JOHN PAFF and JOSE DELGADO Plaintiffs, vs. CAMDEN CITY BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY DOCKET NO. Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR INJUNCTIVE RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Preliminary Statement

Plaintiffs are two citizens who seek to bring Defendant Camden City Board of Education into better compliance with the Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. This lawsuit, among other things, presents five questions for the Court's consideration:

1. How promptly must the Defendant publicly disclose the nonexempt portions of its nonpublic (i.e. "closed" or "executive") meeting minutes?
2. Does the Defendant's claim that it must first "approve" its nonpublic meeting minutes prior to publicly disclosing even redacted versions of them have a basis in law?
3. Must Defendant pass a separate, free-standing resolution in order to satisfy the requirements of N.J.S.A. 10:4-13, or is it sufficient for it to pass a motion, which is recorded in the regular meeting minutes?
4. In its N.J.S.A. 10:4-13 motions or resolutions, how specifically must Defendant describe the topics it plans to discuss during its nonpublic meetings?
5. In its N.J.S.A. 10:4-13 motions or resolutions, how precisely must Defendant state the time when and the circumstances under which the discussion conducted in nonpublic session can be disclosed to the public?

Statement of Facts

Plaintiffs made two records requests, on September 29, 2011 and October 15, 2011, that sought various nonpublic meeting resolutions and minutes from Defendant Camden City Board of Education. The Board responded to Plaintiffs' two requests, respectively, on

October 14, 2011 and October 26, 2011. The Board's responses disclosed the following matters that are relevant to this lawsuit:

1. Even though Defendant held sixteen (16) nonpublic meetings between March 22, 2011 and September 27, 2011, it refused to publicly disclose even redacted versions of those meetings' minutes. (Verified Complaint, ¶ 9). Indeed, in its October 26, 2011 letter, Defendant posits that its responsibility to protect the public interest and personal privacy requires that prior to public disclosure, the "meeting minutes must be reviewed by the Board . . . to determine whether an unwarranted invasion of privacy would occur." (Verified Complaint, ¶ 10, Exhibit page 13). Yet, the Defendant apparently has no apparent timetable for "approval" of its nonpublic minutes. As stated in Exhibit page 14:

> the Board intended to approve additional closed session meeting minutes at its last regularly scheduled meeting. However, that agenda item was tabled to be discussed at a later time. Consequently, there are no additional records responsive to your request other than [the three sets of nonpublic meeting minutes] which were provided to you on October 14, 2011.

2. Instead of adopting separate, free-standing resolutions prior to excluding the public from its meetings, Defendant instead passes motions and embodies them within its public meeting minutes. (Verified Complaint, ¶ 13).

3. Some of the motions that Defendant passes in purported compliance with N.J.S.A. 10:4-13 describe the topics of the nonpublic discussion and predict the time and circumstances under which the nonpublic discussion can be publicly disclosed in very general terms. For example, the February 15, 2011 motion states, in its entirety, that:

> MOTION was made by Mr. Lamboy and seconded by Ms. Coscarello to go into Closed/Executive Session to discuss Legal Update, Contract Negotiations, Suspensions, Acting Principal-

> Vets, Resignations, Stipend Production Manager at 10:20 p.m. The subject matters that have been stated for the record that the board is going into closed session to discuss may be disclosed to the public if and when the need for confidentiality no longer exists. Action may be taken when the Board reconvenes. Motion was carried by the following vote: YES-MR. BROWN, MS. COSCARELLO, MS. DAVIS, MR. LAMBOY, MRS. DUNBAR-BEY, PRESIDENT.
> (Exhibit page 36).

4. The Board sometimes discusses matters during nonpublic session that are not within any of the exceptions enumerated within N.J.S.A. 10:4-12(b)(8). For example, the minutes of the March 1, 2011 nonpublic session state in part that:

> Mr. Sean Brown thinks that it is odd that more information is not given to Board Members regarding important decisions. He also thought that it was odd that the original advertisement was only advertised in two (2) places. Then it was advertised more fully. (Exhibit page 8).

Argument

Point I: Availability of Injunctive Relief

N.J.S.A. 10:4-16 expressly authorizes "any member of the public" to "apply to the Superior Court for injunctive orders or other remedies to insure compliance" with the Open Public Meetings Act. "Where injunctions are creatures of statute, all that need be proven is a statutory violation. Other jurisdictions, having similar open meetings acts, hold that the legislative intent is to allow injunctions once a violation is shown and relief is deemed appropriate." Burnett v. Gloucester, 409 N.J. Super. 219, 242, (App. Div. 2009) quoting Matawan Reg'l Teachers Assoc. v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328, 335 (Law Div.1986) (internal citations omitted). Here, violations of the Act are evident and this Court should grant injunctive relief.

Point II: Prompt availability of meeting minutes.

Defendant's position is that the law permits it to entirely suppress its nonpublic meeting minutes until after it "approves" those minutes at a subsequent meeting. But, the Board had not, as of October 26, 2011, "approved" its nonpublic minutes from meetings held as early as March 22, 2011. Depriving the public of access to even redacted versions of a nonpublic meeting held more than seven months ago cannot be reconciled with the mandate of N.J.S.A. 10:4-14 that those minutes be made "promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12]."

Further, the Board has previously failed to "approve" its closed meeting minutes for two years after a nonpublic meeting occurred. See "Motion to Accept the remaining closed session minutes from April 2, 2009 through May 31, 2010" passed on April 26, 2011. Exhibit page 17.

At Exhibit page 13, Defendant cites O'Shea v. W. Milford Board of Educ., 391 N.J. Super. 534 (App. Div. 2007). The record at issue in O'Shea was not a set of nonpublic meeting minutes, but the board secretary's handwritten notes, which the Appellate Division compared to "yellow-sticky note[s] penned by a government official to help him or her remember a work-related task." Id. at 539.

Indeed, O'Shea is actually contrary to Defendant's position because the school board in that case "provided [Mr. O'Shea] with the unapproved but typed formal minutes of the executive session, as prepared by the Secretary and submitted to the Board." Id. at 537. The fact that the West Milford Board publicly disclosed its "unapproved" minutes calls into question Defendant's contention that it needs to "approve" its nonpublic meeting minutes proper to their release.

Other case law undercuts Defendant's reliance on O'Shea. Attached to this brief as Exhibit A is a July 30, 2008 order entered by Hon. Lawrence M. Lawson, A.J.S.C. in the case of Napoli v. Borough of Interlaken, Docket No. MON-L-1831-08. Attached as Exhibit B is Judge Lawson's June 26, 2008 written opinion in this unpublished case.

Beginning on at the bottom of page 7 of his written opinion, Judge Lawson addressed O'Shea in response to the defendant's contention that the plaintiff "was not entitled to closed session meeting minutes as the meetings contained detailed discussions that were permitted to be discussed in private session." Judge Lawson found that "pursuant to the Appellate Division's decision in O'Shea the Defendant's contention for failing to provide timely minutes must fail. As a result, the court finds that the Defendant failed to provide the Plaintiff with timely minutes in accordance with N.J.S.A. 10:4-14."

Both on the second page of his order and on page 27 of his opinion Judge Lawson ordered "defendant to provide its minutes within thirty (30) days of the last held meeting or prior to the governing body's next scheduled meeting, whichever occurs first." It is noteworthy that Judge Lawson's order applied to both public and nonpublic meeting minutes, which undercuts the Camden Board's assertion, at Exhibit page 13, that nonpublic meeting minutes need to be approved before redacted, draft versions of them can be disclosed to the public.

Other cases have also held that nonpublic meeting minutes, properly redacted, must be made available within a short, fixed period of time and that there is no requirement that those redacted minutes be "approved" prior to their release.

Attached to this brief as Exhibit C is Judge Lawson's February 13, 2009 order

entered in the case of Paff v. Keyport Borough Council, et al., Docket No. MON-L-3317-07. Similar to his holding in Napoli, Judge Lawson ordered that "the minutes of both public and nonpublic meetings of Defendant Keyport Borough Council shall be available to the public within thirty (30) days of the last held meeting or prior to the next scheduled meeting, whichever occurs first." The requirement that the Keyport Council publicly disclose its nonpublic minutes *prior to* the next scheduled meeting precludes it from "approving" those minutes prior to public disclosure. Attached as Exhibit D is Judge Lawson's December 8, 2008 unpublished opinion in Paff v. Keyport, which held, at page 23, that ""the court will order Defendant to provide its minutes within thirty (30) days of the last held meeting or prior to the governing body's next scheduled meeting, whichever occurs first."

In accord with both Napoli v. Interlaken and Paff v. Keyport Borough Council, et al. is Paff v. Absecon Custodian et al, Docket No. ATL-L-3392-08. Attached as Exhibit E is the Hon. Steven P. Perskie's June 26, 2009 order ordering the City of Port Republic to "publicly disclose draft versions of the City Council's nonpublic meeting minutes, redacted as lawfully allowed, within thirty (30) days after the nonpublic meeting is held or prior to the City Council's next scheduled meeting, whichever occurs first."

Also in accord is Paff v. Dover Township, Docket No. OCN-L-2165-07, in which Assignment Judge Vincent J. Grasso ordered the Township to "endeavor to have at least draft minutes available to the public by Defendant's next regularly scheduled meeting, but in all events shall make at least draft minutes available to the public not later than thirty days after the subject meeting or the second meeting after the subject meeting, whichever comes first." Judge Grasso's July 18, 2008 order is attached as Exhibit F.

Other than these four unpublished cases, the only published case law Plaintiff can locate on the issue of prompt disclosure of minutes are the cases of Liebeskind v. Mayor and Municipal Council of Bayonne, 265 N.J. Super. 389 (App. Div. 1993) and Matawan Regional Teachers Association, supra. Both of these cases dealt with prompt disclosure of *public* meeting minutes.

In Liebeskind, supra at 394-395 (App. Div. 1993), the Appellate Division did not take issue with the trial court's order that required the Bayonne City Council to make "copies of final meeting minutes . . . available for inspection within two weeks after each meeting and at least three business days before the next meeting."

In Matawan Regional Teachers Association, supra, the court interpreted the statutory requirement of making the minutes available "promptly" in light of the Meetings Act's policy "favoring public involvement in almost every aspect of government." Id. at 330. The court held that making minutes promptly available implements the Act's overall purpose in three ways:

> 1. Enabling those attending a meeting to know what occurred at prior meetings. This is particularly important if successive meetings deal with related issues, as here.
>
> 2. Providing all persons with the opportunity to take action prior to the next meeting of the public body.
>
> 3. Informing persons, who might be aggrieved by actions of the public body and enabling them to take appropriate and timely steps to appeal or otherwise respond.
>
> Matawan at 331

The court, after considering several factors, such as how often the board met and the public importance of the minutes' subject matter, ultimately held that the board's public

meeting "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. If successive meetings involving the same subject matter are held at intervals shorter than two weeks, the board shall make the minutes of the earlier meeting available in advance of the later one." Id. at 334.

Importantly, the Matawan court held that not only did meeting minutes need to be disclosed promptly, but that the "standard for publication of the minutes . . . must be made known so that it can be enforced and the public and the association, here, can have meaningful recourse to the remedies provided by the act itself." Id. at 333. Unless the public knows in advance when a body's minutes will be disclosed, it will not know whether the mandates of the Meetings Act are being obeyed.

