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KEVIN M. O'BRIEN, *Plaintiff* v. BOROUGH OF WOODCLIFF LAKE, *Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-5215-11 CIVIL ACTION OPINION

Argued: July 29, 2011

Decided: August 4, 2011
Honorable Peter E. Doyne, A.J.S.C.

Kevin M. O'Brien appearing pro se.

Mark Madaio, Esq. appearing on behalf of the defendant, Borough of Woodcliff Lake (Law Office of Mark Madaio).

Introduction

On June 16, 2011, Kevin O'Brien, pro se, ("plaintiff" or "O'Brien") filed a "Notice of motion; Order of Prerogative Writ [sic]." The notice apparently sought to include a four count complaint. As plaintiff proceeds pro se, procedural irregularities shall be overlooked to the extent defendant's due process rights are not violated.

Plaintiff named the Borough of Woodcliff Lake ("Woodcliff Lake," "Borough," or "defendant") as the defendant. O'Brien, a former resident of Woodcliff Lake now

residing in Westwood, New Jersey, alleged the Borough violated the Open Public Records Act ("OPRA" or the "Act"), N.J.S.A. 47:1A-1 to -13 and the Open Public Meetings Act ("OPMA"), N.J.S.A. 10:4-6 to -21, by failing to produce certain records corresponding to a "Closed Session Executive Session of the Town Council meeting [which took place on] June 7, 2010" ("closed session" or "closed meeting"). [1] Specifically, plaintiff alleged the Borough records custodian failed to comply with his OPRA request for the closed session meeting minutes and the Borough, in violation of OPMA, failed to release the minutes in a "prompt" manner as required by the statute.

Pleadings

Plaintiff's first count of his June 16, 2011 "complaint" alleged the Borough did not respond in accordance with OPRA when plaintiff requested the closed meeting minutes which addressed the issue of the indemnification of Joanne Howley ("Howley"), a former council member. Plaintiff's second count alleged the Borough failed to provide access to the closed session minutes thereby violating OPMA. The third count set forth the Borough failed to provide adequate notice of the closed session meeting and to release the agenda and minutes for the closed session in a "prompt" manner as required by the Open Public Meetings Act. N.J.S.A. 10:4-14[2]. In count four, plaintiff appears to allege OPMA and a prior court order were violated by the Borough Planning Board's ("Planning Board") refusal to grant him access to the minutes. Plaintiff further alleged, by way of his brief, the Planning Board violated a February 15, 2011 court order by

[1] Plaintiff does not currently reside in Woodcliff Lake. As O'Brien was a resident of Westwood at the time of this action's filing, there may be an issue of standing. However, as counsel did not raise the issue the court will proceed to address the matter on the merits. Nothing herein shall be deemed a consideration of the standing issue.

[2] Within this count, plaintiff alleged the Borough failed to issue a purported forty-eight (48) hour public notice prior to the closed session meeting on June 7, 2010.

holding meetings via private e-mail exchanges thereby conducting public business in a "secluded process."

O'Brien sought a court order (1) to compel the Borough to release the minutes of the June 7, 2010 closed session town meeting, (2) to mandate the planning board comply with a court order prohibiting the use of private emails to conduct town business, (3) declaring the Borough violated OPRA by not responding when the closed session meeting minutes would be made available, (4) declaring the Borough violated OPMA by failing to make the requested meeting minutes "promptly available to the public," (5) to compel the Borough to fix a time within which it must make nonexempt portions of its meetings publicly accessible, (6) to enjoin the Borough from violating the time period fixed by OPMA and mandate forty-eight hour notice be given prior to Town Council closed sessions and (7) for all costs associated with this litigation.

On behalf of Woodcliff Lake, Borough Attorney, Mark Madaio, Esq. ("Madaio," "Borough Attorney," or "counsel for defendant") filed, on July 14, 2011, an answer with seventeen affirmative defenses and a summary judgment motion seeking the dismissal of plaintiff's complaint. Defendant's motion included certifications by the Borough clerk and records custodian, Lorinda Sciara ("Sciara", "clerk" or "Clerk Cert.") and Borough Mayor Joseph Lapaglia ("Lapaglia" or "Mayor"). Defendant requested the court dismiss counts one, two, and three of O'Brien's complaint for failure to state a cause of action upon which relief can be granted. R. 4:6-2(e). Counsel's brief also requested the fourth count be dismissed as the Planning Board is not a party.

On July 18, 2011 plaintiff submitted a reply in opposition to defendant's motion for dismissal and summary judgment.

Both parties thereafter filed unauthorized sur-replies which were also reviewed and considered.

Statement of Facts

Sciara was on extended sick leave from May 1, 2010 to September 7, 2010. In her stead, Edward Sandve ("Sandve") acted as the certified clerk and was tasked with all the duties of the Borough's custodian of records. On June 7, 2010, while Sciara was on sick leave, a Town Council meeting took place. After an open session resolution, the Town Council entered into closed session to discuss an indemnification request by Howley, a former council member who, at the time, was under investigation for purported ethics violations by the Bergen County Prosecutors Office. Kathy Rizza ("Rizza"), a secretary for the Borough, took the minutes for the June 7, 2010 meeting.

It appears on June 21, 2010, the minutes for the open and closed session meetings were approved, but before the closed session minutes could be released, a second "releasability" vote was required.

