



Gloucester County Prosecutor

SEAN F. DALTON  
Prosecutor  
MICHAEL S. CURWIN  
First Assistant Prosecutor

P.O. Box 623  
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FREDERICK A. SUTER  
Chief of Investigators

September 14, 2011

Mr. John Paff  
P.O. Box 5424  
Somerset, NJ 08875

**Re: Open Public Meetings Act**

Mr. Paff:

Enclose please find a letter to the solicitor of Pitman in response to your complaint regarding an OPMA violation. I also enclose a letter just received from Mr. Duffield. Lastly, I enclose a memo sent to Mr. Duffield, as well as all the municipal solicitors, requesting they draft guidelines for their governing body to address this issue in the future.

Thank you for bringing this matter to my attention.

Very truly yours,

Sean F. Dalton  
Gloucester County Prosecutor

SFD:pc



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FREDERICK A. SUTER  
Chief of Investigators

September 13, 2011

Brian Duffield, Solicitor  
Borough of Pitman  
110 South Broadway  
Pitman, NJ 08071

### **Re: Violation of the Open Public Meetings Act (OPMA) – Borough of Pitman Governing Body**

Dear Mr. Duffield:

As you are aware, this office received a complaint from Mr. John Paff on February 19, 2011 alleging that members of the Pitman Borough Council ("Council") violated the Open Public Meetings Act ("OPMA") by voting via email to pay a borough bill in March 2011.

When email communications are shared between members of a governing body constituting a quorum, legal issues regarding adherence to the Open Public Meetings Act (OPMA) are raised. Under the OPMA, the public has the right to be present at all meetings of public bodies and witness all phases of deliberation, policy formulation and decision making. N.J.S.A. 10:4-7. In order for the public to be present, public meetings must be preceded by adequate notice. N.J.S.A. 10:4-9. Although likely not contemplated at the time of its enactment in 1976 the OPMA does provide that a meeting includes any gathering... by means of communication equipment which is attended by or open to all members of a public body, held with the intent to discuss or act as a unit upon the specific public business of that body. See N.J.S.A. 10:4-8(b).

The email communications in question occurred on or about March 9, 2010 when a council member informed the borough clerk that she along with three other council members all answered yes to paying a South Jersey gas bill. There is no written documentation as to any emails any of the council members forwarded that would correspond with the email that was sent to the township administrator. There are no other emails requested by Mr. Paff which raise any other issues regarding compliance with the OPMA. Shortly after this issue was raised, it is my understanding that you counseled the Pitman governing body on the use of email communications in light of the requirements of the OPMA.

In this situation, it appears that a member of the governing body contacted the township administrator via email regarding a borough bill. The email suggests that the council member contacted the three other members of council either by email communication or some other method in order to determine their opinion with respect to paying said bill. Regardless of the method, it appears that there was a communication involving a quorum of the Pitman governing body. Further, it appears that members of the governing body met with the intent to discuss or act as a unit upon specific public business of that body. Based upon the fact that a vote was taken with respect to a borough bill, outside a scheduled public meeting with notice, I find that there is sufficient evidence to believe a violation of the OPMA took place.

The question presented is whether this violation should be addressed pursuant to the provisions of N.J.S.A. 10:4-17. The statute provides for the filing of a summary proceeding by either the Attorney General or County Prosecutor when any person knowingly violates the OPMA. The statute provides for a fine of \$100 for the first offense and no less \$100 nor more than \$500 for any subsequent offense. This statute was enacted in order to provide an enforcement mechanism for the OPMA. In the present case, the members of the governing body have already been counseled by you regarding compliance with the OPMA as well as Mr. Paff making them aware as well. I also further find that the email communication was not a concerted effort on the part of any member of the governing body to circumvent the provisions of the OPMA. Rather, this is an example of public officials utilizing modern technology to advance the business of the public body. In light of the remedial action already taken, I do not believe the expenditure of public dollars in filing an enforcement action against the Borough of Pitman which would in turn expend public dollars in responding to said action to be in the best interest of the public or the parties involved.

I have enclosed a memo which has been forwarded to all municipalities in Gloucester County asking their solicitors to adopt rules regarding the use of email communications by their governing bodies and employees. I would request that Pitman do likewise to ensure there are standards in place addressing this issue.

A separate issue is raised by Mr. Paff regarding the retention of email communications. He references a Department of State Circular Letter 03-10-ST: Managing Electronic Mail: Guidelines and Best Practices. While the County Prosecutor has no enforcement authority regarding the retention of email communications, the Circular Letter is certainly instructive on how this issue should be addressed.

Very truly yours,



Sean F. Dalton  
Gloucester County Prosecutor

SFD:pc  
enclosure  
cc: John Paff

**Gloucester County Prosecutor****SEAN F. DALTON**  
Prosecutor**MICHAEL S. CURWIN**  
First Assistant ProsecutorP.O. Box 623  
Woodbury, NJ 08096  
(856) 384-5500  
FAX (856) 384-8624**FREDERICK A. SUTER**  
Chief of InvestigatorsE-Mail: [gcprosecutor@co.gloucester.nj.us](mailto:gcprosecutor@co.gloucester.nj.us)**MEMORANDUM****To: All Gloucester County Municipal Solicitors****From: Prosecutor Sean F. Dalton** **Date: September 13, 2011****Re: Open Public Meetings Act**

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Under N.J.S.A. 10:4-17, the County Prosecutor is responsible for enforcing the provisions of the Open Public Meetings Act along with the Attorney General. At the time of passage in 1976, the New Jersey Legislature was certainly not aware of the role technology would play in making electronic communications via email so prevalent. While the development of this technology has certainly provided for instantaneous communication, it also raises legal concerns about possible violations of the Open Public Meeting Act when applied to email communications between members of the governing body constituting a quorum.