In sum, the weight of the case law demonstrates that public bodies must provide the public with draft versions of its public meeting minutes and draft versions of appropriately redacted nonpublic meetings within a short period of time and prior to the body's next scheduled meeting. And, the case law demonstrates that the standard under which the Board must disclose its minutes must be known by the public so that citizens know in advance when the minutes of a particular meeting are required to be disclosed. Accordingly, this Court should follow the lead of other courts and, after evaluating the specific circumstances of the Camden Board (e.g. how frequently the Board meets), fix a period of time within which the Board must make draft versions of the nonexempt portions of its nonpublic meeting minutes publicly available.

Point III: N.J.S.A. 10:4-13 is satisfied by "resolutions" and not "motions."

N.J.S.A. 10:4-13 specifies that before excluding the public from a meeting, a public body must "adopt a resolution" setting forth information about the matters to be discussed in nonpublic session and when those discussions can be made public. The statute does not state that "passing a motion" is sufficient but specifically calls for "a resolution" to be adopted.

"Resolutions," while similar to "motions" differ in two respects. First, a resolution is more formal than a motion. Second, resolutions are drawn as separate, free-standing documents while motions are embodied within a body's public meeting minutes. Plaintiff asserts that the Legislature, in N.J.S.A. 10:4-13, specifically called for resolutions instead of motions because it wanted a certain degree of formality to attend to an act as significant as excluding the public from a meeting. Further, and of more practical importance, is that free-standing resolutions, as documents that are drafted and approved at a public meeting, would be available to the public much sooner than minutes that are incorporated within a body's regular meeting minutes.

Meeting minutes of public bodies are rarely, if ever, publicly available immediately after the conclusion of a meeting or even within a day or two thereafter. Rather, public meeting minutes often are not typed up, even in draft form, for several weeks after the meeting. Since this is a fact that is "so generally known . . . that [it] cannot reasonably be the subject of dispute," Plaintiffs ask the Court to take judicial notice of it. N.J.R.E. 201(b).

A member of the public who wishes to inform himself or herself of the reasons why a public body excluded the public from a meeting would be able to secure a copy of a formal resolution that contained those reasons at the body's office within a day or two after the

meeting. But, if those reasons were embodied within a motion, the motion would likely not be publicly available in written form for several weeks after the meeting. Thus, Plaintiff asserts, the Legislature specifically required that "resolutions" and not "motions" be adopted in advance of nonpublic sessions to enable to the public to promptly obtain the body's written reasons for going into nonpublic session.

Even if the Court doubts Plaintiffs' contention, the Meetings Act is to be "liberally construed in order to accomplish its purpose and the public policy of this State as set forth in [N.J.S.A. 10:4-7]." N.J.S.A. 10:4-21, Rice v. Union County Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64, 70 (App.Div.1977), certif. denied, 76 N.J. 238 (1978). Since providing the public with prompt access to the written reasons why a public body excluded the public from one of its meetings fosters and enhances the "proper functioning of the democratic process," N.J.S.A. 10:4-7, the Court should construe N.J.S.A. 10:4-13 liberally by compelling the Defendant, going forward, to adopt free-standing resolutions, rather than motions, to authorize its nonpublic sessions.

Point IV: N.J.S.A. 10:4-13(a) requires more detail regarding the matters privately discussed than the Defendant's motions currently provide.

N.J.S.A. 10:4-13(a) requires the Defendant, in a resolution, to "stat[e] the general nature of the subject to be discussed" during a nonpublic session. The Defendant, in its motions, describes the subjects to be privately discussed with varying degrees of specificity.

At its March 22, 2011 public meeting, for example, the subjects of the nonpublic session were specifically described as "Ronald Ford vs. CBOE, J.R. for L.R. vs. CBOE, Carruth vs. CBOE, Snead vs. CBOE, Negotiations Teachers and Administration Updates." Exhibit page 15. Yet, the Board's February 15, 2011 motion described the topic of the

nonpublic discussion as being "Legal Update, Contract Negotiations, Suspensions, Acting Principal-Vets, Resignations, Stipend Production Manager." Exhibit page 36.

In McGovern v. Rutgers, 418 N.J. Super. 458, 469-70 (App. Div. 2011), the Appellate Division considered the question of how much specificity N.J.S.A. 10:4-13(a) requires. The court held that when informing the public of the general nature of nonpublic meeting discussion topics, a body "must tread a fine line—informing the public about its executive-session activities while not compromising the privacy interests of those whose business is being discussed" (quoting Council of New Jersey State College Locals v. Trenton State College Board, 284 N.J. Super. 108, 113, (Law Div.1994)). The court approved of the New Jersey State College court's statement that a resolution "should contain as much information as is consistent with full public knowledge without doing any harm to the public interest." 284 N.J. Super at 114 (quoting 34 New Jersey Practice, Local Government Law § 141, at 174 (Michael A. Pane) (2d ed. 1993)).

Informing the public that a "Legal Update" or "Contract Negotiations" were going to be privately discussed, as the Defendant did on February 15, 2011, does not meet this standard. The Board could and should have included within its resolution the parties to the contract being negotiated and the specific legal issues that were being "updated."

Further, it is not clear what "Acting Principal-Vets" means or what aspect of the "Stipend Production Manager" was being discussed. Without this information, it is impossible for the public to judge whether or not either of these topics properly qualified for nonpublic discussion.

Plaintiffs request an order, consistent with McGovern v. Rutgers, requiring the

Defendant, going forward, to place within its nonpublic meeting a resolutions a description of the topics to be privately discussed that contains the maximum amount of information about those topics that can be disclosed without doing any harm to the public interest. For example, if the Board were to receive a $20,000 settlement offer from the attorney of a slip and fall plaintiff who sued the Board for negligence, the Board should describe the discussion in its resolution as "to discuss a $20,000 settlement offer received from the Plaintiff in John Doe v. Camden Board of Education, Docket No. CAM-L-1234-10." No harm will be done by public disclosure of this level of detail because a) the plaintiff and his lawyer already know that they offered a $20,000 settlement and b) the sole purpose of the contract and litigation exception within N.J.S.A. 10:4-12(b)(7) is to keep *adverse parties* to litigation and contracts from being privy to the details of the public body's negotiation tactics and litigation strategy. Nevin v. Asbury Park City Council, 2005 WL 2847974 (App. Div. November 1, 2005), attached as Exhibit G.

Point V: N.J.S.A. 10:4-13(b) requires more detail regarding the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public than the Defendant's motions currently provide.

N.J.S.A. 10:4-13(b) requires the Defendant's nonpublic session resolutions to "stat[e] as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public." Yet, the Board purports to satisfy this statutory requirement by stating in its motions that "The subject matters that have been stated for the record that the board is going to closed session to discuss may be disclosed to the public if and when the need for confidentiality no longer exists." Exhibit pages 15 - 33.

The Board's language provides the public with no real information and is essentially meaningless. In order to comply with the statute, the Board must analyze each topic discussed in closed session and predict, as best as it can, the time when or circumstances under which the closed topic discussion can be disclosed. If, for example, the Board was discussing settlement of John Doe's lawsuit, see Point IV, supra, the Board's resolution should state "if the Board accepts Doe's settlement offer, the nonpublic discussion will be disclosed immediately. Otherwise, that discussion will be revealed upon the lawsuit settling or being otherwise disposed of and after the time for which an appeal has expired."

Plaintiffs seek an injunction requiring the Defendant, going forward, to include in its resolutions a specific and meaningful prediction of the time when or circumstances under which closed topic discussions can be disclosed.

Point VI: Improper Nonpublic Discussions

N.J.S.A. 10:4-12(b) states that "a public body may exclude the public **only** from that portion of a meeting at which the public body discusses [nine types of specifically described matters]." (Emphasis supplied). The overall purpose of the Open Public Meetings Act is to maximize the amount a body's official discussion that occurs in public and to construe the exceptions to public meetings strictly in favor of openness and against closure. Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority, 369 N.J. Super. 175, 186 (App. Div. 2004).

Under this standard, nonpublic discussions such as the one set forth in ¶ 20 of the Verified Complaint (where Mr. Sean Brown opined about the dearth of information that is given to Board Members and the lack of sufficient advertisement) are clearly prohibited.

Accordingly, this Court should enjoin Defendant, going forward, from discussing any matters in nonpublic session unless they are within one or more of the N.J.S.A. 10:4-12(b) exceptions, strictly construed against closure and in favor of openness.

Point VII: Plaintiffs should be awarded their costs.

R.4:42-8(a) states:

> Unless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party.

The definition of a "prevailing party" was discussed by the Appellate Division in African Council v. Hadge, 255 N.J. Super. 4, 11 (App. Div. 1992). Although the case dealt with a federal civil rights counsel fee claim, the logic set forth by the African Council court should also apply here:

> Singer v. State adopted a two-pronged test for determining when one is a prevailing party for purposes of Section 1988 counsel fee awards. Singer requires a party to "demonstrate that his [her] lawsuit was causally related to securing the relief obtained; a fee award is justified if plaintiffs' efforts are a 'necessary and important' factor in obtaining the relief" and "plaintiff must establish that the relief granted had some basis in law." (internal citations omitted)

The present litigation, if successful, will cause a substantial change to the timeliness and regularity of the Defendant's disclosure of its nonpublic meeting minutes as well as improvement in the amount of information contained with the Board's nonpublic meeting minutes and an injunction against improper discussions occurring outside of the public's presence. If successful, Plaintiffs should be declared the "prevailing party" because their lawsuit was both "causally related" and a "necessary and important factor" in obtaining the desired relief and because the relief granted has a basis in law. Id.

Exhibit A

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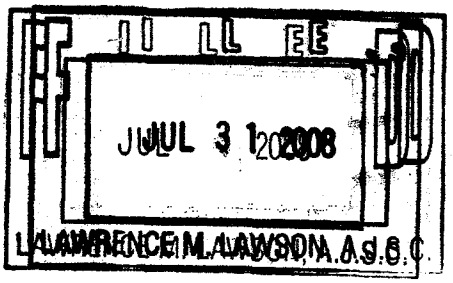


ROBERT NAPOLI, Plaintiff, v. **BOROUGH OF INTERLAKEN,** Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: MONMOUTH COUNTY** **DOCKET NO. MON-L-001831-08** **CIVIL ACTION** **ORDER**

THIS MATTER having been brought before the Court pursuant to *R.* 4:67-2(a) by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC, attorney for Plaintiff, by Verified Complaint and Order to Show Cause for an Order enjoining Defendant Borough of Interlaken from violating the Open Public Meetings Act and other relief; and the Court having considered the papers submitted by the parties, and having heard oral argument on June 3, 2008, and having entered its findings of fact and conclusions of law pursuant to *R.* 1:7-4 on June 26, 2008, and for good cause appearing,

IT IS on this 30th day of July 2008

DECLARED that Defendant violated the Open Public Meetings Act, *N.J.S.A.* 10:4-14, by not making its meeting minutes available to the public promptly; and it is further

DECLARED that Defendant violated the Open Public Meetings Act, *N.J.S.A.* 10:4-12, by discussing whether to propose an ordinance in closed session; and it is further

DECLARED that Defendant violated the Open Public Meetings Act, *N.J.S.A.* 10:4-12, by holding contractual negotiations with opposing parties in closed session; and it is further

DECLARED that Defendant violated the Open Public Meetings Act, *N.J.S.A.* 10:4-11, by preventing a quorum of the Borough Council to be present at a meeting with Ocean Township on January 20, 2008; and it is further

DECLARED that Defendant violated the Open Public Meetings Act, *N.J.S.A.* 10:4-9, by failing to provide adequate notice of its public meeting with Allenhurst on January 23, 2008; and it is

ORDERED that Defendant is permanently enjoined from discussing whether to propose ordinances in closed session; and it is further

ORDERED that Defendant is permanently enjoined from holding contractual negotiations with opposing parties in closed session; and it is further

ORDERED that Defendant's minutes of its meetings shall be available to the public within thirty days after the last held meeting of Defendant or prior to Defendant's next scheduled meeting, whichever occurs first; and it is further

ORDERED that Plaintiff is the prevailing party in this matter and shall file its bill of costs pursuant to R. 4:42-8 with the Clerk within 7 days of this Order's entry and return; and it is further

ORDERED that Plaintiff shall serve a copy of this Order upon Defendant within 7 days of this Order's entry and return.