On August 3, 2010, Howely withdrew her indemnification request.[3] As such, when Sciara returned to her position as clerk on September 7, 2010, she compiled the closed session meeting minutes for eight different closed sessions including one provided to her and entitled "Executive Session Minutes June 7, 2010."[4] By way of her certification, Sciara asserts at the Mayor and Council meeting on October 18, 2010 the governing body voted not to release the closed session minutes of several meetings, including the June 7, 2010 meeting, as many of the body's members had not reviewed the

[3] It was conceded by both parties during oral argument the withdrawal of the indemnification request prompted the requirement for a timely release of the closed session minutes as they were no longer of a sensitive nature.

[4] Sciara confirmed the indemnification of former councilwoman Howley was discussed at this session and was so recorded in the minutes.

minutes. However, the June 7, 2010 closed session minutes were approved for release by the governing body at the next scheduled meeting for Mayor and Council on November 3, 2010. Accordingly, the clerk certifies the minutes presented to her were posted on the town website within a week of the November 3, 2010 approval of release. However, the minutes which were presented to the clerk and posted on the town website were not, in fact, the closed session minutes, but rather were the minutes for the end of open session.

The impetus for the current action occurred when, on June 1, 2011, plaintiff emailed an OPRA request to the Sciara seeking access to these closed session minutes concerning Howley's indemnification. The clerk responded within an hour and asked the plaintiff provide a more specific date for the requested minutes. Plaintiff then contacted Sciara directly and requested the "Closed Session Executive Session of the Town Council meeting on June 7, 2010." Sciara, not realizing only the open session minutes were posted, explained she had already posted the closed session minutes on the borough website. On June 6, 2011, plaintiff contacted Sciara stating the June 7, 2010 minutes provided "were incomplete." The clerk, still apparently under the misunderstanding she had released the closed session minutes, responded by explaining Rizza took the minutes and stating she could not "provide any information as to why the minutes are inaccurate or incomplete. That [was her] final answer on the issue."

Later that day, plaintiff raised the issue of the incomplete closed session minutes at the Mayor and Council meeting; however, Sciara certified she left the meeting early due to a 5:00 AM town commitment the next day. Following the Mayor and Council meeting and after going through stored files at his Borough Hall office, the Mayor approached Sciara on June 7, 2011 and presented her with the "original Meeting Agenda

for June 21, 2010 with all original attachments including the proposed Closed Session Minutes from June 7, 2010." It was at this time, the clerk states, she became aware the minutes the Mayor disclosed to her were not the same as the minutes she was presented with upon her return from sick leave and had posted/distributed following the November 3, 2010 release approval.

Sciara confirmed, after listening to the tape of the June 7, 2010 meeting, the minutes she had posted on the website in November, 2010 and distributed to plaintiff were not the "correct" closed session minutes. What had originally appeared to the clerk as the closed session minutes were actually minutes for the end of the open session.[5] The Mayor directed Sciara to forward the closed session minutes to plaintiff as soon as a copy could be obtained from Rizza.[6]

On June 10, 2011, the clerk emailed plaintiff stating the town meeting's minutes, which had been posted on the town website, were "confusing" and incomplete. Specifically, she had been in possession of, and publicly posted, the minutes for the open session of the town meeting, but not for the closed session. The clerk also certified on June 10, 2011 at 8:56 AM, she forwarded the "correct" closed session minutes of the June 7, 2010 meeting to plaintiff via email. In contrast, plaintiff maintained he did not receive a copy of the closed session minutes until June 21, 2011.[7]

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[5] It is plaintiff's position however, the failure to post the correct closed session minutes was a deliberate act designed to acheive nefarious goals and keep the council's discussion secret.

[6] The mayor certifies during the tape review it was discovered a scrivener's error existed for the July 12, 2010 meeting minutes. Specifically, the June 21, 2010 minutes incorrectly stated the open and closed session meeting minutes of the May 17, 2010 meeting were approved when in reality, the June 7, 2010 minutes were approved during the June 21, 2010 meeting. The correction of the date was "adopted by the Governing Body on June 20, 2011."

[7] There appears to be some degree of uncertainty surrounding which minutes were sent along with the clerk's June 10, 2011 email. During oral argument plaintiff submitted, with the consent of opposing counsel, Sciara's June 10, 2011 8:55 AM email to O'Brien labeled "exhibit C-1." The email shows a document was attached entitled "kr minutes 6-7-10.pdf (499.7 KB)." During oral argument, defendant

The clerk stated she received plaintiff's OPRA request on June 1, 2011 and complied with the request for the "correct" closed session minutes at 8:56 AM on June 10, 2011, within seven (7) business days of the request.

In addition, the clerk asserted she would have to listen to "every tape to see if [the Borough attorney] ever made a reference whether minutes existed referencing his legal guidance concerning Howley's indemnification."[8]

By way of his brief, plaintiff referenced an October 18, 2010 statement by the Borough Attorney at a public meeting to substantiate his allegation the minutes for the closed meeting were missing or incomplete. The record allegedly showed Madaio stating, in reference to the closed meeting, "there is not very much there in the way of minutes . . . . There is really nothing in the minutes, in effect the minutes are really blank pages." Madio then allegedly recommended the minutes not be released.[9] Plaintiff provided no documentation to support this allegation.

Plaintiff also questions the use of private emails by the Planning Board. Plaintiff maintained on or about March 10, 2011, the Borough Planning Board President, George Fry ("Fry"), corresponded with four other board members via private email accounts.