As you know, the Open Public Meetings Act is premised on the important goal that the public has the right to be present at all meetings of public bodies and witness all phases of deliberation, policy formulation and decision making. N.J.S.A. 10:4-7. In order for the public to be present, public meetings must be preceded by adequate notice. N.J.S.A. 10:4-9. In part, N.J.S.A. 10:4-8(b) provides that a meeting includes any gathering... by means of communication equipment, which is attended by or open to all the members of a public body held with the intent... to discuss or act as a unit upon the specific public business of that body. The use of cell phones or computers to communicate via email among members of a governing body could constitute a public meeting raising Open Public Meetings Act issues.

With this evolving technology, I believe it is prudent to provide some guidelines for consideration in advising your governing bodies on the use of email communications in order to

uphold the high levels of transparency contemplated by the Open Public Meetings Act as well as the public. I would strongly urge your governing body to adopt an email policy consistent with the following guidelines:

1. Email communications should, as far as practicable, not include an effective majority of the governing body where discussion of information related to the business of the municipality is involved.
2. Where email communications do include an effective majority of the governing body, such communications should not include any request for a response. This includes emails sent by municipal employees to members of the governing body. The providing of information to the entire governing body should specifically indicate that there should be no email reply or other communication contrary to the OPMA.
3. In the rare instance when a response to an email is necessary, such response must not involve any decision making or deliberative function of the governing body or otherwise address public business as contemplated by the OPMA. Further, the response shall not be made to the entire list of email addressees to avoid even the appearance of impropriety. Utilizing a third party, such as the Clerk, does not change the requirement of the OPMA.
4. "Rolling" email conversations must also be avoided. A "rolling" email occurs when one (1) member of the governing body or a third party contacts other members via email individually to successively discuss or gain opinions on an item of Township business. This would apply to other forms of electronic communications as well. However, communications between less than an effective majority of the governing body do not violate the OPMA provided the dialogue does not become a "rolling" discussion that ends up including an effective majority of the governing body.

While serving the public as a member of a governing body can be extremely difficult in these challenging times, it is the goal of this memo to provide some guidance in order to ensure that elected officials do not unwittingly run afoul of this important statute ensuring transparency in the decision making process.

If you have any questions or comments regarding this issue, please do not hesitate to contact me..

Thank you.

LAW OFFICE OF  
**BRIAN J. DUFFIELD**

www.lawyers-nj.com

BRIAN J. DUFFIELD

95 North Main Street  
Mullica Hill, NJ 08062

JOHN A. MOUSTAKAS  
EKATERINE N. ELEFTHERIOU

(856) 478-6900  
FAX (856) 478-6955

FILE NO

September 13, 2011

**Sent Via Fax & Regular Mail**

**(856) 384-5539**

Sean F. Dalton, Prosecutor  
Gloucester County Prosecutor's Office  
Criminal Justice Complex  
P.O. Box 823  
Woodbury, New Jersey 08096

Re: Borough of Pitman

Dear Mr. Dalton:

As you know, I am the Solicitor for the Borough of Pitman.

In response to our telephone conversation on Thursday, September 8, 2011, I am providing you with the following information with regard to the Borough's updated OPRA procedures:

1. Mayor and Council have implemented an electronic mail ("e-mail") policy consistent with DARM Circular Letter No. 03-10-ST. It is anticipated that the new system will be fully operational by September 23, 2011. The new system is designed to automatically provide a copy to the Custodian of Records and archive every e-mail between Mayor and Council. Moreover, on or about December 30, 2010, I advised/reminded Mayor and Council of the necessity to provide copies of every electronic communication to the Borough's Clerk if said communication directly or indirectly related to Borough business. Previously, Council utilized their personal e-mail addresses. It is my understanding that the Borough Clerk receives copies of all electronic communications between Mayor and Council.
2. In response to John Paff's OPRA request/correspondence dated December 28, 2010 and December 30, 2010, I advised/reminded Mayor and Council of the prohibition against making any decisions; furthering municipal business; and/or in any way communicating in a manner that may be inconsistent with OPRA or OPMA. I have no knowledge that such communications continued after Mr. Paff's correspondence.



# New Jersey Libertarian Party

Open Government Advocacy Project

*John Paff, Chairman*

*P.O. Box 5424*

*Somerset, NJ 08875-5424*

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

*Email: [lpsmc@pobox.com](mailto:lpsmc@pobox.com)*

February 19, 2011

Sean F. Dalton, Prosecutor

County of Gloucester

P.O. Box 623

Woodbury, NJ 08096

(via e-mail only to [gcprosecutor@co.gloucester.nj.us](mailto:gcprosecutor@co.gloucester.nj.us) )

RE: Borough of Pitman

Dear Prosecutor Dalton:

I write both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project to request your office's assistance in resolving two issues:

1. Did Pitman Borough Council President Russell Johnson, and Council members David Swindell, Patti Kelly and Debra Higbee violate the Sen. Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., by voting via e-mail to pay a Borough bill during March 2010?
2. Should the Borough of Pitman be required to have a procedure in place for proper retention of e-mail correspondence sent and received by Borough Council members?