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

OPPOSED (X)

UNOPPOSED ( )

Exhibit B

NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

ROBERT NAPOLI Plaintiff, v. BOROUGH OF INTERLAKEN, Defendant.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NUMBER: MON-L-1831-08 **OPINION**

Argued: June 3, 2008
Decided: June 26, 2008

Walter M. Luers, Esq. on behalf of Plaintiff Robert Napoli.

Dennis Crawford, Esq. of McLaughlin, Gelson, D'Apolito and Stauffer, LLC on behalf of Defendant Borough of Interlaken.

LAWSON, A.J.S.C.

This matter comes before the court as an Order to Show Cause seeking to enjoin the Defendant Borough of Interlaken from violating the Open Public Meetings Act and the Open Public Records Act.

The Court heard oral argument on June 3, 2008 and reserved decision. The Court will grant in part and deny in part the Plaintiffs Order to Show Cause. The court now enters the following finding of facts and conclusions of law pursuant to R. 1:7-4.

I. FACTS:

In 2007, the Monmouth County Prosecutor's Office investigated the Borough of Interlaken's police department. The investigation led to the resignation and arrest of the Borough's police chief and the seizure of the Borough's police department by the Prosecutor's Office. Thereafter the Borough questioned whether to rebuild or disband its police department.

According to Resolution 2007-84 the Borough held a private executive session on December 3, 2007 to discuss the future of the Interlaken Police Department with regard to contracting with neighboring municipalities for police services. On February 25, 2008 Plaintiff Napoli requested the minutes of the December 3, 2007 meeting and requested each report, letter or document sent from the Borough to the Monmouth County Prosecutors Office concerning the investigation of the police department. Although the Plaintiff received the minutes of the December 3, 2007 meeting, the substance of the minutes was entirely redacted.

On December 19, 2007, the Borough held its regularly scheduled council meeting regarding whether to abolish or rebuild the Borough's police department. During said council meeting, Plaintiff contends that the Mayor admitted

to an OPMA violation by stating that the Council would be discussing, on that evening and again on January 2, 2008, in closed session the future of the Interlaken police department. The resolution authorizing the December 19, 2007 executive session stated that the Borough would discuss strategy as it related to matters of public safety such as the future of the police department with receipt of contract proposals from Ocean Township and the Borough of Allenhurst.

Public meetings were subsequently held on January 2, 2008, January 23, 2008, February 6, 2008, February 20, 2008, March 19, 2008, and April 2, 2008. At the February 20, 2008 meeting, the Mayor mentioned that an informed decision would be made on the status of the police department. At the April 2, 2008 public meeting the Borough sought to adopt Ordinance 2008-3, which provided for the disbarment of the police department upon the execution of an agreement to provide police services with an adjoining municipality. The Ordinance stated that the Mayor, Council and Borough Administrator were exploring the issue over the past several months, had reviewed in detail the various options available and determined for several reasons including economics that it was more prudent to

contract out police services rather than rebuild. The Borough Council subsequently denied Ordinance 2008-3.

Additionally, as of February 27, 2008 the Defendant failed to draft the minutes for the January 2, 2008 and February 6, 2008 closed sessions and had failed to approve the minutes for the January 2, 2008, February 6, 2008 and February 20, 2008 open public meetings.

As a result of the above mentioned actions the Plaintiff commenced this action alleging violations of Open Public Meetings Act (OPMA) and the Open Public Records Act (OPRA). Plaintiff contends that the Defendant Borough of Interlaken made decisions in executive session rather than discussing and deliberating in public, held meetings with other public agencies and conducted interviews in private, and failed to create minutes for conducted public meetings within the time frame permitted by law; thereby violating OPMA and OPRA. Plaintiff now moves before this court by an order to show cause seeking to have Defendant enjoined from violating OPMA. Specifically, Plaintiff seeks to enjoin the Defendant from discussing whether to propose an ordinance disbanding the police department at closed sessions; holding contractual negotiations with Ocean Township and Allenhurst in a closed session meeting; and failing to provide timely minutes of the Borough's January

2, 2008 and February 6, 2008 closed session meetings. Plaintiff also contends that the Defendant violated OPRA by failing to promptly provide the report, identified as the Borough of Interlaken Police Department's Internal and External Infrastructure Manual, prepared by Interlaken for the Monmouth County Prosecutor.

II. APPLICABLE LAW:

A. OPMA: N.J.S.A. 10:4-6 et seq.

In the instant matter, Plaintiff contends that the Defendants violated the mandates of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. by discussing whether to propose an ordinance disbanding the police department at a March 5, 2008 closed session meeting, by holding contractual negotiations with Ocean Township and Allenhurst in a closed session meeting and by failing to provide timely minutes of the Borough's January 2, 2008 and February 6, 2008 closed session meetings. OPMA asserts a legislative policy of favoring public involvement in almost every aspect of government and the legislation is to be liberally construed to effectuate this policy. See N.J.S.A. 10:4-21.

FAILING TO PROVIDE TIMELY MINUTES

Plaintiff contends that the Defendant failed to provide timely minutes of its January 2, 2008 and February

6, 2008 closed session meetings. N.J.S.A. 10:4-14, provides:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.

The Act requires that the minutes be made promptly available. N.J.S.A. 10:4-14. Making minutes promptly available implements the Act's overall purpose in three ways:

> 1. Enabling those attending a meeting to know what occurred at prior meetings. This is particularly important if successive meetings deal with related issues, as here.
>
> 2. Providing all persons with the opportunity to take action prior to the next meeting of the public body.
>
> 3. Informing persons, who might be aggrieved by actions of the public body and enabling them to take appropriate and timely steps to appeal or otherwise respond.
>
> [Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J. Super. 328, 331 (Law Division, 1986).]

Although literally, prompt connotes action taken at once or immediate without delay, this literal meaning makes no

sense when applied to the Act as public bodies cannot make minutes available immediately upon conclusion of a meeting. Ibid. The Act's use of the word promptly, not reasonable time or any equivalent term makes clear that the legislative purpose of the OPMA is not served by a mere haphazard publication of the minutes. Id. at 332-333. A standard for publication of the minutes must be consistent with that purpose. Id. at 333. Further the standard must be made known so that it can be enforced and the public can have a meaningful recourse to the remedies provided by the act itself. Ibid.

The Defendant avers that the Borough failed to provide the Plaintiff with the requested minutes as the Borough was short staffed and was backed up on its minutes. The Board's contention that the court should take notice of the convenience of its employees misconceives the Board's position under the mandates of OPMA. The Board's obligation is to adapt to the standard required by the Act and to plan its employee's assignments accordingly. Ibid. Therefore the court will not consider the mere inconvenience of the Borough as a relevant factor in its failure to provide timely minutes.

Defendant further contends that the Plaintiff was not entitled to closed session meeting minutes as the meetings

contained detailed discussions that were permitted to be discussed in private session. In support of this contention the Defendant cites to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). However, the court finds that the Defendant's reliance on O'Shea is mistaken. In O'Shea, the Plaintiff sought minutes of the West Milford Board of Education's executive session held on June 22, 2005. Id. at 536. The Appellate Division held in O'Shea that under OPMA the Board is required to keep minutes of its executive session and must promptly release the notes to the public unless full disclosure would subvert the purpose of the particular exception that justified closed session in the first place. Id. at 540. The Appellate Division noted that although it is a policy decision as to what information the Board should include in its closed session meeting minutes, the minutes of executive session are typically general enough to avoid disclosure of the kind of free and frank exchange of views among the members that OPMA intended to protect. Ibid. Thus, pursuant to the Appellate Division's decision in O'Shea the Defendant's contention for failing to provide timely minutes must fail. As a result, the court finds that the Defendant failed to provide the Plaintiff with timely minutes in accordance with N.J.S.A. 10:4-14.

CONTRACTUAL NEGOTIATIONS WITH OCEAN TOWNSHIP AND ALLENHURST

Plaintiff further contends that the Defendant contractually negotiated with Ocean Township and Allenhurst in closed session meetings, in violation of OPMA. Specifically, Plaintiff contends that on January 23, 2008 a quorum of the governing body held an illegal executive session meeting with Allenhurst and on January 20, 2008 members of the governing body privately met with Ocean Township's Chief of Police in contravention to the open meeting requirements of OPMA.

a. Meeting with Ocean Township Police Chief

Plaintiff contends that the Borough's meeting with the Ocean Township Police Chief was in violation of OPMA. The Borough contends that its actions fell within the exception to OPMA delineated under N.J.S.A. 10:4-12(b)(7). N.J.S.A. 10:4-12(b)(7) states in pertinent part:

> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.

Defendant contends that in accordance with N.J.S.A. 10:4-12(b)(7) it conducted contractual negotiations with Ocean Township in a closed session.

In support of his contention the Plaintiff cites to an unpublished Appellate Division's decision, Nevin v. Asbury Park City Council, No. A-2124-04 (App. Div. November 1, 2005) (slip op. at 10) and N.J.S.A. 10:4-11. In Nevin, the Plaintiffs sought to challenge Asbury Park City Council's July 15, 2004 and August 4, 2004 executive session meetings held to discuss a proposed ordinance. Ibid. Additionally, in Nevin, the Plaintiffs challenged the fact that the redeveloper, Asbury Partners, was permitted to attend the discussions of the proposed ordinance. Ibid. In support of its actions, Asbury Park City Council averred that such conduct was permitted under N.J.S.A. 10:4-12b(7).

The Appellate Division held that the exception provided for under N.J.S.A. 10:4-12b(7) did not apply to contract negotiations with the opposing party, but rather only included contract negotiations by the public body. Ibid. The Appellate Division reasoned that the inclusion of pending or anticipated litigation, in the same subsection strongly supports this conclusion, because the public body would not want to expose its litigation or negotiation strategies in an open session to which the opposing party would be privy. Ibid. The Appellate Division further noted that such a conclusion is almost inescapable as subsection N.J.S.A. 10:4-12(b)(4) expressly

allows the opposing party to a collective bargaining agreement to be present in a non-public session. Ibid. However, no such language appears in N.J.S.A. 10:4-12(b)(7), which itself exempts collective bargaining discussions from the general rubric of contract negotiations.

Although unpublished opinions do not constitute precedent and are not binding upon this court, see R. 1:36-3, the court agrees with the Appellate Division's decision in Nevin. Thus in accordance with the holding in Nevin, this court rejects the Defendant's contention as contract negotiations with another township or the opposing contractual party does not fall within the exception to OPMA provided under N.J.S.A. 10:4-12(b)(7).