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posited, in accord with the Clerk Cert., this attachment contained the closed session minutes requested, and thus constituted a timely response to the OPRA request. However, plaintiff provided a print out of the attachment and notes the attachment contained only the open session minutes to which he already had been provided access, not the closed session minutes which had been revealed to the clerk by the Mayor. After, examining this exhibit, Madaio stated he would check Sciara's email records to discover if the closed session minutes had been included in the 8:55 AM email. However, counsel conceded if plaintiff was correct, that is the closed session minutes were not attached to the June 10, 2011 email, the OPRA response would not have been timely as plaintiff suggested he did not receive the closed session minutes until June 21, 2011. Regardless, counsel maintained any failure to provide the requested minutes on June 10, 2011 was inadvertent. The court did not receive further submissions regarding the result of counsel's research as of the date of this decision.

[8] This statement appears to reference the question of whether the Borough attorney had publicly referenced the closed session minutes, not whether the closed session minutes actually existed. Sciara acknowledged the correct closed session minutes existed earlier in the same email.

[9] During oral argument, Madaio explained his October 18, 2010 statements were with regard to the end of the open session minutes, which he believed along with everyone else, were the closed session minutes.

Fry inquired concerning the other members' positions on "recommending to the Mayor and Council that they consider moving forward with phase 2 of the Broadway study." Plaintiff produced email records showing four private account responses to the Planning Board President's email, all in favor of moving forward with the proposed study. Plaintiff alleged this was a method of seeking votes through a "secluded process" as no public notice was given prior to this "electronic meeting."

Lastly, plaintiff asserted councilman Jeff Hoffman, on June 25, 2010, sent an email using his private email account to four other council members' private accounts rather than their Borough email accounts. The email stated in part, "[P]equannock decided not to offer their boro clerk a new contract. Are they a different form of government? If not why can they replace?".

Parties' Arguments

A. Plaintiff's complaint

By way of his complaint, plaintiff cited to McClain v. College Hospital, 99 N.J. 346, 355 (1985) as representative of New Jersey's strong public policy in fostering an "open government." This public policy is so strong, plaintiff noted, citizens have a common law right to access government records even where their interest in doing so is "slight." Irval Realty v. Bd. of Pub. Util. Commissioners, 61 N.J. 366, 372 (1972).

In count one of his brief, plaintiff argued the response by the clerk to his June 1, 2011 request was not in compliance with OPRA. First, plaintiff alleged non-compliance because the clerk was required to notify the requestor "when the record can be made

available". N.J.S.A 47:1A-5(i).[10] Next, plaintiff argued if the clerk had reason to know the requested minutes would be unavailable, the clerk was obligated under OPRA to "indicate the specific basis [for why the request could not be granted] on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). Plaintiff further contended the clerk's June 6, 2011 response failed to follow this mandate. O'Brien claimed the clerk's failure to respond to his email by appropriately granting, denying, seeking clarification or requesting additional time within seven days constituted a denial of his application. Plaintiff contended the minutes received on June 10, 2011, after Sciara learned of the existence of the "correct" closed session minutes, were once again the open session minutes. Plaintiff provided exhibit C-1 which included a print out of the attachment sent on June 10, 2011. This attachment includes the open session minutes only, in contrast with the Clerk Cert.'s position the requested minutes were sent on June 10, 2011.

In count two, plaintiff maintained the Borough failed to comply with OPMA by refusing him access to the minutes for the closed meeting. Plaintiff, by way of his brief, alleged the Borough's failure to release the minutes were in violation of OPMA which requires the minutes of all meetings be "promptly available to the public". N.J.S.A. 10:4-14. Plaintiff argued any exception to the prompt notice requirement sought under N.J.S.A. 10:4-9, allowing for a delay in notice in order to avoid substantial harm the public interest, would be inapplicable. Specifically, plaintiff noted the meeting was not so urgent and important as to justify noncompliance with OPMA as Howley had retracted her indemnification request "[eleven] months ago", and no significant public harm would

[10] O'Brien cites to this section of OPRA discussing the requisite protocol for when a record is temporarily unavailable or in storage. Had the requested documents been immediately available, the Borough Clerk would have had seven days to comply with O'Brien's request. See N.J.S.A. 47:1A-5.

come from the minutes' release. Furthermore, in a July 25, 2011 letter requesting an amendment to his pleading, plaintiff provided a letter from Howley, dated August 3, 2010, officially withdrawing her indemnification request "without prejudice."

It is plaintiff's contention the need to withhold from the public the minutes concerning Howley's indemnification ended once the indemnification request was withdrawn. As such, plaintiff argued the closed meeting minutes should have been made "promptly" available after August 3, 2010. Defendant does not contravene this assertion.

In count three of plaintiff's brief, plaintiff alleged the Borough also violated OPMA (1) by failing to provide "adequate notice" of the closed session meeting, and (2) by failing to release the open session minutes and the closed session agenda in a "prompt" manner as required by OPMA.[11] Plaintiff maintained the agendas for the open and closed session segments of the June 7, 2010 meeting were not released until June 2011, one year after the meeting took place. Thus, O'Brien posited, the release was not "prompt". O'Brien's brief cited to Liebeskind v. Mayor and Municipal Council of Bayonne, 265 N.J. Super. 389, 394-95 (App. Div. 1993) (affirming the trial judge's mandate that the defendant publish its meeting minutes within two weeks of any given public meeting); O'Shea v. W. Milford Township Council, et al., PAS-L-2229-04, final order (July 14, 2004); and O'Shea and John Paff v. Kearny Board of Education, HUD-L-856-07, final order (May 8, 2007) to indicate other courts have interpreted a "prompt" release of minutes to mean a matter of days to a matter of weeks.[12] Plaintiff also cited to Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of

[11] OPMA has defined adequate notice as "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting . . . .". N.J.S.A. 10:4-8.

[12] O'Brien appears to have addressed the issue of promptness in counts two, three, and four of his brief. And see R. 1: 36-3.