In order to illustrate these matters, I have attached the following:

1. My December 28, 2010 letter to Mayor Batten and the Pitman Borough Council (pages 1 through 3).
2. My December 28, 2010 records request (page 4).
3. Pitman Borough Clerk's December 28, 2010 response (page 5) with enclosures (pages 6 through 8).

4. My December 30, 2010 records request (pages 9 through 11).
5. Borough Clerk's January 10, 2011 response (page 12) with enclosures (pages 12 through 16).
6. Borough Clerk's January 12, 2011 e-mail (page 17).

### **OPEN PUBLIC MEETINGS ACT VIOLATION**

Exhibit page 8 is a March 9, 2010 e-mail from Borough Council member Debra Higbee informing the Borough Clerk that she, Borough Council President Russell Johnson, and Council members David Swindell and Patti Kelly "have all answered yes to paying the bill . . . so it is ok to pay the sj gas bill." When I requested additional e-mails regarding this apparent e-mail vote (see exhibit page 11), the Borough Clerk informed me that "Russ, Dave and Patti . . . have all responded that they cannot find any emails pertaining to [the South Jersey Gas bill]."

The Legislature, when it passed the Open Public Meetings Act in 1975, recognized that private, off-the-record meetings and decision making by public officials "undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." N.J.S.A. 10:4-7. It therefore required that "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12.

The evidence suggests that these four Council members, constituting a quorum of the Council, "met" via e-mail and took action on an issue that should have been discussed and voted upon at a properly advertised meeting to which the public was admitted.

Do you agree that this was a violation of the Act. If so, do you think that it warrants the imposition of financial penalties against Higbee, Johnson, Swindell and Kelly in accordance with N.J.S.A. 10:4-17?

### **DESTRUCTION OF PUBLIC RECORDS LAW VIOLATION**

In my December 28, 2010 letter, I asked Mayor Batten and the Pitman Borough Council how the Borough is properly retaining its elected officials' e-mailed correspondence, as required by Division of Archives and Records Management (DARM) directives, when it allows its mayor and council members to correspond with each other and the public using their private e-mail addresses.

In her December 28, 2010 response (page 5), Clerk Judith O'Donnell states that the Borough, as of that date, had no policy "addressing the requirements and/or recommendations as set forth in DARM Circular Letter 03-10-ST pertaining to managing electronic mail."

In order to test whether or not the Borough, despite not having a policy, was compliant with the DARM Circular Letter, I requested official e-mails sent by former Council member



Fred Schwarz during his term of office (page 4 and 11). In her January 10, 2011 response (page 12), Clerk O'Donnell indicates that since she had none of former council member's e-mails on file she had contacted Schwarz directly. In her January 12, 2011 e-mail (page 17), the Clerk indicated that Schwarz advised her that "he no longer has any emails from his time served on Pitman Council."

The Destruction of Public Records Act states:

***Unauthorized removal or alteration of public records; alteration or destruction with malicious intent.***

*Any person who, without the consent of the person authorized to have custody thereof, removes an official record or paper from the files of any public agency or body, or who alters any map, plat, or other paper signed and approved by a public official without permission, or who alters, defaces, mutilates or destroys with malicious intent any public record shall be guilty of a high misdemeanor.*

The problem of which I complain—not having a municipal policy to prevent e-mails from being deleted or lost before the end of their retention period—is probably<sup>1</sup> not a violation of the Act. However, Pitman's failure or refusal to have a proper retention policy in place is clearly allowing the continuing loss or destruction of important public records.

I ask that you office please direct, or at least encourage, Pitman Borough, as well as other public agencies within Gloucester County, to promptly adopt policies that will effectuate DARM Circular Letter 03-10-ST.

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

Sincerely,



John Paff

cc. Mayor and Council, Borough of Pitman (via e-mail)

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<sup>1</sup> However, it could be argued that the Borough of Pitman, by lacking a retention policy, has wittingly or unwittingly delegated responsibility for official e-mail retention to the Borough officials who send or receive the e-mails. It would follow that Mr. Schwarz, as the delegated custodian of official e-mails sent by him during his term of office, "remove[d]" those e-mails by deleting them, thus violating the Act.



# New Jersey Libertarian Party

Open Government Advocacy Project

*John Paff, Chairman*

*P.O. Box 5424*

*Somerset, NJ 08875-5424*

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

*Email: [lpsmc@pobox.com](mailto:lpsmc@pobox.com)*

December 28, 2010

Hon. Michael Batten, Mayor and members of the  
Pitman Borough Council  
110 South Broadway  
Pitman, NJ 08071 *(via e-mail only<sup>1</sup>)*

Dear Mayor Batten and Council Members:

I write both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project to learn whether Pitman Borough has an e-mail retention policy that will ensure that official e-mails are retained and archived consistent with State guidelines.