Defendant further avers that contractually negotiating with the Ocean Township Police Department did not violate OPMA as the Mayor formed sub-committees to review specific documents and gather information in order to assist the Mayor and Council in this decision making process. N.J.S.A. 10:4-7 provides:

> The Legislature, therefore, declares that it is the understanding and the intention of the Legislature that in order to be covered by the provisions of this act a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons'

> rights; that, therefore, informal or purely advisory bodies with no effective authority are not covered, nor are groupings composed of a public official with subordinates or advisors, who are not empowered to act by vote such as a mayor or the Governor meeting with department heads or cabinet members... that to be covered by the provisions of this act a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business; and therefore, typical partisan caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this act, nor are they intended to be so covered.

The Defendant avers that pursuant to N.J.S.A. 10:4-7, meetings held or arranged by subcommittees created by the Mayor, such as the meeting held with the Chief of Police of Ocean Township, are not subject to the provisions of OPMA.

However, the record before the court contradicts the Defendant's assertions. The Chief of Police of Ocean Township Antonio Amodio certified that he was invited by the Interlaken Council President Liz Brown to partake in discussions at Council President Brown's home concerning whether Ocean Township would provide police services to Interlaken. Police Chief Amodio contends that the meeting began with Council President Brown and Interlaken Council members Jean Primavera and Keith Miller. After a few hours, Council President Brown called and invited Interlaken Mayor Wolf to join the meeting. As Mayor Wolf

arrived, Council member Miller left the meeting. Thereafter Police Chief Amodio certifies that Council President Brown called and invited Council member Lynn Parry to attend the meeting and as Council member Parry arrived at the meeting, Mayor Wolf left.

Plaintiff asserts that the above-mentioned meeting held on January 20, 2008 was conducted in order to circumvent the requirements of OPMA. In support of this assertion Plaintiff points to N.J.S.A. 10:4-11 which provides "[n]o person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of [OPMA]." Although there is little case law on the application of N.J.S.A. 10:4-11, the Appellate Division decided a similar issue in Allan-Deane Corp. v. Township of Bedminster et al., 153 N.J. Super. 114 (App. Div. 1977). In Allan-Deane, the Plaintiff challenged a private meeting called by the Somerset County Planning Meeting, wherein some but not all of the Planning Board's members were to participate and wherein one member of each of various public agencies, including the governing body, the planning board and the environmental commission of the nine municipalities within Somerset County, were invited to attend. Id. at 116-117. The Appellate Division concluded that the meeting open to only one member of each of the

nine municipal public bodies and apparently not open to a quorum of the County Planning Board was so constituted for the purpose of circumventing the Act. Id. at 120. Here, this court holds that the same principle applies to the January 20, 2008 Interlaken meeting with Police Chief Amodio. The Defendant overtly attempted to circumvent the Act by preventing a quorum by inviting a council member to join the meeting as another council member left. It is evident that the Defendant's intent was to circumvent the requirements of OPMA. Therefore, the court finds that the Defendant violated the statutory requirements of OPMA by its actions on January 20, 2008.

b. Meeting with Allenhurst

Plaintiff also contends that the Board violated OPMA by holding an illegal executive session meeting with the representatives of Allenhurst to discuss possibly contracting with Allenhurst for police services. Specifically, Plaintiff asserts that following a public Interlaken meeting held in Allenhurst, a quorum of Interlaken's governing body met with a quorum of Allenhurst's governing body to negotiate Allenhurst providing police services to the Borough of Interlaken without providing notice to the residents of Interlaken. Plaintiff further contends that the presence of a quorum

initiated the Borough's requirements under OPMA. Defendant contends that a meeting did occur, however the meeting was initiated and duly noticed by Allenhurst.

In analyzing the OPMA, the court disagrees with the Defendant's contention and finds that the meeting with Allenhurst was in contravention of OPMA as it was an executive session meeting discussing contractual negotiations with an opposing party and the meeting was not duly noticed. The court will focus on the issue of notice as the court has already addressed the inability of a public agency to conduct contractual negotiations in closed session with the opposing party.

OPMA guarantees the public's right to attend meetings of public bodies at which public business is discussed or acted upon and to have adequate notice of these meetings. N.J.S.A. 10:4-6. The OPMA defines a meeting as:

> any gathering...which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.
>
> [N.J.S.A. 10:4-8.]

Moreover, the requirements of OPMA should be liberally construed in order to accomplish its purpose and the public policy of this State. N.J.S.A. 10:4-2. It is undisputed that a quorum of the Interlaken Borough Council held a meeting with the Borough Council of Allenhurst to discuss Allenhurst providing police services to Interlaken. Thus the only matter left to decide is whether sufficient notice was provided to the public. The court finds that under the Act's liberal construction, Interlaken failed to properly notice the public regarding the Borough Council's meeting with Allenhurst. A duly noticed Interlaken public meeting was held at the Allenhurst fire house on January 23, 2008 at 6:00 p.m., a few hours before the challenged closed session meeting with Allenhurst. The public meeting was well attended with approximately 200 or more Interlaken residents. Conversely, no one from the public was present at the Allenhurst meeting to view what was being discussed or to hear the deliberations. It is hard to imagine that with such a large crowd attending the public session's discussion on the future of the Interlaken police department that the public would not be interested in the Interlaken's meeting with Allenhurst.

In addition, the notice provided by Allenhurst only stated:

> The Board of Commissioners of the Borough of Allenhurst will meet with the Council of the Borough of Interlaken on Wednesday, January 23, 2008, at Allenhurst Borough Hall. The purpose of the meeting will be to enter into executive session to discuss contractual matters. There will be no action taken by the Allenhurst Board of Commissioners at this meeting.
>
> [Second Leurs Certification, Exhibit 2.]

Allenhurst's notice was insufficient to provide the residents of Interlaken with notice that a meeting was being held with the Borough Council of Interlaken and Allenhurst to discuss possibly contracting with Allenhurst for police services. This can be seen by the lack of public participation with regard to said Allenhurst meeting. "Secrecy in public affairs 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. Thus the legislature has declared that it is public policy to insure the right of citizens to have adequate notice of all meetings of public bodies at which any business affecting the public is discussed. Ibid. Interlaken's reliance on Allenhurst's notice belies the policy and purpose behind OPMA. As a result, the court holds that Interlaken's failure to provide its public with notice of its meeting with Allenhurst is in violation of OPMA.

POLICE CHIEF CANDIDATE INTERVIEW

Plaintiff also alleges that the Borough violated OPMA by interviewing a potential chief of Police candidate in closed session. The Defendant contends that this meeting was justified as it fell within the personnel exception under N.J.S.A. 10:4-12(b)(8). N.J.S.A. 10:4-12(b)(8) provides an exception for:

> 8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

In support of its actions, the Defendant cites to Jones v. East Windsor Regional Board of Education, 143 N.J. Super. 182 (Law Div. 1976). In Jones, the East Windsor School Board met in executive session to interview applicants for the vacancy of the Board. Id. at 186. The Board then reconvened and nominated applicants and voted on a candidate. Ibid. In Jones, the Plaintiff contended that the Board's procedure violated OPMA. However, the court concluded that the Board's actions were justified because the individual privacy of the applicants might be invaded

by conducting the interviews in a public session. Id. at 191. Thus the court held that the Board did not violate OPMA by interviewing applicants in executive session. Id. at 192. While the Borough can exclude the public from deliberations or interviews, the personnel exception is not an excuse for excluding the public from the entire process. Gannett Satellite Information Network, Inc. v. Board of Education of the Borough of Manville, 201 N.J. Super. 65, 69 (Law Div. 1984). Here, the Plaintiff does not assert that the public was excluded from the entire process, rather Plaintiff only contends that the Borough held an interview in closed session. Discussions or interviews pertaining to the employment of a new Chief of Police is clearly within the realm of N.J.S.A. 10:4-12(b)(8), since this provision encompasses "any matter" involving the employment or appointment of an employee. See Houman v. Pompton Lakes, 155 N.J. Super. 129, 145-146 (Law Div. 1977). As there is no indication from the record before the court that the entire candidate process was excluded from the public, the court finds that interviewing a potential Chief of Police candidate in closed session is not violative of OPMA.

PROPOSING AN ORDINANCE IN CLOSED SESSION

The Plaintiff further contends that the Defendant, in a closed session meeting held on March 5, 2008, proposed an ordinance to disband the Borough's police department in contravention of OPMA. In adopting the OPMA, the Legislature recognized that secrecy in public affairs undermines the faith of the public government. N.J.S.A. 10:4-7. The Legislature declared that the right of the public to witness the full details of all phases of deliberation, policy formulation and decision making of public bodies is vital to the proper functioning of the democratic process. In re Consider Distrib. of the Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16-17 (App. Div. 2008). OPMA requires the members of the public body to deliberate and vote at a public meeting held after giving adequate notice to the public. Id. at 17.

The Defendant contends that the public was apprised of all actions concerning the police department. As a result, the Defendant maintains that it was not in violation of OPMA. Although the public was kept abreast of the actions pertaining to the disbanding of the police department, OPMA does not provide a provision that allows a closed session discussion regarding proposing an ordinance. Such discussions should have been held in a public meeting.

Nonetheless, the Ordinance contemplated by the Borough in the matter sub judice did not pass, therefore the action taken at the meeting, that Plaintiff contends is in violation of OPMA, becomes meaningless. See Nevin v. Asbury Park City Council, No. A-2124-04 (App. Div. November 1, 2005) (slip op. at 10) (finding that Defendants OPMA violation at the July 15, 2004 meeting was meaningless since no action was taken at that meeting). Though the court finds that the Defendant's March 5, 2008 closed session meeting was improper, the denial of the Ordinance during a subsequent public meeting renders the nonconformity of the Borough's actions moot.

OPEN PUBLIC RECORDS ACT: N.J.S.A. 47:1A-1.1

Plaintiff further contends that the Defendants violated the Open Public Records Act by failing to provide the report prepared by Interlaken for the Monmouth County Prosecutor. Defendant contends that the Plaintiff's request was denied because at the time of the Plaintiff's request the Report was privileged under the inter-agency or intra-agency advisory, consultative or deliberative material exception under N.J.S.A. 47:1A-1. In order to be excepted under N.J.S.A. 47:1A-1, the document must fall within the following two prongs: (1) pre-decisional, generated before the adoption of an agency's policy

decision and (2) deliberative, containing opinions, recommendations or advice about agency policy.

In enacting OPRA, the Legislature declared it to be the public policy of the State that government records be readily accessible for inspection copying or examination and that all government records shall be subject to public access unless exempt. There is no dispute that the Report is a government record under OPRA's expansive definition of this term, thus the Report must be released to the Plaintiff unless it falls within an exception or provision that protects it from disclosure. N.J.S.A. 47:1A-1.1 provides that the terms "government record" or "record" "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material". Thus the court must consider whether the provisions under OPRA require the Borough of Interlaken to provide Plaintiff with the prepared Report.

The exemption from disclosure provided by N.J.S.A. 47:1A-1.1, which is often referred to as the deliberative process privilege, is aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure. Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 219-220 (App. Div. 2005). To qualify for this

privilege, two conditions must be satisfied: (1) the document must be pre-decisional, meaning it was "generated before the adoption of an agency's policy or decision," and (2) it "must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." Ibid. (quoting In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). The privilege does not extend to purely factual material that does not reflect deliberative processes. Ibid. Therefore, if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed. Ibid.