Education, 212 N.J. Super. 328, 331 (Law Div. 1986) for the proposition the purpose of providing prompt access to minutes is, in part, to allow the public "the opportunity to take action before the next meeting." Lastly, plaintiff supported the premise a delay of minutes availability beyond two weeks is not prompt by citing to the New Jersey Municipal Clerk's Study Guide which states, in part, "the board's minutes, in order to be promptly available as required by the Open Public Meetings Act, must be available within two weeks after any regular meeting."

In count four, plaintiff maintained the Planning Board violated OPMA and a prior order by refusing to release the closed meeting minutes. Plaintiff again cited to Liebeskind, supra, 265 N.J. Super at 394-95 for the proposition minutes should be made available within two weeks after each meeting and at least three business days prior to the next meeting. The brief also reiterated OPMA's directive of keeping "reasonably comprehensible" minutes to be promptly available to the public. N.J.S.A. 10:4-14.

Plaintiff raised additional OPMA claims against the Planning Board for their use of private email accounts in conducting public business, including the violation of a February 15, 2011 court order.[13]

B. Defendant's Answer

By way of his brief, counsel for the defendant asserted the first and second counts of plaintiff's complaint, when taken together, argue the Borough violated OPRA due to its failure to comply with the June 1, 2011 OPRA request for the closed session minutes. Counsel simply stated after the initial confusion concerning the closed session minutes, the clerk supplied plaintiff with the requested documents on June 10, 2011, within seven (7) business days of the OPRA request. Therefore, counsel urged, there has been no

[13] Plaintiff does not provide any citation or a physical copy of the order.

OPRA violation, and plaintiff has been provided access to the requested records. As such, counsel concluded, of the several types of relief sought by plaintiff, production of the closed session minutes and setting of a time when the minutes may be made available are moot as the documents have already been provided in accordance with OPRA.

Next, counsel addressed plaintiff's requests (1) the court declare OPRA was violated due to the clerk's failure to state when the closed session minutes would be available and (2) declare OPMA was violated due to a lack of prompt release of the minutes. Counsel asserts the stated relief is not sustainable as a matter of law in the absence of an OPRA or OPMA violation. Based on the submissions, counsel contended there has been no OPRA or OPMA violation with regards to plaintiff's request for closed session minutes and therefore, counts one and two must be dismissed.

Counsel depicted plaintiff's third count as one which asserts the town violated OPMA by its failure to (1) provide adequate notice for the closed session meeting, (2) disseminate a closed session agenda and (3) promptly release the closed session minutes.

First, counsel dismissed the notion closed session meetings are subject to the adequate notice requirement. Counsel cites N.J.S.A. 10:4-8(d) to demonstrate adequate notice only applies to the "agenda of any regular, special, or rescheduled meeting", as opposed to a closed session meeting.

Second, counsel urged OPMA does not require an agenda be released for a "closed session." Rather, the brief cited N.J.S.A. 10:4-13 for the proposition closed sessions may be conducted, "by the adoption of a Resolution that sets forth the nature of the matters to be discussed, and the time as precisely as possible, under which the discussion conducted in closed session of the public body can be disclosed to the public."

Therefore, the argument goes, there is no case law or statutory provision requiring either and agenda or adequate notice for a closed session meeting.

Third, counsel disputed plaintiff's contention the closed session minutes must have been made available to the public more promptly. According to counsel, the various cases cited by plaintiff to support and explain the requirement of "prompt" availability are distinguishable as those cases addressed minutes of open sessions rather than closed sessions. Counsel asserted the appropriate law controlling the availability of closed session minutes requires the minutes to be released only after "the reason for the need for closed session has passed." In support of this proposition, counsel cites Hartz Mountain Indus., Inc. v. New Jersey Sports & Exposition Authority, 369 N.J. Super. 175, (App. Div. 2004), certif. denied, 182 N.J. 147 (2004). In the instant matter, counsel argued, compliance occurred when the minutes were voted for release on November 3, 2010.

Counsel conceded there was confusion on the part of the clerk as to what constituted the minutes for the closed session meeting. However, it is argued the clerk, by submitting what she believed to be the closed session minutes of the June 7, 2010 meeting for release on November 3, 2010, performed adequately. Once the clerk became aware, on June 7, 2011, the minutes released were not correct, she received the actual closed session minutes and submitted them to plaintiff within seven business days of his request.[14]

[14] During oral argument, counsel for defendant conceded even if the "correct" closed session minutes had been released following the November 3, 2010 vote, this would not be prompt under OPRA, as the need to keep the closed session minutes from the public ended on August 3, 2010 with the withdrawal of Howley's request. Therefore, it was conceded the release of the minutes was not prompt and OPMA was violated.

Accordingly, it was counsel's position, with regards to count three, the clerk released the minutes promptly following the November 3, 2010 vote,[15] and though the minutes which were released were not the correct closed session minutes, the Borough clerk complied to the best of her ability.

Counsel suggested count four must be dismissed as the Planning Bard is not party to the instant action and there is no proper indication of a prior order or "to what portions of the Order are being violated."

In conclusion, counsel argued counts one and two must be dismissed as the clerk complied appropriately with the OPRA request by granting access to the closed session minutes; there is no claim for relief under count three as the Borough is not required to provide adequate notice of a closed session meeting, nor is it required to released closed session minutes until the need which prompted closed session has passed; and lastly, count four is non cognizable as the Panning Bard is not a party to this action.

