Fine Print Here

Insert Farewell Statement Here

SPECIAL MEETING OF JUNE 28, 2010

The Commissioners of the Housing Authority of the Township of Neptune, in the County of Monmouth, met in regular session in the conference room at 1810 Alberta Avenue, Neptune, New Jersey. Chairman Williams called the meeting to order at 4:00 P.M. Mr. Caverly called the roll.

Present: Commissioner Green, Lawson, Manning, Neuman, O'Neil, Reilly, Williams
Absent: None

It was announced that the requirements of R.S. 10:4-18 has been satisfied by the publication of the required advertisement in the Asbury Park Press and the Coaster on June 24, 2010, posted on the bulletin board in the Central Office of the Housing Authority of the Township of Neptune and filing said notice with the Municipal Clerk of the Township of Neptune. In case of a fire, the stairways to the right and left will be utilized as our emergency exits.

Following a minute of silence and the flag salute the Chairman called for an Executive Session. A motion was offered by Commissioner O'Neil and seconded by Commissioner Green. The "Ayes" and "Nays" were as follows:

Ayes: Green, Lawson, Manning, Neuman, O'Neil, Reilly, Williams
Nays: None

A return from Executive Session was offered by Commissioner O'Neil and seconded by Commissioner Reilly. The "Ayes" and "Nays" were as follows:

Ayes: Green, Lawson, Manning, Neuman, O'Neil, Reilly, Williams
Nays: None

A resolution was presented whereas the Board of the Authority wishes to continue discussions with the hospital (J.S.U.M.C.) in regard to the purchase of the Authority's property on Davis Avenue (48-2). It was further decided that both the Hospital Committee and the Executive Director are authorized to continue the talks and are instructed to approve the procurement of a developer and negotiate a contract that will be beneficial to the Housing Authority. A motion was offered by Commissioner O'Neil and seconded by Commissioner Green. The "Ayes" and "Nays" were as follows:

Ayes: Commissioners Green, Lawson, Manning, Neuman, O'Neil, Reilly
Nays: None
Abstain: Commissioner Williams

A motion to adjourn was offered by Commissioner O'Neil and seconded by Commissioner Green and the vote was unanimous. Meeting closed at 5:45 P.M.

Paul F. Caverly, PHM
Executive Director