Pursuant to the deliberative process privilege, the government is permitted to withhold documents "that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The Court, in In re Liquidation of Integrity Ins. Co., noted that the privilege "is rooted in the notion that the sovereign has an interest in protecting the integrity of its deliberations." Ibid. In Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 945-46 (Ct. Cl. 1958),

the court expanded upon this underlying rationale as follows:

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with the power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.
>
> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

It is clear from the language of Kaiser that the deliberative process privilege is designed to shield inter-agency or intra-agency deliberations from public scrutiny in order to foster a free and open exchange of ideas. That is, the privilege encourages public officials or employees to express various concepts, good and bad, for the solution of an issue, without fear of the condemnation of public second guessing.

Here, Plaintiff suggests that the Report is neither a pre-decisional document nor a deliberative document. Plaintiff maintains that the Report is not pre-decisional

as it is a final report. Plaintiff supports this assertion by stating that the Report states that it was decided by the governing body after vast research and study combined with input from the community that it is in the best interest of the Borough to revive the Police Department. This court is constrained to disagree with the Plaintiffs analysis that the Borough's Report falls outside the definition of pre-decisional. At the time of the Plaintiff's request the Borough was still deliberating as to what course of action to take regarding its police department. This is exemplified by the fact that in April of 2008 a public hearing was held to adopt an Ordinance to disband the police department. This is further supported by the fact that the Borough decided to deny the adoption of the Ordinance.

Moreover, the governing body was asked to prepare the Report by the Prosecutor in order to facilitate the Prosecutors investigation of the Borough's police department. In Gannett, the clerk's tentative views concerning the course of action the County should follow was held to be deliberative and therefore protected from the purview of OPRA. supra 397 N.J. Super. at 220. As here, the Report was a tentative view on the potential internal and external infrastructure should the governing

body decide to rebuild the police department, which was prepared as a result of a request by the Monmouth County Prosecutor. Accordingly, the Defendant appropriately denied Plaintiff's request as the Report was privileged under the inter-agency or intra-agency advisory, consultative or deliberative material exception under N.J.S.A. 47:1A-1.

III. CONCLUSION:

After a careful review of the record before the court, the court finds that the Defendant did not violate OPRA by failing to provide the Plaintiff with the Report prepared for the Monmouth County Prosecutor and did not violate OPMA by interviewing a police chief candidate in closed session. However, the court finds that the Defendant violated the requirements of OPMA by discussing whether to propose an ordinance disbanding the police department at a March 5, 2008 closed sessions meeting, holding contractual negotiations with Ocean Township and Allenhurst in closed session meeting, and failing to provide timely meeting minutes of the Borough's January 2 and February 6, 2008 closed session meetings.

The remedies provided by the statute for violation of the Act includes: voiding the action taken at the nonconforming meeting; injunctive orders; or imposition of

fines for intentional violations. See Matawan Regional Teachers Association, supra 212 N.J. Super. at 334. This matter does not entail an intentional violation and the court cannot void the actions of the Borough's noncompliant meetings as the Borough did not act. Where injunctions are creatures of statute, all that need be proven is a statutory violation. Ibid. Thus, injunctive relief is the appropriate remedy in this case as no specific adverse effect of the violations in the past is alleged and the only concern facing this court is the Borough's future compliance with the Act. Ibid.

As a result, this court will enjoin the Defendant from discussing whether to propose an ordinance in closed sessions and holding contractual negotiations with opposing parties in closed sessions. In addition, as it is the practice within the Monmouth County vicinage, the court will order Defendant to provide its minutes within thirty (30) days of the last held meeting or prior to the governing body's next scheduled meeting, whichever occurs first.

Walter M. Leurs, Esq. counsel for Plaintiff Robert Napoli is directed to prepare and submit an Order consistent with this Opinion within 10 days of receipt of this Opinion.

Exhibit C

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

JOHN PAFF

Plaintiff(s)

vs.

KEYPORT BOROUGH COUNCIL and VALERIE T. HEILWEIL

Defendant(s)

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

CIVIL ACTION

ORDER

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

It is on this 13 day of February, 2009 :

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

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

first.

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

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

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

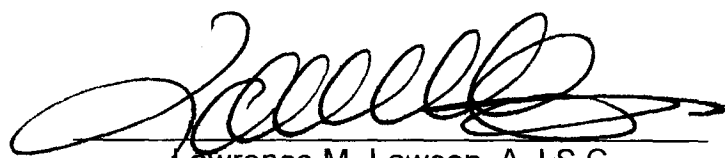
6) **DECLARED** that the first redaction within Paragraph 3 of the Keyport Borough Council's September 19, 2006 nonpublic meeting minutes (i.e. the redacted word between "Police Officers who become" and "and policies that can be set") would reveal "detailed medical or psychological information" that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

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

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

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

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



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

Exhibit D

NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

JOHN PAFF Plaintiff, v. KEYPORT BOROUGH COUNCIL and VALERIE T. HEILWEIL, Defendants.	:	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NUMBER: MON-L-3317-07 **OPINION**

Argued: August 12, 2008
Decided: December 8, 2008

John Paff, pro se.

Kenneth R. Ebner, Jr., Esq. of Wisniewski and Associates on behalf of Defendants Keyport Borough Council and Valerie T. Heilweil.

LAWSON, A.J.S.C.

This matter comes before the court as an Order to Show Cause wherein Plaintiff John Paff alleges violations of the Open Public Records Act ("OPRA") and the Senator Byron M. Baer Open Public Meetings Act ("OPMA") by Defendants Keyport Borough Council and Valerie T. Heilweil, the Borough Clerk.

The Court heard oral argument on August 12, 2008 and reserved decision. The Court will grant in part and deny in part the Plaintiff's Order to Show Cause. The court now

enters the following finding of facts and conclusions of law pursuant to R. 1:7-4.

I. FACTS:

On or about November 3, 2006, Plaintiff John Paff submitted an Open Public Records Act ("OPRA") request seeking, *inter alia*, closed session minutes of Defendant Keyport Borough Council's meetings held on September 9, 2006, October 3, 2006 and October 17, 2006. On November 16, 2006, the Borough responded to Plaintiffs request and informed Plaintiff that the requested minutes had not yet been transcribed. On December 13, 2006, the Borough provided Plaintiff with the requested minutes with several redactions.

On November 24, 2006, Plaintiff sent a letter to the Monmouth County Prosecutor ("Prosecutor") stating that the Borough failed to comply with the provisions of OPRA. On June 21, 2007 Plaintiff requested from the Borough of Keyport: 1) any and all correspondence, including emails, sent to Plaintiff regarding Plaintiff's November 24, 2006 letter; 2) any and all correspondence, including emails, from the Prosecutor relating to Plaintiff's November 24, 2006 letter; 3) any and all correspondence, including emails, from the Borough, or any of its offices or employees, to the Prosecutor relating to Plaintiff's

November 24, 2006 letter; and 4) any and all correspondence, including emails, relating to the issues presented in Plaintiff's November 24, 2006 letter sent or received by the Borough of Keyport. In response to Plaintiffs request the Borough informed Plaintiff that it will not provide the requested emails as the emails are not discoverable in accordance with the attorney client privilege and intra-agency advisory, consultative material exception.

On the same date, Plaintiff also sought the following: 1) the minutes of the Borough Council's public meetings held on April 10, 2007 and May 21, 2007; 2) the minutes of the Borough Council's nonpublic meetings held on March 6, 2007, April 10, 2007, April 24, 2007, May 1, 2007 and May 21, 2007; and 3) the resolutions that authorized the Borough Council's nonpublic March 6, 2007, April 10, 2007, April 24, 2007, May 1, 2007 and May 21, 2007 meetings. By letter dated June 29, 2007 and July 30, 2007 respectively, the Borough provided Plaintiff with redacted versions of the following requests: 1) the minutes of the Borough Council's public meetings held on April 10, 2007 and May 21, 2007 and 2) the minutes of the Borough Council's nonpublic meetings held on March 6, 2007, May 1, 2007, and May 21, 2007.

Plaintiff contends that during the April 10, 2007, and April 24, 2007 nonpublic meetings the Defendant Council discussed topics under topic headings "Loitering of Day Workers", "Proposed Ordinance-Smoking in Motor Vehicles with Children", and two instances of "K. Hovanian". Each of these topic headings appeared under a "Potential Litigation" category heading. Almost all text beneath each topic heading was redacted. Plaintiff further contends that during the April 10 and April 24, 2007 non-public meetings the Defendants discussed the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials. Each of these topic headings appeared under the personnel exception category heading.

The Borough's September 19, 2006 and October 17, 2006 nonpublic meetings contained redacted names of specific Keyport police officers and employees who were discussed at both closed session meetings. On June 21, 2007, the Plaintiff attached copies of the first page of redacted minutes from the Borough's September 19, 2006 and October 17, 2006 nonpublic meetings and requested that the Borough consider whether any of the presently redacted information could be disclosed. Ms. Heilweil, in her June 29, 2007 response to Plaintiff, stated that the redacted portions of

Page 1 of the Borough's September 19, 2007 and October 17, 2007 closed session meetings could not be disclosed as the information fell within N.J.S.A. 47:1A-9 and 10:4-12(b)(8).

Plaintiff further contends that in response to his requests, the Defendants reasons for redaction were that the redacted information requested could not be disclosed pursuant to N.J.S.A. 47:1A-9 and 10:2-12(b)(8) or that the redactions were done in accordance with the attorney client privilege exception to the Open Public Records Act (OPRA). Plaintiff contends that the Defendants did not provide a legally justifiable reason under OPRA to suppress the requested information. As a result of the Defendants actions, Plaintiff commenced this Order to Show Cause seeking to have the court set a time within which the Defendant shall make its meeting minutes available, enjoin the Defendants from discussing in closed session, matters not pertaining to a specific prospective public officer or employee in accordance with N.J.S.A. 10:4-12(b)(8) and from discussing matters not pertaining to actual, pending or anticipated litigation in accordance with N.J.S.A. 10:4-12(b)(7) and require Defendants to explain each redaction in a manner to be guided by the standards set forth for information withheld in R. 4:10-2(e).

II. APPLICABLE LAW:

A. OPMA: N.J.S.A. 10:4-6 et seq.

In the instant matter, Plaintiff contends that the Defendants violated the mandates of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., by failing to provide timely minutes of the Borough's April 10, 2007 and May 21, 2007 public meetings and the Borough's March 6, 2007, April 10, 2007, April 24, 2007, May 1, 2007 and May 21, 2007 closed session meetings and discussing "potential litigation" and "personnel exceptions" in closed session meetings. OPMA asserts a legislative policy of favoring public involvement in almost every aspect of government and the legislation is to be liberally construed to effectuate this policy. See N.J.S.A. 10:4-21.

FAILING TO PROVIDE TIMELY MINUTES

Plaintiff contends that the Defendant failed to provide timely minutes of its April 10, and May 21, 2007 public meetings and the Borough's March 6, 2007, April 10, 2007, April 24, 2007, May 1, 2007 and May 21, 2007 closed session meetings in accordance with N.J.S.A. 10:4-14. N.J.S.A. 10:4-14, provides:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.

The Act requires that the minutes be made promptly available. N.J.S.A. 10:4-14. Making minutes promptly available implements the Act's overall purpose in three ways:

> 1. Enabling those attending a meeting to know what occurred at prior meetings. This is particularly important if successive meetings deal with related issues, as here.
>
> 2. Providing all persons with the opportunity to take action prior to the next meeting of the public body.
>
> 3. Informing persons, who might be aggrieved by actions of the public body and enabling them to take appropriate and timely steps to appeal or otherwise respond.

Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J. Super. 328, 331 (Law Division, 1986).

Although literally, "prompt" connotes action taken at once or immediate without delay, this literal meaning makes no sense when applied to the Act as public bodies cannot make minutes available immediately upon conclusion of a

meeting. Ibid. The Act's use of the word "promptly", not "reasonable time" or any equivalent term makes clear that the legislative purpose of the OPMA is not served by a mere haphazard publication of the minutes. Id. at 332-333. A standard for publication of the minutes must be consistent with that purpose. Id. at 333. Further the standard must be made known so that it can be enforced and the public can have a meaningful recourse to the remedies provided by the act itself. Ibid.

The Defendant avers that it responded to Plaintiff's request within seven (7) days in accordance with the requirements of OPRA, N.J.S.A. 47:1A-5, informing Plaintiff that the minutes were not yet available as the governing body had not yet approved them. However, our courts have repeatedly held that OPMA requires that minutes be publicly disclosed prior to the municipality's next meeting. See Liebskind v. Mayor and Municipal Council of Bayonne, 265 N.J. Super. 389, 394, 395 (App. Div. 1993). OPMA's policy favors public involvement in almost every aspect of government. Matawan Regional Teacher's Association, supra, 212 N.J. Super. at 331. It has been Monmouth County's practice that municipalities provide its minutes within thirty (30) days of its last held meeting or prior to the governing body's next scheduled meeting, whichever occurs

first. Thus although Defendants responded to Plaintiff's request within a reasonable time, the Defendants failed to provided its minutes promptly in accordance with N.J.S.A. 10:14-4. OPMA mandates that a municipality's minutes be made promptly available, and here the Defendants provided its minutes to Plaintiff within sixty-three days or more. As such, Defendants actions are contrary to New Jersey case law and the legislative intent of OPMA. Therefore, the court finds that the Defendants failed to make its minutes promptly available in accordance with N.J.S.A. 10:4-14.

"POTENTIAL LITIGATION" AND "PERSONNEL EXCEPTION"

Plaintiff further contends that the Defendants violated OPMA by discussing matters in closed sessions listed under topic headings "Loitering of Day Workers", "Proposed Ordinance-Smoking in Motor Vehicles with Children", K. Hovnanian, the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials. Specifically, Plaintiff contends that the Defendant discussed said matters in closed session under the pretext that said matters fell within the anticipated or potential litigation exception to OPMA under N.J.S.A. 10:4-12(b)(7) and the personnel exception to OPMA under N.J.S.A. 10:4-12(b)(8).

Defendants maintain that its actions fell within the exceptions to OPMA delineated under N.J.S.A. 10:4-12(b)(7) and (8). The exceptions to OPMA noted under N.J.S.A. 10:4-12(b)(7) and (8) provides:

> (7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

The Defendant's consideration of issues relating to litigation may be conducted in a private session under the potential/anticipated litigation exception to OPMA. Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 145 (Law Div. 1977). The term litigation has a broad significance in common usage. Ibid. Litigation is defined as the "[a]ct or process of litigating a suit at law; a judicial contest; also figuratively, (a) dispute;

discussion." Ibid. (quoting Webster's New International Dictionary (2 ed)). To invoke the exception to open disclosure under N.J.S.A. 10:4-12(b)(7), the subject under discussion must be the pending or anticipated litigation itself, that is the public body must be discussing its strategy in the litigation, the position it will take, the strengths and weaknesses of that position with respect to the litigation, possible settlements of the litigation or some other facet of the litigation itself. Ibid. The Keyport Borough Council's discussion of the legal challenges regarding "Loitering of Day Workers", "Proposed Ordinance-Smoking in Motor Vehicles with Children" and K. Hovnanian falls within the broad definition of the anticipated/potential litigation exception delineated under N.J.S.A. 10:4-12(b)(7).

Moreover, Defendants contend that its discussions during closed session about the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials falls within the ambit of N.J.S.A. 10:4-12(b)(8). Discussions of whether to employ someone to check parking and the employment of Class I and Class II specials is clearly within the realm of N.J.S.A. 10:4-12(b)(8), since this provision encompasses "any matter

involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining" of an employee. See Houman v. Pompton Lakes, 155 N.J. Super. 129, 145-146 (Law Div. 1977). As a result the court finds that the Borough Council's discussions regarding the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials in closed session is not violative of OPMA.

Defendants further contend that the information discussed in closed session fell within the attorney-client exception to OPMA. Generally speaking, when confidentiality is at issue, our courts have held that the right to disclosure depends upon how compelling the reasons are for insuring confidentiality. When there is a strong need to maintain a high degree of confidentiality in governmental records, even if a public interest is asserted, more than the citizen's status and good faith are necessary to require production of the records. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super.480, 489 (Law. Div. 2001). On the other hand, as the justification for maintaining confidentiality becomes less persuasive, the burden on the party seeking

release is diminished. Techniscan Corp. v. Passaic Valley Water Comm'n, 113 N.J. 233, 236 (1988).

The importance of protecting confidentiality within the attorney-client relationship has a long history of recognition by the courts. The Press of Atlantic City, supra, 337 N.J. Super. at 489. Our Supreme Court has noted that "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure. . .must be removed." Ibid. (quoting In re Selser, 15 N.J. 393, 404 (1954)). The underlying rationale for the privilege has been characterized as the need for the attorney "to know all that relates to the client's reasons for seeking representation." Macey v. Rollins Environmental Services, 179 N.J. Super. 535, 539 (App. Div. 1981) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). The United States Supreme Court has recognized that the proper preparation of a case requires that a lawyer assemble information, sift relevant from irrelevant facts, prepare legal theories and plan strategy without undue and needless interference. United States v. Nobles, 422 U.S. 225, 237 (1975).

The protections afforded by the attorney-client relationship are not limited to private representation. The privilege has been held "fully applicable to communications

between a public body and an attorney retained to represent it." In re State Comm'n of Investigation, 226 N.J. Super. 461 (App. Div. 1988). Public scrutiny of matters traditionally falling within the purview of attorney-client privilege is often inimical to the public's interest, notwithstanding that a governmental entity is a client. The Press of Atlantic City, supra, 337 N.J. Super. at 489. Although New Jersey has a notably strong public policy in favor of open government as evidenced by the OPMA and OPRA the public's right of inspection is not unlimited. Accident Index Bureau, Inc. v. Hughes, 83 N.J. Super. 293, 298 (App. Div. 1964). Our Legislature has recognized that matters falling within the privilege should be free from public review notwithstanding that a governmental entity is a client and despite the strong public policy favoring maximum access to governmental deliberations. The Press of Atlantic City, supra, 337 N.J. Super. at 489. The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Id. at 492. When analyzing the competing interests in this case the court finds that the release of the attorney-client communications contained within the

Borough Council's meeting minutes would be inappropriate. As the information sought by Plaintiff falls within the exception to OPMA under N.J.S.A. 10:4-12(b)(7) and (8), the court holds that Defendants did not abridge the mandates of OPMA by discussing matters in closed sessions listed under topic headings "Loitering of Day Workers", "Proposed Ordinance-Smoking in Motor Vehicles with Children", K. Hovnanian, the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials.

B. OPRA: N.J.S.A. 47:1A-1 et seq. AND THE COMMON LAW RIGHT TO KNOW

Plaintiff contends that Defendants in its September 19, 2007 and October 17, 2007 meeting minutes redacted the names of certain Keyport Borough officers and employees. Plaintiff contends that pursuant to OPRA and the common law right to know, Plaintiff's right to know, in the present circumstance, outweighs the Defendants right to privacy. Defendants maintain that the Keyport Borough officers and employees were redacted in accordance with N.J.S.A. 47:1A-9 and 10:4-12(b)(8).

OPRA presents citizens with "an almost absolute right to inspect, copy, or purchase" even if the documents

contain confidential or privileged information. Keddie v. Rutgers, State University, 148 N.J. 36, 44 (1997). Under OPRA there is a limited legislative safeguard from public access and disclosure of a citizen's personal information when disclosure would be violative of an individual's reasonable expectation of privacy. Williamson v. Treasurer, State of N.J., 357 N.J. Super. 253 (App. Div. 2003). The common law defines a public record more broadly than OPRA. At common law a public record is a document which is made by a public official in the exercise of a public function. Notwithstanding, the common law right to know and OPRA's right to access of public records is not absolute or boundless. Ibid. As a matter of public policy the primary reason for public access to government records is for the citizen to see how government functions. Ibid. The public's access to a public record should not be in derogation of the privacy interests of a citizen or that citizens' personal information entrusted to the government. As there is little doubt that the information requested by Plaintiff is a public record, the court is called upon to weigh the Plaintiff's interest in exposure against the confidentiality interest of the municipality in maintaining the privacy of its citizens. Loigman v. Kimmelman, 102 N.J. 98, 112.

Plaintiff first alleges that the redaction in the first paragraph within section 3 of Plaintiff's Exhibit 13 is inappropriate as the redaction appears to be the word injured or sick. The Defendants contend that the redacted information provides a medical condition that if revealed would identify the officer. N.J.S.A. 47:1A-10 provides:

> data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

The Plaintiff in his brief also notes that the redaction in the first paragraph within section 3 of Plaintiff's Exhibit 13 more than likely pertains to an ailment. Thus in accordance with N.J.S.A. 47:1A-10, the court finds that the medical information of a police officer is not public information and was appropriately redacted from the Keyport Borough's meeting minutes.

Second, Plaintiff seeks the release of redacted portions of minutes concerning the disciplining of any specific prospective public officer or employee. The Defendants maintain that said redactions are justified and may not be disclosed pursuant to N.J.S.A. 10:4-12(b)(8) and N.J.S.A. 47:1A-9. As stated above N.J.S.A. 10:4-12(b)(8)

provides that any matter involving the disciplining of any specific prospective public officer or employee may be held in executive session and N.J.S.A. 47:1A-9 provides:

> a. The provisions of this act, shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.
>
> b. The provisions of this act, shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

The personnel exemption to OPMA focuses on the free and uninhibited discussion about matters relating to the hiring, firing, performance, compensation and discipline of public employees. South Jersey Publishing Co., Inc., 124 N.J. 478, 493 (1991). Such discussions necessarily involve subjective comments and evaluations of employees by members of the public body and their willingness to comment freely about such matters would obviously be inhibited if the discussion were to be conducted publicly. Ibid. However,

OPMA specifically requires that the public maintain reasonably comprehensible minutes of all meetings including executive sessions to be made promptly available to the public. Ibid.

> Minutes are intended to recite and disclose any official decision or action taken by a public body and disclose any official decision or action taken by a public body, and necessarily must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination. The purpose of the personnel exemption is to facilitate the process by which the public body makes personnel-type decisions, permitting the debate and deliberation to be conducted without public scrutiny or participation. But the exemption is designed to enable the public body to determine the appropriate action to be taken, not to withhold from the public either the public body's determination or the reasons on which its determination was based...it would be anomalous to interpret [OPMA], enacted by the Legislature to enhance the public's access to and understanding of the proceedings of governmental bodies, in a manner that foreclosed the public's right to obtain material and information vital to its ability to evaluate the wisdom of governmental action.
> [Id. at 493-494.]