This inquiry was prompted by my visit to Pitman's Internet site<sup>2</sup> today where I noticed that the e-mail addresses listed for the Mayor and Council appear to be personal rather than "municipal" e-mail addresses. For example, Borough Council Member Michael Razze's e-mail address is listed as [michaelrazze@comcast.net](mailto:michaelrazze@comcast.net) which is apparently his personal e-mail address.

Compare the Pitman Council's e-mail directory to Vineland's<sup>3</sup>. If you click on the e-mail link for any of the Vineland City Council members, you'll be given their "Vinelandcity.org" address, which is part of the municipality's domain rather than a personal e-mail address.

The fact that Pitman's Internet site invites the public to contact its elected officials at their personal e-mail addresses concerns me because it leaves open the possibility that the Mayor and Council may be sending and receiving e-mails that are "government records" in accordance

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<sup>1</sup> Sent to the following addresses, as listed on the Borough's Internet site: [michaelbatten@comcast.net](mailto:michaelbatten@comcast.net) , [db4pitman@comcast.net](mailto:db4pitman@comcast.net) , [prkelley125@comcast.net](mailto:prkelley125@comcast.net) , [higbee147@comcast.net](mailto:higbee147@comcast.net) , [russjohnson3@verizon.net](mailto:russjohnson3@verizon.net) , [councilmansanders@verizon.net](mailto:councilmansanders@verizon.net) , [michaelrazze@comcast.net](mailto:michaelrazze@comcast.net)

<sup>2</sup> <http://www.pitman.org/page.asp?prmName=council>

<sup>3</sup> <http://www.vinelandcity.org/Government.htm>

with the Open Public Records Act (OPRA)<sup>4</sup> but which are not being properly retained and archived by the Borough administration.

For example, Councilman Razze, whose term of office expires at the end of 2010, according to the Borough's Internet site, receives e-mails at [michaelrazze@comcast.net](mailto:michaelrazze@comcast.net). Suppose that Mr. Razzie was not re-elected<sup>5</sup>, relocated out of state and that a year or two from now a citizen requests some e-mails that he sent and received during 2010 that dealt with municipal business.

In such a case, would the Borough Clerk be able to produce the requested e-mails from the Borough's own files, or would she need to track down former Councilman Razze and ask him to produce the e-mails from his own files in order to satisfy the records request? If it's the latter, then what would the Borough Clerk do if former Councilman Razze's computer had since crashed or if the e-mails were otherwise not available?

Vineland wouldn't have this problem because e-mails that are sent or received by Vinelandcity.com e-mail addresses are presumably preserved on the City's server. So, Vineland's clerk could retrieve any requested e-mails from the City's server without having to contact the Council member who sent or received those e-mails.

As you are probably aware, Pitman Borough must comply with the New Jersey Division of Archives and Records Management's "Circular Letter No. 03-10-ST" entitled, "Managing Electronic Mail: Guidelines And Best Practices"<sup>6</sup> which, among other things, makes the Borough responsible for a) archiving e-mails and ensuring that the e-mail system is reliable enough to meet state and federal "Rules of Evidence" requirements (Sec. 2.6); b) ensuring that e-mails are "indexed in an organized and consistent pattern" (Sec. 2.7); and c) setting forth "agency procedures" so that employees can "understand and carry out their role in managing e-mail." (Sec. 2.8).

Since it appears that the Pitman Mayor and Council members are likely communicating official business via their personal e-mail accounts, I am having difficulty understanding how they are compliant with the Circular Letter. In order to learn more about Pitman's compliance with that Circular Letter, please find my OPRA request<sup>7</sup>.

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<sup>4</sup> E-mails on an elected official's personal computer are government records subject to disclosure under the Open Public Records Act. See Donal Meyers v. Borough of Fair Lawn, GRC Case No. 2005-127 at <http://www.nj.gov/grc/decisions/2005-127.html>


<sup>5</sup> I realize that Mr. Razze was re-elected, along with Council President Russell C. Johnson, III, at the November 2010 election.

<sup>6</sup> See, <http://www.njarchives.org/links/circular-letter-03-10-st.html>

<sup>7</sup> I have sent the OPRA request directly to the Borough Clerk.

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

Sincerely,

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

John Paff

# OPRA Request

## Borough of Pitman

***Submitted on 12/28/10 via Fax to 856-589-6833***

**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:** Please DO NOT use regular mail – use e-mail or fax  
**Phone:** 732-873-1251  
**Fax:** 908-325-0129  
**E-Mail:** paff@pobox.com

### **Records Requested:**

1. The nonexempt portions of the first three e-mails sent after 12:01 a.m. on February 23, 2008 by former Councilman Fred Schwartz<sup>1</sup> that related to municipal business.
2. The nonexempt portions of the first three (3) e-mails sent by sitting Councilwoman Debra Higbee after 12:01 a.m. on February 23, 2010 that related to municipal business.
3. Any policy or other writing presently in force in Pitman Borough which addresses the requirements and recommendations set forth in DARM Circular Letter No. 03-10-ST.

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<sup>1</sup> Schwartz served from September 2007 through December 31, 2008.