C. Plaintiff's Reply

In his July 18, 2011 reply, plaintiff contended the certification of the Mayor implicates additional OPRA violations. Plaintiff asserted Sandve was authorized by the Town Council to be the acting Clerk during Sciara's absence and was paid an additional $350 per week to perform those duties. Therefore, it was the clerk's or acting clerk's duty, not Rizza's, to take and maintain the minutes of the all meetings.[16]

Plaintiff rejected the Borough's position that the failure to release the correct closed session minutes was due to confusion on the part of the government body and clerk. Instead, it was plaintiff's position the failure to release the minutes was nefarious.

[15] Defendant references "prompt" in terms of the requirement for closed session minutes as referenced in Hartz Mountain Indus., Inc., supra, 369 N.J. Super. at 175.
[16] This issue was not raised in the complaint.

Plaintiff believed it was known by Borough officials there was an error with regard to the close session minutes. In support of this theory, plaintiff asserted councilman Jeffery Bader stated on November 3, 2010 the minutes voted on were not the actual closed session minutes from June 7, 2010. Plaintiff also went on to state "[t]he Borough Attorney is captured supporting what was extended as the minutes despite the fact the matter was brought to his attention. [He was][o]pposed to seeking the Closed Session Meeting minutes be made available."

With regard to the clerk's certification, plaintiff attempted to highlight what he believes is an inconsistency in the Sciara's statements. First, plaintiff quoted the clerk's June 10, 2011 email stating "[a]s I have previously stated to you, I have never seen the closed session meeting minutes from the June 7th, 2010 mayor and council meeting you are requesting until Tuesday, June 7th, 201[1]." Next, plaintiff quoted the Clerk's Cert.: "I was presented with various documents that were generated during my absence . . . including a document captioned "Executive Session Minutes June 7th, 2010." Plaintiff concluded the clerk claims to have never seen the closed session minutes until June 2011, but also claims to have been handed the approved closed session minutes in November. [17]

Next, plaintiff questioned, why, if the open and closed session minutes were approved by the governing body on June 21, 2010, the documents were not released "promptly" in accordance with OPMA.[18] Plaintiff urged the failure to release the closed session minutes until five months following the June 21, 2010 approval should be seen as

[17] It appears the clerk intended to convey she received the minutes for the end of the open session which had been mislabeled "Executive Session Minutes." If this is indeed the case, there would be no contradiction as Sciara concedes she submitted open session minutes for release believing them to be closed session minutes.

[18] It appears based upon defendant's submission the content of the closed session minutes was approved in June while the release of that content was not approved until November.

a "[r]efusal to release the minutes prior to the Election [which] denied the public to view [sic] the action of the elected officials.

Plaintiff then seemingly alleged the clerk did not email the closed session minutes until a June 21, 2011 email entitled "closed session minutes" with a message stating "Here they are."

O'Brien's brief went on to reexamine certain facts surrounding the allegations against the Borough, many of which had been previously stated in his original brief accompanying the motion. In addition to further allegations of deceit and secrecy, plaintiff "attempted to draw the courts [sic] attention to the wor[d] special" in the definition of adequate notice as set forth in N.J.S.A. 10:4-8(d). It was plaintiff's position that because the closed session was a special closed meeting of the Town Council, adequate notice was required. Plaintiff provided no case law for the proposition adequate notice, as defined by OPMA, is required prior to a closed meeting session, special or otherwise.

Plaintiff referenced prior court actions involving defendant. Plaintiff alluded to O'Brien v. Borough of Woodlcliff Lake , Docket No. BER-L-6976-08, apparently referencing an order executed by the Honorable Robert P. Contillo, P.J.Ch., on January 9, 2009 ("Judge Contillo's Order"); O'Brien v. Borough of Woodcliff Lake, Docket No. BER-L-2091-10, apparently referencing a decision by the Honorable Joseph S. Conte, J.S.C., dated January 13, 2011 ("Judge Conte's letter decision"); and Mann v. Woodcliff Lake, GRC Complaint No. 2005-69 (February 28, 2007). By referencing these prior actions, plaintiff intended to demonstrate the Borough's habitual disregard for OPRA and OPMA.

Plaintiff's statement he received the closed session minutes on June 21, 2011 directly contradicts the clerk's certification the request was complied with on June 10, 2011. A copy of an email from the Clerk titled "closed meeting minutes," dated June 21, 2011, is provided in support of plaintiff's assertion access to the closed session minutes was not granted within seven (7) business days. Further, plaintiff has provided exhibit C-1 which is a print out of the June 10, 2011 email sent by the clerk and a printout of the attachment entitled "kr minutes 6-7-10.pdf (4999.7 KB)." The attachment contained only the open session minutes.

Legal Standards

A. Summary Judgment

Motions for summary judgment are controlled by R.4:46-2. It states in pertinent part as follows:

> "The judgment or order sought shall be rendered forthwith if the pleadings… together with the affidavits…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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require the submission of the issue to the trier of fact."

The seminal New Jersey case interpreting R.4:46-2 is Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Supreme Court of New Jersey held that when deciding a motion for summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in light most favorable to the non-moving party in consideration of the applicable

evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party. Id. at 523.

In order to satisfy its burden of proof on a summary judgment motion, plaintiff must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party – here, the Borough – to present evidence there is a genuine issue for trial. Id. In satisfying its burden, the defendant may not rest upon mere allegations or denials in its pleading, but must produce sufficient evidence to reasonably support a verdict in its favor. Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004); R. 4:46-5(a).

B. OPRA

OPRA provides "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access [under this Act] shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. A "government record" is defined as:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1].

i. Exclusions/Exceptions

Excluded from this definition, however, are twenty-one categories of information which are deemed confidential and are not to be disclosed. Additionally, there are two exclusions provided in separate sections of the Act.