Thus, OPMA does not absolutely prohibit the release of executive session minutes. Id. at 495. There is no conflict between the release of closed session minutes and the authorization that personnel matters be discussed in executive session. Id. at 494. As such the public body

cannot permanently withhold the redacted portions of its closed session minutes from disclosure under the pretext that said redactions were done in accordance with the personnel exception to OPMA.

The salutary purposes for allowing confidential discussion are neither inconsistent nor in conflict with the strong public policy requiring comprehensible disclosure of the actions taken by public bodies. Ibid. To the extent a cognizable privacy interest may be compromised by the required disclosure, the extent of disclosure may be modified appropriately. Accordingly, OPMA's personnel exception does not excuse Defendants from disclosing the redacted minutes concerning the discipline of a public officer or employee.

C. DID CLERK PROVIDE PLAINTIFF WITH LEGALLY JUSTIFIABLE REASON FOR DENYING HIS REQUEST FOR EMAILS

Plaintiff contends that the Borough Clerk failed to provide Plaintiff with a legally justifiable reason for denying his request for emails and redacted closed session meeting minutes relating to Plaintiff's November 24, 2006 letter to the Monmouth County Prosecutor. The Defendants explanation for redacting this material was that the information may not be disclosed in accordance with N.J.S.A. 10:4-12(b)(8) and N.J.S.A. 47:1A-10, that the

redactions were applied in accordance with the attorney client privilege exception to OPRA and that the emails were not discoverable as they fell within the intra-agency advisory, consultative materials exception to OPRA.

OPRA requires record custodians to inform the requestor of the "specific basis for its denial of access to a public record. N.J.S.A. 47:1A-5(g). Under OPRA a public agency seeking to restrict the public's right to access to government records 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. Nonetheless, the Defendant argues that Plaintiff's challenge to the emails regarding his November 24, 2006 letter is barred as Plaintiff's challenge commenced well beyond the forty-five (45) day filing period contemplated by OPRA. Proceedings under OPRA are to be conducted in a summary or expedited manner. As a result they are subject to the forty-five (45) day filing period of R. 4:69-6(a). See Mason v. City of Hoboken, 196 N.J. 51 (2008). Thus Plaintiffs challenge contending that the Borough Clerk failed to provide Plaintiff with a legally justifiable reason for denying his request for emails and redacted closed session meeting minutes relating to Plaintiff's November 24, 2006 letter to the Monmouth

County Prosecutor are barred as Plaintiff's request was made more than forty-five days after the requested action.

III. CONCLUSION:

New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry. OPMA and OPRA exemplify our state's policy of favoring the public's right to be informed about governmental actions. After a careful review of the record before the court, the court finds that the Defendants did not violate OPMA by discussing in closed sessions matters listed under topic headings "Loitering of Day Worker", "Proposed Ordinance-Smoking in Motor Vehicles with Children", K. Hovnanian, the "need to find someone on a three-man shift that can check parking in the business district" and a general question concerning Class I and Class II specials as said matters fell within the anticipated litigation and personnel exceptions to OPMA. The Court also holds that the Defendant did not violate OPRA by redacting the medical information of a police officer from the Keyport Borough meeting minutes as same is not public information under N.J.S.A. 47:1A-10.

However, the Court finds that Defendants failed to provide timely minutes of its April 10 and May 21, 2007 public meetings and the Borough's March 6, 2007, April 10,

2007, April 24, 2007, May 1, 2007 and May 21, 2007 closed session meetings. As it is the practice within the Monmouth vicinage, the court will order Defendant to provide its minutes within thirty (30) days of the last held meeting or prior to the governing body's next scheduled meeting, whichever occurs first. Therefore, Plaintiff's request for injunctive relief is granted. Moreover, the Court holds that the Defendants violated the mandates of OPRA by redacting in its September 19, 2007 and October 17, 2007 meeting minutes the names of certain Borough officers and employees as OPMA's personnel exception does not excuse Defendants from disclosing the redacted minutes concerning the discipline of a public officer or employee.

The Court further finds that Plaintiff's allegation that the Borough Clerk failed to provide Plaintiff with a legally justifiable reason for denying his request for emails and redacted closed session meeting minutes relating to Plaintiff's November 24, 2006 letter to the Monmouth County Prosecutor is barred in accordance with Mason v. City of Hoboken and R. 4:69-6.

The right to an award of costs is governed by R. 4:42-8, which provides "[u]nless otherwise provided by law, these rules or court order, costs shall be allowed as of

course to the prevailing party." A plaintiff is considered a prevailing party when actual relief on the merits of the claim materially alters the relationship between the parties by modifying the Defendant's behavior in a way that directly benefits the plaintiff. Mason v. City of Hoboken, supra, 196 N.J. at 74. A Requestor qualifies for an award of costs and fees under OPRA and the common law right to know if the Requestor can prove that the lawsuit was causally related to the relief obtained and the relief had a basis in law. Based on these reasons the court finds that Plaintiff is entitled to costs in accordance with Mason, as Plaintiff is the prevailing party. See Mason v. City of Hoboken, supra, 196 N.J. at 79.

Kenneth R. Ebner, Jr., Esq. counsel for the Defendant Borough of Keyport is directed to prepare and submit an Order consistent with this Opinion within 10 days of receipt of this Opinion.

Exhibit E

John Paff
P.O. Box 5424
Somerset, NJ 08875-5424
Tel. 732-873-1251
Email: paff@pobox.com
Plaintiff

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

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

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

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

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

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

Steven P. Perskie, J.S.C.

This motion was (check one) ✓ Opposed ___ Unopposed

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

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

Exhibit F

FILED: 7-18-2008
IN CHAMBERS
VINCENT J. GRASSO, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
OCEAN COUNTY

John Paff Plaintiff(s)

vs.

DOCKET NO. OCN-L- 2165-07

Dover Township Defendant(s)

ORDER

THIS MATTER, having been brought before the Court, and the Court having ascertained that the following determinations are warranted and appropriate,

IT IS, on this 18th **day of** July, 2008,

ORDERED as follows:

- DEFENDANT SHALL ENDEAVOR TO HAVE AT LEAST DRAFT MINUTES AVAILABLE TO THE PUBLIC BY DEFENDANT'S NEXT REGULARLY SCHEDULED MEETING, BUT IN ALL EVENTS DEFENDANT SHALL MAKE AT LEAST DRAFT MINUTES AVAILABLE TO THE PUBLIC NOT LATER THAN THIRTY DAYS AFTER THE SUBJECT MEETING OR THE SECOND MEETING AFTER THE SUBJECT MEETING, WHICHEVER COMES FIRST
- DEFENDANT, IN ITS MINUTES, SHALL NOT USE THE FORM "INDEX OF ITEMS NOT RELEASED" AND SHALL RELEASE ~~ANY~~ MINUTES OF ALL TOPICS DISCUSSED UNLESS ~~IS~~ PRIVILEGED OR OTHERWISE EXEMPT FROM DISCLOSURE
- TOPIC ONE IN THE 9/12/06 CLOSED SESSION MINUTES SHOULD HAVE BEEN DISCUSSED IN OPEN SESSION, AND DEFENDANT SHALL NOT DISCUSS MATTERS IN CLOSED SESSION UNLESS SUCH MATTERS ARE PRIVILEGED OR AUTHORIZED FOR DISCUSSION IN CLOSED SESSION.

THE UNDERSIGNED HEREBY CONSENT TO THE FORM AND ENTRY OF THIS ORDER.

V. Grasso
Vincent J. Grasso, A.J.S.C.

Walter Arden FOR PLAINTIFF
COUNSEL OR PRO SE SIGNATURE

COUNSEL OR PRO SE SIGNATURE

for defendant
COUNSEL OR PRO SE SIGNATURE

COUNSEL OR PRO SE SIGNATURE

NAME ON CASE: PAFF v. DOVER TOWNSHIP

DOCKET NO.: OCN-L-2165-07

DATE: 7/18/08

ORDER SUPPLEMENTAL PAGE 2 OF 2

THE COURT RESERVES DECISION ON PLAINTIFF'S APPLICATION FOR COSTS PENDING RECEIPT OF PLAINTIFF'S FORMAL APPLICATION AND DEFENDANT'S RESPONSE THERETO.

Ct finds matters were techical violations and no finding of bad faith or willfulness

Ct 1 of complaint alleging O.P.R.A violation in para 12 is dismissed.

Vincent J. Grasso, P.J.Ch.

Exhibit G

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Maureen **NEVIN,** Patrick Schiavino and Patrick Fasano, Plaintiffs-Appellants,
v.
ASBURY PARK CITY COUNCIL, Mayor Kevin Sanders, Terence J. Reidy and **Asbury** Partners, Defendants-Respondents.

Submitted Sept. 21, 2005.
Decided Nov. 1, 2005.

SYNOPSIS
On appeal from Superior Court of New Jersey, Law Division, Monmouth County, L-3886-04.

Jules L. Rossi, attorney for appellants.

Ansell Zaro Grimm & Aaron, attorneys for respondents Asbury Park City Council, Mayor Kevin Sanders and Terence J. Reidy (Barry M. Capp, on the brief).

Becker Meisell, attorneys for respondent Asbury Partners, (Martin L. Borosko and Amanda L. Schultz, on the brief).

Before Judges CONLEY and WEISSBARD.

PER CURIAM.

***1** Plaintiffs Maureen Nevin, Patrick Schiavino and Patrick Fasano appeal from an order of November 22, 2004, dismissing their complaint in lieu of prerogative writs which named as defendants the Asbury Park City Council, Asbury Park Mayor Kevin Sanders, City Manager Terence J. Reidy (collectively the City), and Asbury Partners, the master developer for the City's Waterfront Redevelopment Project. We affirm.

Plaintiffs' complaint alleged that the City's August 4, 2004 adoption of Ordinance 2700, which amended that portion of the City's October 22, 2002 Agreement with the redeveloper dealing with tax abatements, violated the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-12. More specifically, plaintiffs alleged that at City Council meetings on July 15, 21, and August 4, 2004, the Council met in executive sessions to discuss the proposed Ordinance and that, in violation of OPMA, the redeveloper was permitted to attend the executive sessions and participate in the discussions of the proposed ordinance.

After answers were filed, the City and Asbury Partners moved to dismiss the complaint pursuant to *R.* 4:6-2(e). The City's motion was supported by a certification of Frederick C. Raffetto, the City Attorney, who attended the July 15, 21, and August 4, 2004 council meetings, as well as the executive sessions on those dates, explaining in detail what took place on each occasion. Plaintiffs cross-moved for summary judgment. After briefs were submitted and oral argument conducted, the judge, in a written decision of October 22, 2004, elected to treat defendants' motions as being for summary judgment, since they relied on facts outside the pleadings; the judge thereupon dismissed the complaint.

On appeal, plaintiffs argue that the judge erred as a matter of law in holding: (1) that *N.J.S.A.* 10:4-12(b)(7) permits a non-governmental party to attend an executive session to negotiate a contract with the municipality, and (2) that an OPMA violation could be cured by subsequently bringing the matter before the public.

Before the trial judge, and on appeal, defendants argue that any executive sessions at which Asbury Partners were present came within the OPMA exception for contract negotiations, which reads in pertinent part:

> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> * * *
>
> (7) Any pending or anticipated litigation or contract negotiation other than in subsection b(4) herein in which the public body is, or may become

a party.

[*N.J.S.A.* 10:4-12b(7).]