# Borough of Pitman

110 SOUTH BROADWAY  
Phone: 856-589-3522  
E-mail: [pitman@pitman.org](mailto:pitman@pitman.org)

PITMAN, NEW JERSEY 08071  
FAX: 856-589-6833  
[www.pitman.org](http://www.pitman.org)

December 28, 2010

Dear Mr. Paff,

In response to the OPRA Request submitted to me on December 28, 2010, attached you will find the first three emails sent after 12:01 a.m. on February 23, 2010 by Councilwoman Debra Higbee that related to municipal business.

In regards to the request for emails sent by former Councilman Fred Swartz, I was not in my present position with the Borough of Pitman at that time, and therefore had no occasion to send or receive any form of correspondence from Councilman Swartz.

Finally, at present, there is no policy in force in the Borough of Pitman addressing the requirements and/or recommendations as set forth in DARM Circular Letter No. 03-10-ST pertaining to managing electronic mail.

I hope this information satisfies your request. If I may be of any further assistance, please feel free to get in touch.

Sincerely,

Judith O'Donnell  
Municipal Clerk

**Judy O'Donnell**

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**From:** higgbee147@comcast.net  
**Sent:** Tuesday, February 23, 2010 1:28 PM  
**To:** Steve Considine  
**Cc:** clerk  
**Subject:** council meeting

Steve,

At last night's council meeting, Dave Swindell brought up the idea of electronic billing. I told him I had mentioned it in Borough Hall and it did not meet with much excitement. Other council members did not jump on it so I don't know if he will pursue or drop the idea.

What if anything was determined about the check for Elm Avenue? Judy and I looked through the file last night and found an **unsigned** voucher for 75% of the Local Aid Grant requesting \$185,245.12. We also found a **signed** voucher requesting final payment of \$73,190.13. Do you want me to phone Mr. San Jose (like that town, my niece lives there) or Chris Bergeman to see what our next step is?

Ryan Pierson wrote and was awarded a SCBA grant. Last night he asked the Borough for \$13,387, a partial match needed to complete the project. In addition, funding of \$6,500 will be needed to upgrade the breathing air compressor at #1. I showed council the temporary budget amounts available. Brian looked at it and said we could authorize the \$13,387 now by taking some from each fire line in the budget. The \$6,500 we will deal with later. The vendor's prices were only good for a certain time so we needed to go ahead now. If you don't have a copy of the SCBA grant paper I'll get you one.

Hope you are having a nice day,  
Debbie

**Judy O'Donnell**

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**From:** higbee147@comcast.net  
**Sent:** Tuesday, March 09, 2010 10:24 AM  
**To:** clerk  
**Subject:** email

Judy,  
May I have Ryan Pierson's email address please.  
Also, in your any of your classes have you studied under what circumstances a councilperson should abstain from voting? Patti and Russ both belong to the Chamber. Should they vote on Chamber issues? I was told years ago that any vote involving something I am involved with (Methodist Church and Walls School for example) were things I should not vote on.  
Are you sitting in on the meeting today about Redev.? I am coming to the 6:30 meeting.  
Debbie



**Judy O'Donnell**

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**From:** higbee147@comcast.net  
**Sent:** Tuesday, March 09, 2010 2:32 PM  
**To:** clerk  
**Subject:** gas bill

Judy,  
Russ, Dave and Patti have all answered yes to paying the bill and I make 4 so it is okay to pay the sj gas bill  
Debbie

# OPRA Request Borough of Pitman

***Submitted on 12/30/10 via e-mail to judy@pitman.org***

**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:** Please DO NOT use regular mail – use e-mail or fax  
**Phone:** 732-873-1251  
**Fax:** 908-325-0129  
**E-Mail:** paff@pobox.com

## **FACTS:**

On December 28, 2010, I submitted to the Borough of Pitman a records request for

- 1. The nonexempt portions of the first three e-mails sent after 12:01 a.m. on February 23, 2008 by former Councilman Fred Swartz<sup>1</sup> that related to municipal business.*
- 2. The nonexempt portions of the first three (3) e-mails sent by sitting Councilwoman Debra Higbee after 12:01 a.m. on February 23, 2010 that related to municipal business.*
- 3. Any policy or other writing presently in force in Pitman Borough which addresses the requirements and recommendations set forth in DARM Circular Letter No. 03-10-ST.*

The overall purpose of my request was to determine whether the Borough is in compliance with DARM Circular Letter No. 03-10-ST, which requires the Borough to reliably retain and archive its official records, including those that are sent from or received at an elected official's personal e-mail account.<sup>2</sup>

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<sup>1</sup> In my request, I misspelled the Councilman's name as "Schwartz."

<sup>2</sup> The DARM Circular Letter is on-line at <http://www.njarchives.org/links/circular-letter-03-10-st.html> and official correspondence sent and received from an elected official's personal e-mail account have been determined to be government records disclosable under the Open Public Records Act (OPRA), see Donal Meyers v. Borough of Fair Lawn, GRC Case No. 2005-127 at <http://www.nj.gov/grc/decisions/2005-127.html>

On December 28, 2010, Borough Clerk Judith O'Donnell responded. In response to my request for former Councilman Swartz's e-mails, Clerk O'Donnell stated:

*I was not in my present position with the Borough of Pitman at [the time that Mr. Swartz served on Borough Council], and therefore had no occasion or receive any form of correspondence from Councilman Schwartz.*

In response to my request for Councilwoman Higbee's e-mails, Clerk O'Donnell provided three e-mails dated February 23, 2010, 1:28 p.m.; March 9, 2010, 10:24 a.m., and March 9, 2010, 2:32 p.m.