One exception to public access is found in N.J.S.A. 47:1A-3(a), which states, "where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access . . . may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest." However, the provision then goes on to state, "this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced." Ibid.

ii. Availability of Records

Records are typically available during the public agency's regular business hours with an exception for smaller towns, agencies, and school districts. N.J.S.A. 47:1A-5. The records may be redacted to protect personal information. Ibid. The records custodian ("custodian") may charge a fee for copying and related services. Ibid. Typically, any request for a record must be made using the agency's official request form. Ibid. The custodian must respond to all requests within seven business days, unless applicant fails to provide necessary contact information. See Ibid.; Mason v. City of Hoboken, 196 N.J. 51, 65-66. Access is deemed denied when the record is not made available within seven business days of the request, "provided that the record is currently

available and not in storage or archived." N.J.S.A. 47:1A-5(i). The custodian must inform the requestor if the records in question are in storage within seven business days of the request, and must further inform the requestor when such records may be made available. Ibid. If the records are not made available by the time noted, "access shall be deemed denied". Ibid.

iii. Enforcement of Rights pursuant to OPRA

If access to a government record is denied, the person denied access may challenge the decision by filing a complaint in superior court before the appropriate judge. N.J.S.A. 47:1A-6. Only the requestor may bring the application. Ibid. The Supreme Court has held "a 45-day statute of limitations should apply to OPRA actions, consistent with the limitations period in actions in lieu of prerogative writs." Mason v. City of Hoboken, 196 N.J. 51, 68 (2007).

The proceeding will go forward in a summary or expedited manner. N.J.S.A. 47:1A-6; see Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003). As such, "the action is commenced by order to show cause supported by a verified complaint." Courier News, supra, 358 N.J. Super. at 378. In Courier, the Appellate Division held the trial court had failed to follow proper procedure when it denied a newspaper its right to summary adjudication on an OPRA action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. Id. at 377. As a result, the Appellate Division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. Id. at 379.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. Id.; see also N.J.S.A. 47:1A-6. As such, the agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, supra, 358 N.J. Super. at 383. In establishing legal support, "[a] decision of the council [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court." N.J.S.A. 47:1A-7. However, "we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act governing the agency." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Lastly, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Ibid.

If it is determined access was improperly denied, such access shall be granted. Ibid. A successful requestor shall be entitled to reasonable attorney's fees. Ibid.

C. OPMA

The OPMA statute provides the public has a right to be present at all meetings of public bodies, unless one or more of the nine exceptions excluding the public from the meeting applies. N.J.S.A. 10:4-7; see also, N.J.S.A.10:4-12(b) (providing a list of exceptions to the holding of public meetings). Even so, "the Legislature contemplated that the minutes of all meetings, including executive-session meetings, would be disclosed eventually unless their release otherwise would conflict with the legislative purpose in authorizing the executive-session meeting." S. Jersey Pub. Co. v. N.J.

Expressway Auth., 124 N.J. 478, 491 (1991) (citing N.J.S.A. 10:4-14). The Borough is required to make all its minutes "promptly" available to the public even when a public body has met in closed session so long as full disclosure of the minutes would not subvert the purpose of having the closed session to begin with. Payton v. N.J. Tpk. Auth., 148 N.J., 524, 557 (1997) (finding if a public body meets in closed session it must still make those minutes "'promptly available to the public' unless full disclosure would subvert the purpose of the particular exception" (quoting N.J.S.A. 10:4-14)). "Prompt" availability for open session minutes has been held to mean a time period of two days to two weeks from the meeting's conclusion depending in part on when the next meeting is scheduled. See Liebeskind, supra, 265 N.J. Super at 394-95.

Further, the released minutes "must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination[s] made in a non-public session." S. Jersey Pub. Co. v. N.J. Expressway Authority, 124 N.J. 478, 493. (1991).

N.J.S.A. 10:4-9 requires a public body to provide adequate notice prior to any public meeting other than those exempted by the statute. N.J.S.A. 10:4-8(d) defines adequate notice as notice of "at least 48 hours providing the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken."

Case law interpreting N.J.S.A. 10:4-9 demonstrates closed sessions do not necessitate "adequate notice" as defined by the statute, merely a resolution to enter into closed session. See McGovern v. Rutgers, 418 N.J. Super. 458, 469 (App. Div. 2011) (finding for a closed session to comply with OPMA, the public body must first pass a

resolution at a public meeting providing the general nature of the closed session discussion, but need not provide adequate notice as defined by N.J.S.A. 10:4-8(d)).

Analysis

A. Count One

The question posed in count one is whether the clerk granted access to the closed session minutes within seven business days of the initial request on June 1, 2011.

Plaintiff correctly contends OPRA, in its pursuit of government transparency and public involvement, mandates a prompt response to requests for the disclosure of public records. N.J.S.A. 47:1A-5. The clerk's June 6, 2011 response to plaintiff's request for the closed meeting minutes expressed her inability to explain why the minutes were incomplete or missing, in part, due to her sick leave. This response, had it indeed been the final response by the clerk, would have been a violation of OPRA as the custodian is required to expressly state whether a request is denied, and if denied, provide specific details as to why the request is not granted. N.J.S.A. 47:1A-5(i). However, on June 10, 2011 at 8:55 AM, the last day an OPRA response may have been properly extended, the clerk once again communicated with plaintiff via email. In the email, the clerk explained she had been misinformed concerning the closed session minutes until June 7, 2011.