The reference to subsection b(4), concerning discussions of collective bargaining matters, is not applicable here. Defendants' position is that any limited discussions between Asbury Partners and the City in the closed sessions fell within the exemption for "contract negotiations," since they stemmed from the City's Agreement with the redeveloper. Plaintiffs argued "that the statute only permits members of the Council to have a closed meeting to discuss strategy in anticipation of contract negotiations." The judge agreed with defendants, but we agree with plaintiffs.

***2** In our view, exception b(7) does not relate to contract negotiations with the opposing party but only, as plaintiffs contend, to discussions *about* contract negotiations by the public body. The inclusion of "pending or anticipated litigation" in the same subsection strongly supports this conclusion. *See* *Gandolfi v. Town of Hammonton*, 367 *N.J.Super.* 527, 539 (App.Div.2004) (propriety of adverse attorney being present in closed meeting "may be in doubt" in light of statements by the Court in *Payton v. New Jersey Tpk. Auth.*, 148 *N.J.* 524, 558 (1997)). In both instances, the public body would not want to expose its litigation or negotiation strategy in an open session to which the opposing party would be privy. *Caldwell v. Lambrou*, 161 *N.J.Super.* 284, 288-89 (Law Div.1978). Indeed, this conclusion is made almost inescapable by subsection b(4), which expressly allows the opposing party to a collective bargaining agreement to be present in a non-public session. No such language appears in b(7) which itself exempts collective bargaining discussions from the general rubric of contract negotiations. We agree with the observations of one commentator:

> The second aspect of Exception (7) deals with "contract negotiations." It is noted that this section explicitly excludes any contract which falls under the language of the collective bargaining section. Is this section to be read as superseding any part of the Local Public Contracts Law? Almost certainly not.
>
> The intent of this entire exception is open to question. For example, can a municipal governing body go into executive session with a landlord group to negotiate a rent level for the coming year in a rent-controlled community? Can a plaintiff suing a governing body go into executive session with the governing body to discuss settlement of the suit? Can the governing body go into executive session with a major landowner whose taxes are delinquent to discuss repayment of delinquent taxes over time? Although there has been no case law squarely dealing with this subject, it is difficult to imagine that an affirmative answer in any of the above cases would be consistent with the purposes of the Act. If the governing body could enter into secret negotiations in all of the above cases, who then would be ignorant of the proceedings? Only the public. In other words, granting a meeting in executive session under these circumstances would in point of fact achieve exactly the opposite result from that intended by the Act as a whole. A reading of this section in pari materia with Exception (4) above would seem to confirm this fact in that whereas Exception (4) specifically allows employees or employee representatives to meet in executive session with the public body, there is no similar language in the contract negotiations of Exception (7). It would therefore seem that the maxim "inclusio unius est exclusio alterius" would apply here. It may be assumed that the purpose of the first two parts of Exception (7) is simply to allow the governing body the opportunity to develop a negotiating position among themselves in order to be able to communicate same to their negotiators and staff for later communication to the adverse party.
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> ***3** [Pane, 34 *New Jersey Practice, Local Government Law*, § 5.7, p. 154 (3d ed.1999).]

The trial judge's reliance on *Hartz Mountain Indus., Inc. v. New Jersey Sports & Exposition Auth.*, 369 *N.J.Super.* 175 (App.Div .2004) was misplaced. That case involved a challenge to the award of a contract by the New Jersey Sports & Exposition Authority (NJSEA), after bidding, for the construction of "a massive multi-use development, denominated the Meadowlands Xanadu, to be constructed and operated at and around the Continental Arena site in the Hackensack Meadowlands." *Id.* at 179. Two unsuccessful bidders, as well as a taxpayer, challenged the award to two successful bidders. Most of the opinion deals with issues arising under the Open Public Re-

cords Act (OPRA), *N.J.S.A.* 47:1A-1 to -13. *Id.* at 181-86. However, the appeal also challenged action taken by NJSEA at an executive session. The court concluded that the executive session fell within the exceptions for real estate/public funds and contract negotiation in *N.J.S.A.* 10:4-12(b)(4) and (7). [FN1] *Id.* at 186. The court then continued as follows:

> FN1. We agree with the parties, and the trial judge, that the reference to exception b(5) in the opinion, *id.* at 186, must be a typographical error. The reference to the contract negotiation exception makes clear that the citation should have been to subsection b(7).

> The executive session here challenged was held in accordance with the recommendation of the NJSEA president to initiate contract negotiations with redevelopers who had responded to the RFP and had proposed a contract including a land lease. We have reviewed the minutes of that executive session. We recognize that the reported discussion was expansive respecting the bidders' general compliance with the basic redevelopment criteria of economics, land use, transportation and environmental impact and that at least some of that discussion could possibly have taken place in public without compromising the confidentiality necessary for contract negotiations and disposition of real estate. Nevertheless, we are satisfied that the import of the discussion related sufficiently to contract negotiation issues and real estate disposition as to qualify it for a closed executive session. We are also satisfied that the straw vote taken at the executive session did not vitiate that qualification. *See, e.g., In re Cole*, 194 *N.J.Super.* 237, 247 (App.Div.1984).
>
> [*Id.* at 186-87.]

The judge read this portion of the opinion to mean that the developers, who were the opposing parties in the contract negotiations with NJSEA, were present and participated in the discussions at the executive session. But we are not convinced that the developers were present. Indeed, the City concedes that the opinion is not clear on that critical point but asserts that the decision "does not hint" that the outcome would have been any different if the developer were present. We disagree. The presence of the opposing party is critical. Clearly the b(7) exception permits the public body to discuss contract negotiations in executive session, but, as we have stated earlier, it does not permit negotiations with the opposing party to take place in executive session, and *Hartz Mountain* does not say so.

***4** Further, although not relied upon by plaintiffs, *N.J.S.A.* 10:4-13 provides that the public may not be excluded:

> from any meeting to discuss any matter described in [*N.J.S.A.* 10:4-12b] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted: (a) [s]tating the general nature of the subject to be discussed; and (b) [s]tating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

See Caldwell v. Lambrou, supra, 161 *N.J.Super.* at 289; *Council of N.J. State Coll. Locals v. Trenton State Coll. Bd. of Trs.*, 284 *N.J.Super.* 108, 113- 15 (Law Div.1995). There is nothing in the record to suggest that the City complied with this provision before going into executive session on July 15, 21, or August 4, 2004.

The judge was also mistaken in his reading of *N.J.S.A.* 10:4-15(a), which provides that "[a]ny action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court...." The judge found that since no "action" was taken by the City in its closed session, there was nothing to be voided. "Although the tax abatement ordinance was discussed, it was not voted upon during the closed sessions. Rather, the ordinance was presented to the public and voted on in the presence of the public." We disagree with this view of the statute. Referring to August 4, 2004, the meeting which is the subject of the statute is the entire council meeting on that date, not just the closed session. We believe that is the only sensible construction of the statute. The executive session was part of the meeting. Since that session was improperly conducted in private, the "action taken" at the public portion of the meeting, the passage of Ordinance 2700, was voidable.

Notwithstanding, the "action taken," in this case the passage of Ordinance 2700, is only to be voided if the subject of that Ordinance was discussed in executive session at which Asbury Partners was present preceding passage of the Ordinance. *Lambrou, supra*, 161 *N.J.Super.* at 291-92. Here, the trial judge found that the Ordinance was discussed at the closed session. We agree with that portion of his ruling. Indeed, the City Attorney's certification confirms that finding. With respect to the meeting of July 15, 2004, he states that the Council engaged in contract negotiations with Asbury Partners in Executive session "in accordance with *N.J.S.A.* 10:4-12b(7)." As we have discussed earlier, we do not agree that the statutory exception covers contract negotiations with the opposing party. However, since no action was taken at that meeting, the violation of OPMA becomes meaningless. On July 21, 2004, the same scenario took place. Although there was discussion with Asbury Partners in closed session, nothing happened at the public session related to those discussions. Not so on August 4, 2004. On that date, the one-hour closed session with Asbury Partners included, as usual, discussions concerning "the rights and responsibilities of the partners under the Redeveloper's Agreement." However, that "discussion" included "the proposed Ordinance and Tax Agreement with the Council and Asbury Partners." Following that closed session, the council moved to a "Public Workshop Session" at which the Ordinance was further discussed and then a "Regular Session" at which the Ordinance was introduced. Although this constituted "action taken" at the meeting, the Ordinance was not passed on that date.

***5** The City Attorney's certification explained what happened after August 4, 2004:

> 11. Following the introduction of the Ordinance, the City Clerk caused a notice to be published in *The Asbury Park Press* on August 9, 2004, providing notice to the public, in accordance with *N.J.S.A.* 10:4-6, *et seq.*, that a public hearing and second reading would be held on the Ordinance and Tax Agreement on August 18, 2004. The notice was in accordance with the requirements of the Open Public Meetings Act.
>
> 12. On August 18, 2004, which was the next regularly scheduled City Council Meeting, the Ordinance Approving a Standard form Tax Abatement Agreement (Ordinance No. 2700) was listed on the agenda for public hearing and second reading as part of the Regular Public portion of the meeting, commencing at 7:00 p.m. The matter was not listed on any other agenda, nor discussed at any other session of the Council, Workshop or Executive, held that evening. When the Council reached the matter, as part of its regular agenda, Mr. Hastie again engaged in a *detailed presentation* regarding the proposed Ordinance and Tax Agreement. This presentation included large charts that were exhibited for the benefit of the Council and all members of the public who were in attendance. The Council members engaged in a *lengthy* discussion with Mr. Hastie regarding the contents of the Ordinance and the Tax Agreement, including the implications and ramifications of same. Such discussion endured for a *substantial* period of time. The Council then opened up the public hearing, and *many* members of the public availed themselves of the opportunity to question Mr. Hastie, the Council and/or the City Manager, regarding the Ordinance and the proposed Tax Agreement. Discussion, debate, questioning and answering ensued for a period in excess of *two hours* on this topic, all of which was completely within the full view of, and included participation of the public. At the conclusion of the public hearing and discussion, the Council voted to adopt the Ordinance on second reading, and the Ordinance was successfully adopted on that date. The Ordinance was *not* adopted on August 4, 2004, as erroneously referenced in the First Count of the Plaintiffs' Complaint.

There is no dispute that no closed session was conducted on August 18, 2004, and a full public discussion took place on that date. The question, then, is whether the improper meeting of August 4, at which the Ordinance was introduced, must result in voiding the action taken at the subsequent meeting at which no violation occurred. Although the issue is not free from doubt, we conclude that the action taken at the August 18 meeting was not tainted by the earlier OPMA violation on August 4 when the Ordinance was introduced. The full public discussion and vote on August 18 sufficed as "corrective or remedial action" within the purview of OPMA. *N.J.S.A.*

10:4-15a. *See* *Gandolfi, supra*, 367 *N.J.Super.* at 527, 540; *Council of N.J. State Coll. Locals, supra*, 284 *N.J.Super.* at 115-16 and cases cited therein. The August 18 action was not a "mere confirming vote." Pane, *supra*, § 5.11 at p. 167. As the Court said in *Polillo v. Deane*, 74 *N.J* . 562, 579 (1977), the remedial section of OPMA "contemplate[s] maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business." Viewed in light of this standard of "maximum flexibility," the final passage of Ordinance 2700 on August 18, 2004, was in compliance with OPMA. As a result, while we do not agree with the trial judge's analysis, we ultimately reach the same conclusion.

***6** Affirmed.

Not Reported in A.2d, 2005 WL 2847974 (N.J.Super.A.D.)

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