Clerk O'Donnell's cover letter and three responses are on-line at <http://ogtf.lpcnj.org/2010363UH//b01229Docs%20responsive%20to%20OPRA.pdf>

## **ANALYSIS:**

### Swartz's e-mails:

Clerk O'Donnell improperly responded to my request for Swartz's e-mails. My request was for "the nonexempt portions of the first three e-mails sent after 12:01 a.m. on February 23, 2008 by former Councilman Fred Swartz that related to municipal business." Clerk O'Donnell, however, apparently interpreted my request as being for e-mails Swartz had sent to **her**. Since Clerk O'Donnell was not the Borough Clerk when Swartz served on Council, she asserted that since she had not corresponded with Swartz, no records were responsive to my request.

But, my request wasn't limited to e-mails Swartz sent to Clerk O'Donnell or even to the person who served as Borough Clerk during 2008. Rather, my request was for three e-mails that dealt with municipal business that Swartz sent, during a certain time frame, to **anyone** while he served as a member of the Borough Council.

Suppose, for example, that Swartz sent a February 24, 2008 e-mail to a municipal vendor regarding a municipal contract. Suppose further that Swartz did not send a copy of that e-mail to the Clerk or anyone else. This e-mail would likely be categorized as "general external correspondence" that the Borough is required to retain for 3 years.<sup>3</sup> Thus, the Borough would be under an affirmative duty to retain such an e-mail for at least three years regardless of whether or not Swartz had sent a copy of it to anyone else and regardless of whether Swartz transmitted it from a computer at Borough Hall, his home or from a Starbucks in San Diego.

Accordingly, I am repeating my request for Swartz's e-mails in Request No. 1 below. This time, I ask Clerk O'Donnell to properly respond.

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<sup>3</sup> See Record Series No. 0503-0001 in the Municipal Agencies General Records Retention Schedule which is on-line at <http://www.state.nj.us/state/darm/links/pdf/m100000-007.pdf>

## Higbee's e-mails:

I note that two of Councilwoman Higbee's three e-mails were addressed to Clerk O'Donnell and the third e-mail was copied (i.e. cc 'd) to Clerk O'Donnell. But this raises a question as to whether Clerk O'Donnell provided me with only those e-mails that were sent to her as opposed to those that Higbee sent to others. As stated in my analysis of Swartz, my request was not limited to only those e-mails to which Clerk O'Donnell received. Rather, my request was broad enough to encompass municipality related e-mails that Councilwoman Higbee sent to anyone, such as a vendor, a fire chief or a colleague on the Borough Council. Accordingly, I am resubmitting another request, in Request No. 2 below, restricted to e-mails Higbee sent that were **not** sent or copied to the municipal clerk.

Also, Higbee's March 9, 2010, 2:32 p.m. e-mail states:

*Russ [presumably Council President Russell Johnson], Dave [presumably Councilman David Swindell] and Patti [presumably Councilwoman Patti Kelley] have all answered yes to paying the bill and I make it 4 so it is okay to pay the sj gas bill.*

It appears that a majority of the Borough Council "met" via e-mail and "voted" to expend money from the public treasury.<sup>4</sup> This raises a separate question regarding compliance with the Senator Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq. Accordingly, Request No. 3 seeks to learn more about this on-line vote.

### **RECORDS REQUESTED:**

1. The nonexempt portions of the first three (3) e-mails sent after 12:01 a.m. on February 23, 2008 by former Councilman Fred Swartz that related to municipal business.
2. The nonexempt portions of the first three (3) e-mails sent by sitting Councilwoman Debra Higbee after 12:01 a.m. on February 23, 2010 that related to municipal business. Specifically excluded from this request are any e-mails that were sent or copied (i.e. cc' d) to Clerk O'Donnell.
3. All e-mails from "Russ," "Dave" and "Patti" regarding the "sj gas bill" referred to in Councilman Higbee's March 9, 2010, 2:32 p.m. e-mail.

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<sup>4</sup> The March 8, 2010 public meeting minutes (on-line at <http://www.pitman.org/userfiles/03.08.2010%20Minutes.doc> ) indicate that a question was raised about a \$34.31 gas bill that was deducted from the ambulance hall budget and could have been possibly coded to the wrong account. The minutes reflect that the payment of the \$34.31 bill was not approved for payment at the March 8, 2010 meeting. While authorizing payment of a small sum by an e-mail vote may appear to be an insignificant violation of the Meetings Act, it is nevertheless concerning since it suggests that the Council, on other occasions, may have taken votes on more significant issues outside of public view.



# Borough of Pitman

110 SOUTH BROADWAY  
Phone: 856-589-3522  
E-mail: [pitman@pitman.org](mailto:pitman@pitman.org)

PITMAN, NEW JERSEY 08071  
FAX: 856-589-6833  
[www.pitman.org](http://www.pitman.org)

January 10, 2011

Dear Mr. Paff,

In response to the OPRA Request submitted to me dated December 30, 2010, attached you will find the first three emails sent after 12:01 a.m. on February 23, 2010 by Councilwoman Debra Higbee that related to municipal business.