The email record shows an attachment file, entitled "kr minutes 6-7-10.pdf (4999.7 KB)," was sent along with the message. The Clerk Cert. suggests the requested closed session minutes were attached to the June 10, 2011 email. If true, the response by the clerk would have been timely and no OPRA violation would have occurred. However, plaintiff asserts he did not receive the minutes until June 21, 2011, well after the seven business day compliance period. Aside from the statements in the Clerk Cert.,

counsel for defendant has provided no proof or documentation to negate plaintiff's contention.

The following three subsections will discuss defendant's cross motion for summary judgment, plaintiff's allegation of an OPRA violation, and plaintiff's reference to the Borough's history of non compliance with OPRA and OPMA.

i. Defendant's cross motion seeking summary judgment with regard to the timeliness of the response to the OPRA request.

It appears the closed session minutes were not received until June 21, 2011. In a motion for summary judgment, movant has the burden of providing "competent evidential materials," which "when viewed in light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party." Brill, 142 N.J. at 523. Plaintiff provides two forms of documentation to support his arguments: (1) the print out of the June 10, 2011 OPRA response and attachment which contains the open session record only and (2) an email entitled "closed session meeting minutes" from the clerk dated June 21, 2011. The June 10, 2011 attachment containing only the open session minutes and the June 21, 2011 email of the closed session minutes strongly suggest the OPRA request was not complied with until June 21, 2011.

Defendant attempts to substantiate its contention of a timely OPRA response with allegations set forth in its pleadings, supported by the Clerk Cert. However, without further proof or documentation, defendant has failed to demonstrate adequate compliance and, accordingly, summary judgment would be inappropriate.

ii. Plaintiff's allegation of an OPRA violation.

The Borough failed to provide a timely response to the June 1, 2011 OPRA request. Under OPRA, a custodian's response to an OPRA request, either granting or denying access, is due within seven business days of the request. N.J.S.A. 47:1A-5(i). As the requested minutes were not provided to plaintiff until June 21, 2011, clearly beyond the seven business day requirement, defendant is in violation of OPRA.

Regardless, the court is satisfied this violation, the OPRA response being eleven days overdue, is *de minimis*. The attachment of the open session minutes rather than the closed session minutes to the clerk's June 10, 2011 reply speaks more to oversight than it does to chicanery. This conclusion is especially apparent when considering the confusion surrounding the minutes and the fact the requested minutes were apparently posted on the town website on June 7, 2011.[19]

iii. Previous matters involving the Borough referenced by plaintiff to show a pattern of disregard for OPMA and OPRA.

It is plaintiff's contention the existence of prior court orders finding defendant in violation of OPRA shows a pattern of disregard for the statute. However, a history of blatant non-compliance and disregard does not exist based on the prior actions referenced by plaintiff. Judge Contillo's order found only *de minimis* and technical noncompliance with OPRA such that no civil penalty was assessed and the violations were deemed inadvertent.[20] Judge Conte's letter opinion determined the clerk had failed to properly specify in an OPRA response when minutes would be provided. As such, he somewhat

[19] During oral argument, counsel for defendant asserted the correct closed session minutes were posted on the website on June 7, 2011.

[20] Full citations for Judge Contillo's January, 2009 order, Judge Conte's January, 2011 letter opinion, and the February, 2007 GRC decision can be found on page 16.

aggressively ordered the Borough revisit its internal training in regard to handling OPRA requests. Lastly, in Mann, the council found there was no denial of access by the Borough and the custodian had acted in good faith. Mann, supra, GRC Complaint No. 2005-69. The same hardly speaks to a pattern of noncompliance.

B. Count two

Plaintiff's second count, asserting minutes were not provided as required by OPMA, is moot. Plaintiff filed this action on June 16, 2011. Plaintiff maintained, both in his papers and at oral argument, he received the requested minutes on June 21, 2011, five days after the complaint was filed. As such, count two and relief stemming therefrom need not be further addressed.[21]

C. Count Three:

Counsel for defendant correctly states a closed session meeting does not require (1) adequate notice or (2) the dissemination of a separate agenda. See N.J.S.A. 10:4-13; see also N.J.S.A. 10:4-8(d) (requiring adequate notice "for any regular, special, or rescheduled meeting"). To enter a closed session, the Borough need only pass a resolution which sets forth the nature of the matters to be discussed, and the time as precisely as possible, under which the discussion conducted in closed session of the public body can be disclosed to the public. N.J.S.A. 10:4-13; see also McGovern, supra, 418 N.J. Super. at 469. As the Borough passed an appropriate resolution prior to entering closed session, plaintiff's allegations the Borough did not provide adequate notice for the

[21] In count two of his brief, plaintiff addressed the issue of a "prompt" release of minutes under OPMA. However, plaintiff also addressed the issue of the timely release of minutes in count three, and again in count four. As such, the court has elected to fully address this issue in count three for purposes of structure and flow.

closed session and failed to disseminate a closed session agenda are unsustainable as a matter of law.

With these aspects of plaintiff's count three resolved, the court now looks to the issue of the prompt release of the closed session minutes.

Defendant's argument the closed session minutes were released "promptly" and in accordance with OPRA is less than compelling. The closed session minutes were approved for release on November 3, 2010. It was not until June 7, 2011 the clerk discovered she had not posted, maintain and/or distributed the correct minutes. As such, the plaintiff's argument is two fold. First, due to Howely's withdrawal of her indemnification request on August 3, 2010, the closed session minutes were not so sensitive in nature such that their release should have been delayed until November 3, 2010. Second, as admitted by counsel for defendant, the actual closed session minutes were not released on November 3, 2010 at all. Plaintiff's argument on this issue of promptness is obviously correct; the Borough should have published its minutes prior to June of 2011. Counsel for defendant concedes the same, as he must.