In regards to the request for emails sent by former Councilman Fred Swartz, I have contacted Councilman Swartz, and am awaiting his reply to your request.

Finally, I have contacted Russ, Dave and Patti regarding the South Jersey Gas bill referred to in Councilwoman Higbee's March 9, 2010 email. All three have responded that they cannot find any emails pertaining to this subject..

I hope this information satisfies your request. If I may be of any further assistance, please feel free to get in touch.

Sincerely,

Judith O'Donnell  
Municipal Clerk

**SmartZone Communications Center**

higbee147@comcast.net

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**Re: rats**

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**From :** Pitman PD Traffic Unit <trafficunit@pitman.org>  
**Subject :** Re: rats  
**To :** higbee147@comcast.net

Wed Feb 24 2010 3:26:40 PM

Ok...actually just got a complaint about the corner property about an hour ago.. I will definately look into both. I will keep you posted!

Dan

---

**----- Original Message -----**

**From:** higbee147@comcast.net  
**To:** Pitman PD Traffic Unit  
**Sent:** Wednesday, February 24, 2010 3:23 PM  
**Subject:** Re: rats

Dan,  
Jean is concerned about the corner property too but obviously can't tell where the rats are living or feeding.  
Debbie

**----- Original Message -----**

**From:** "Pitman PD Traffic Unit" <trafficunit@pitman.org>  
**To:** higbee147@comcast.net  
**Cc:** "clerk" <judy@pitman.org>  
**Sent:** Wednesday, February 24, 2010 2:05:25 PM GMT -05:00 US/Canada Eastern  
**Subject:** Re: rats

Councilwoman Higbee:

Good afternoon! I will follow this up again. I have been keeping an eye on the residence next to the "Blocks" and had a feeling that it was not sufficiently corrected. I may have to bring Ryan Pierson in on it to make a determination and have it boarded. I will also check the other residence. Have there been any complaints about that one? I will keep you posted.

Dan

---

**----- Original Message -----**

**From:** higbee147@comcast.net  
**To:** Dan McAteer  
**Cc:** clerk  
**Sent:** Wednesday, February 24, 2010 1:22 PM  
**Subject:** rats

Hello Officer Dan and Judy,  
Jean Block of 20 Webb Avenue came to me today to tell me that she has seen rats again near her house. There are now two empty houses on her block and perhaps they are coming from there. Is there anything we can do? Who else should I contact?  
Debbie

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SmartZone Communications Center

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**SmartZone Communications Center**

higbee147@comcast.net

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**Re: Books**

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**From :** Sharon Furgason <sharon.furgason@mccowan-pitman.org>

Tue Mar 9 2010 10:52:54 AM

**Subject :** Re: Books**To :** higbee147@comcast.net

Sorry about that, Debbie. I think if you have Vista on your computer it will not open my attachments. We have Macs here, however we do all of our documents on NeoOffice which is supposedly compatible with PCs and Word. But I think not Vista. I will print it out and put it in your mailbox. In the meantime, I will do a Baker & Taylor book order. I will print out the order with the extended price. When the invoice comes in, I will attach the order with titles. I will include additional charges for processing and freight surcharge.

Sharon

On Mar 9, 2010, at 10:30 AM, [higbee147@comcast.net](mailto:higbee147@comcast.net) wrote:

Sharon,

I cannot open your file at home or at work.

I want you to prepare a book order. Put a "do not exceed" price of \$500.00 on it. Give me the invoice and I will put it on the next bill pay. It must show exact titles and an exact total. Include processing and shipping, if any. Please put a printed copy in my Borough Hall mailbox.

Debbie

----- Original Message -----

**From:** "Sharon Furgason" <sharon.furgason@mccowan-pitman.org>**To:** "Debbie Higbee" <higbee147@comcast.net>**Sent:** Thursday, March 4, 2010 4:52:20 PM GMT -05:00 US/Canada Eastern**Subject:** Books

Hi, Debbie I have attached a spreadsheet of titles that I selected. I have not gone to Baker and Taylor to see the "our" price or the extension. We get 40% off most of everything we buy and I would assume we would get that for these also. Even with 40% off, this list would exceed \$500 so it needs to be reduced. Also, Line 34 is a 4 book series. How would you like me to proceed? The books that I have selected are mostly new—from Booklist (2/15/10 Spotlight on the Environment) and Horn Book. Let me know what to do next. I'm excited about this

Sharon Sharon Furgason Director McCowan Memorial Library 15 Pitman Ave. Pitman, NJ 08071 856-589-1656 Fax: 856-582-4982

SmartZone Communications Center

Page 1 of 2

**SmartZone Communications Center**

higbee147@comcast.net

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**RE: Obama signs NJ disaster declaration**

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**From :** Judy O'Donnell <judy@pitman.org>  
**Subject :** RE: Obama signs NJ disaster declaration  
**To :** higbee147@comcast.net

Tue Apr 6 2010 9:14:50 AM

 1 attachment

We are getting all the receipts, time sheets, etc together right now to submit for reimbursement. We also were eligible for reimbursement from the December storms which has been submitted for already. I saw you and Bruce walking a dog yesterday around 5:00. I did not know you had a dog-just cats.

---

**From:** higbee147@comcast.net [mailto:higbee147@comcast.net]  
**Sent:** Tuesday, April 06, 2010 9:28 AM  
**To:** Judy O'Donnell  
**Subject:** Re: Obama signs NJ disaster declaration

Judy,  
Just looking through old emails. Do you know the status of this program and if we are eligible?  
Debbie

— Original Message —

**From:** "Judy O'Donnell" <judy@pitman.org>  
**To:** ppwtom@verizon.net, "David Swindell" <dbs4pitman@comcast.net>, higbee147@comcast.net, "Jeff Sanders" <councilmansanders@verizon.net>, "Michael Batten" <michaelbatten@comcast.net>, "Michael Razzo" <Mrazzo@GlennInsurance.com>, prkelley125@comcast.net, "RUSS JOHNSON" <RUSSJOHNSON3@VERIZON.NET>  
**Sent:** Wednesday, March 24, 2010 12:21:29 PM GMT -05:00 US/Canada Eastern  
**Subject:** FW: Obama signs NJ disaster declaration

FYI

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**From:** Moriarty, Asm. D.O. [mailto:AsmMoriarty@njleg.org]  
**Sent:** Wednesday, March 24, 2010 11:59 AM  
**Subject:** FW: Obama signs NJ disaster declaration

Dear Mayor and Council,

Please see the statement below from the White House indicating that the Federal Emergency Management Agency (FEMA) will be providing assistance for storm damage that many of your municipalities experienced in early February.

If I could be of any assistance, please do not hesitate to reach out to my office as well.

Sincerely,

Paul Moriarty  
Assemblyman, 4<sup>th</sup> District

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**From:** Richmc01@aol.com [mailto:Richmc01@aol.com]  
**Sent:** Wednesday, March 24, 2010 11:26 AM  
**To:** Moriarty, Asm. D.O.  
**Subject:** Fwd: Obama signs NJ disaster declaration

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**Exhibit Page 15 of 17**





THE WHITE HOUSE  
Office of the Press Secretary  
For Immediate Release  
March 23, 2010

President Obama Signs New Jersey Disaster Declaration

*The President today declared a major disaster exists in the State of New Jersey and ordered Federal aid to supplement State and local recovery efforts in the area struck by a severe winter storm and snowstorm during the period of February 5-6, 2010.*

*Federal funding is available to State and eligible local governments and certain private nonprofit organizations on a cost-sharing basis for emergency work and the repair or replacement of facilities damaged by the severe winter storm and snowstorm in the counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, and Salem.*

*In addition, assistance is available to State and eligible local governments on a cost-sharing basis for emergency protective measures, including snow assistance, for a continuous 48-hour period during or proximate to the incident period.*

*Federal funding is also available on a cost-sharing basis for hazard mitigation measures statewide.*

*W. Craig Fugate, Administrator, Federal Emergency Management Agency (FEMA), Department of Homeland Security, named William L. Vogel as the Federal Coordinating Officer for Federal recovery operations in the affected area.*

*FEMA said additional designations may be made at a later date if requested by the State and warranted by the results of further damage assessments.*

FOR FURTHER INFORMATION CONTACT: FEMA (202) 646-3272.

Richard McGrath  
Director of Communications  
Congressman Frank Pallone, Jr.  
237 Cannon House Office Building  
Phones: 202.225.4671/609.280.4300  
Richard.McGrath@mail.house.gov  
Richmc01@aol.com



image001.jpg  
5 KB

X-CAA-SPAM: N00000

X-Authority-Analysis: v=1.1 cv=19qy/NRqjviAJbceVCEvXv3umjRWDVwA/vd+W/E388=  
c=1 sm=1 a=MRZ0FHSSkhOHWfuVvhvwPg==:17 a=9g\_lhyRhiRAQL3m0-5sA:9  
a=8ngkiEX1lzQnRHxfZ\_4A:7 a=7frqbhTH30N4Etqzm2Y1ej\_qoAkA:4  
a=CjuIK1q\_8ugA:10  
a=SSmOFEACAAAA:8 a=IG-biO6qGvW6x2-Fu2UA:9 a=5PKf3cDuyRpzSQKf3dcA:7  
a=YzBvyg0exBACmcka8axxM6GzxlcA:4 a=MRZ0FHSSkhOHWfuVvhvwPg==:117

Delivered-To: paff@pobox.com

X-Pobox-Orig-Sender: <judy@pitman.org>

X-Pobox-Delivery-ID:

76794E56-1E9D-11E0-AA68-D5A56F388256-97442625!maroon.pobox.com

x-pobox-client-address: 208.112.92.42

x-pobox-client-name: ds136342-2.aitcomputers.net

From: "Judy O'Donnell" <judy@pitman.org>

To: <paff@pobox.com>

Subject: Pitman Opra Request

Date: Wed, 12 Jan 2011 17:15:33 -0500

X-Mailer: Microsoft Office Outlook 11

Thread-Index: AcuypjsaEqpajW+kRKqimlw/Wv58nQ==

X-Pobox-Pass: judy@pitman.org is whitelisted

Dear Mr. Paff

I have received a telephone response from former councilman, Fred Swartz, relating to your request for the first three emails sent after 12:01 a.m. on February 23, 2008, pertaining to municipal business. Councilman Swartz stated that he no longer has any emails from his time served on Pitman Council.

Judy O'Donnell

Borough Clerk

Borough of Pitman