Plaintiff's position on promptness is supported by case law interpreting OPMA. In Liebeskind, the appellate court affirmed the trial judge's finding a two month delay in the release of meeting minutes was not prompt and affirmed the order the town publish its public meeting minutes within no more than two weeks from the meeting date. Liebeskind, supra, 265 N.J. Super. 389. Here, the closed session minutes were not released until ten months after the indemnification request was withdrawn and seven months from when the minutes were voted for release.[22] Clearly, if a two month delay in

[22] In his papers, counsel for defendant distinguished Liebeskind from the instant case in so far as Liebeskind concerned minutes for an open session meeting. Defendant posited instead that Hartz Mountain

publication is a violation, a ten month delay following the withdrawal of the indemnification request cannot be considered prompt.

That said, plaintiff has not shown, based upon his submissions, this failure to promptly release the minutes was due to a nefarious motive. What is clear, however, is the minutes, which were initially posted on the town website and provided to requestors by the clerk, were not the actual minutes of the closed session meeting conducted on June 7, 2010. Whether the closed session minutes failed to be made promptly available due to a late vote on November 3, 2010 when Howley's request was withdrawn three months prior, or whether the minutes failed to be made promptly available as a result of their having been confused with the open session minutes is of little import. Ultimately, the closed session minutes were not made available until June of 2011, seven months after they had been voted for release to the public and ten months following the withdrawal of Howley's indemnification request. Hence, the release of the closed session minutes was not prompt in any conceivable manner and OPMA was violated. See Payton, supra, 148 N.J. at 556; N.J.S.A. 10:4-14.

Further, plaintiff correctly asserts the clerk's sick leave does not excuse an erroneous posting or misplacement of minutes when such actions constitute an OPMA violation. Again, the defendant was compelled to concede the same. Moreover, it is not clear to the court why Rizza took and maintained the closed session minutes when the minutes were the responsibility of Sandve, the certified acting clerk.

Indus., Inc., supra, 369 N.J. Super. 175 controlled and as such a November release following the August 3, 2010 indemnification request withdrawal was prompt. However, counsel seemed to abandon this line of reasoning and appeared to concede the November vote for release of the closed session minutes was not prompt considering Howley's August 3, 2010 withdrawal of her request.

Lastly on this issue, South Jersey Pub. Co., supra, 124 N.J. at 493, declared reasonably comprehensible minutes must be released, even concerning a closed session. As the minutes released in November were not, in fact, the correct closed session minutes, they could not have been a reasonably comprehensible record of what had been discussed during the session.

D. Count four

As to the fourth count, counsel for defendant correctly indicates the Planning Board is not a party to the instant action and, as such, any consideration of allegations against that entity would be inappropriate. That said, the practice of utilizing private emails to conduct public business appears highly questionable. [23]

Conclusion

While plaintiff has demonstrated the Borough violated sections of OPRA and OPMA, the court is not convinced of a nefarious plot or secret collusion on the part of the Borough and/or its elected officials. That said, there has been a cascade of errors by the Borough, although possibly inadvertent, which are almost too numerous to list completely. The Borough failed to address the June 1, 2011 OPRA request within seven business days; failed to vote on the release of the closed session minutes promptly following the withdrawal of the indemnification request; failed to release the correct minutes after the vote to provide access was approved; and failed to provide the proper attached document in the June 10, 2011 OPRA response. That said, there has been an

[23] Notwithstanding the inappropriateness of issuing a formal decision regarding the Planning Board, the Borough Attorney labeled himself as a "champion of no personal emails." Accordingly, counsel agreed to distribute a memorandum to all pertinent Borough employees reiterating the position private emails are an unacceptable means of conducting Borough business.

insufficient showing these numerous errors were not simply the product of sloppiness or inadvertent errors.

As to count one, the court finds the June 21, 2011 OPRA response was not timely and, accordingly, was a violation of OPRA. However, due to the minor nature of the violation, considering the clerk was required to provide the minutes by June 10, 2011 and the confusion surrounding the minutes in general, the court finds the OPRA violation *de minimis*. Therefore, other than a finding a violation occurred, further relief is not warranted.

As to count two, the court finds the Borough ultimately complied with OPMA by granting plaintiff access to the minutes and posting the minutes on the town website. Therefore, relief need not be provided under this count.

As to count three, the court finds although neither an agenda nor "adequate notice" is required for a closed session meeting, the meeting minutes were by no means released in a "prompt" manner as required by OPMA. Therefore, the Borough is found to have violated OPMA. However, as the minutes have finally been released and the Borough's violation appears inadvertent, no further relief is provided with regard to count three.

A ruling on count four would be inappropriate due to plaintiff's failure to name the Planning Board as a party. However, based upon the consent of the defendant's counsel at oral argument, the court orders counsel for defendant to circulate a memorandum among all pertinent Borough employees directing they use only their public email accounts, rather than private accounts, when conducting town business.

Further, and again by consent, the court orders the Borough Attorney to provide any and all emails related to the steps taken by the Borough to comply with Judge Conte's January 2011 order regarding internal training to plaintiff within thirty (30) days of the date of this decision.

Having prevailed on several grounds, plaintiff is entitled to all costs associated with this litigation.

Counsel for defendant shall submit the appropriate order pursuant to the 5 day rule.[24]

[24] Although normally the court would ask plaintiff to submit an order under the 5 day rule, as plaintiff is pro se, the court directs defendant's counsel to do so.