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JOHN A. O'SHAUGHNESSY, J.S.C.

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MARTIN O'SHEA and JOHN PAFF, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART HUDSON COUNTY
vs.	DOCKET NO. L 856-07
KEARNY BOARD OF EDUCATION, Defendant.	Civil Action
	ORDER

This matter being opened to the Court by Richard Gutman, P.C., attorney for Plaintiffs Martin O'Shea and John Paff, by way of an order to show cause summary action, on notice to Kenneth J. Linderfelser Esq., attorney for Defendant Kearny Board of Education and the Court having considered the papers submitted by the parties, and having heard oral argument on April 27, 2007, and for reasons set forth on the record on April 27, 2007, and for good cause appearing,

IT IS on 8th Day of May, 2007 ORDERED as follows:

1. It is hereby declared that the Kearny Board of Education violated the Open Public Meetings Act, N.J.S.A. 10:4-14, by denying O'Shea and Paff access to the minutes of the January 16, 2007 public meeting prior to the February 2007 meeting;

2. The Kearny Board of Education is hereby ordered to grant access to the minutes of public meetings no later than ~~two weeks after the meeting or~~ three business days prior to the next

meeting, ~~whichever comes first~~;

3. It is hereby declaring that the Kearny Board of Education on February 8, 2007, violated OPRA, N.J.S.A. 47:1A-1, -5, and the common law right of access to public records by denying O'Shea and Paff access to the factual portions of the minutes of the January 16, 2007, public meeting; Denied

4. The Kearny Board of Education to hereby ordered to grant O'Shea and Paff access to factual portions of unapproved minutes of public meetings.

5. ~~Plaintiff shall submit any bill of costs or petition for attorney's fees by _____, 2007.~~ *

6. Plaintiff shall serve a copy of this order upon the Defendants within 7 days of the date hereof.

JOHN A. O'SHAUGHNESSY, J.S.C.

opposed ✓

unopposed _____

* Denied as this Court finds Plaintiff is not entitled to Counsel's Fees under OPRA, N.J.S.A. 47:1A-1 et.seq. as Plaintiff is NOT a Prevailing Party under the STATUTE.

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MARTIN O'SHEA and JOHN PAFF, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART HUDSON COUNTY
vs.	:	DOCKET NO.
KEARNY BOARD OF EDUCATION, Defendant.	:	Civil Action
	:	**VERIFIED COMPLAINT**

Plaintiffs Martin O'Shea and John Paff, by way of complaint against Defendant Kearny Board of Education, state as follows:

Preliminary Statement

1. This is an action under the Open Public Meetings Act, N.J.S.A. 10:4-16, the Open Public Records Act, N.J.S.A. 47:1A-6, and the common law right of access to records, for access to unapproved minutes of a public meeting of the Kearny Board of Education.

Parties

2. Plaintiff Martin O'Shea resides at 10 Lake Shore Road East, Stockholm, New Jersey.

3. Plaintiff John Paff resides at 1605 Amwell Road, Somerset, New Jersey.

4. Defendant Kearny Board of Education is a political subdivision of the State of New Jersey.

First Count
(Open Public Meetings Act)

5. Plaintiff repeats the allegations stated above as if set forth at length herein.

6. An article in the New York Times on February 1, 2007, referred to "corrective action" taken against a schoolteacher by Kearny school officials. (Ex. A.)

7. Martin O'Shea and John Paff on February 5, 2007, faxed to the Kearny school district a request for, among other records, the minutes of any public board of education meetings during which the complaint of Matthew LeClair against teacher David Paszkiewicz was discussed. (Ex. B.)

8. O'Shea and Paff repeated the same records request on February 7, 2007, using an official request form. (Ex. C.)

9. As regards the aforementioned records requests, the Kearny Board of Education on February 8, 2007, stated

> The minutes of the January 2007 meeting have not yet been approved by the Board. They are expected to be approved at the Board meeting of February 20, 2007. Please renew your request after this date if you wish this information. (Ex. D.)

10. O'Shea and Paff responded by citing legal authority requiring public access to meeting minutes prior to their formal approval. (Ex. E.)

11. O'Shea and Paff wrote again on February 9, 2009, in response to a voicemail from the Board Attorney. (Ex. F.)

12. The Board on February 12, 2007, repeated its denial of

access to the meeting minutes prior to formal approval. (Ex. G.)

13. The Defendant Board's denial of access to the minutes of the January 16, 2007, public meeting prior to the February 20, 2007 meeting violated the Open Public Meetings Act, N.J.S.A. 10:4-14.

WHEREFORE, Plaintiffs demand judgment against Defendant Kearny Board of Education as follows:

A. Declaring that the Kearny Board of Education violated OPMA, N.J.S.A. 10:4-14, by denying O'Shea and Paff access to the minutes of the January 16, 2007 public meeting prior to the February 2007 meeting;

B. Ordering the Kearny Board of Education to grant access to the minutes of public meetings no later than two weeks after the meeting or three business days prior to the next meeting, whichever comes first;

C. Awarding costs; and

D. For such other relief as the Court deems equitable and just.

Second Count
(Open Public Records Act)

14. Plaintiff repeats the allegations stated above as if set forth at length herein.

15. The Defendant Board's denial of access to the factual portions of the minutes of the January 16, 2007, public meeting violated OPRA, N.J.S.A. 47:1A-1, -5.

WHEREFORE, Plaintiffs demands judgment against Defendant Kearny Board of Education as follows:

A. Declaring that the Kearny Board of Education on February 8 and 12, 2007, violated OPRA, N.J.S.A. 47:1A-1, -5, by denying O'Shea and Paff access to the factual portions of the minutes of the January 16, 2007 public meeting;

B. Ordering the Kearny Board of Education to grant O'Shea and Paff access to factual portions of unapproved minutes of public meetings.

C. Awarding costs and attorney's fees; and

D. For such other relief as the Court deems equitable and just.

Third Count
(Common Law Right of Access to Public Records)

16. Plaintiff repeats the allegations stated above as if set forth at length herein.

17. The Defendant Board's denial of access to the factual portions of the minutes of the January 16, 2007, public meeting violated the common law right of access to public records.

WHEREFORE, Plaintiff demands judgment against Defendant Kearny Board of Education as follows:

A. Declaring that the Kearny Board of Education on February 8 and 11, 2007, violated the common law right of access to public records by denying O'Shea and Paff access to the factual portions of the minutes of the January 16, 2007, public meeting;

B. Ordering the Kearny Board of Education to grant O'Shea and Paff access to the factual portions of unapproved minutes of public meetings.

C. Awarding costs; and

D. For such other relief as the Court deems equitable and just.

Designation of Trial Counsel

Plaintiffs designate Richard Gutman as trial counsel in this action.

Certification Pursuant to R. 4:5-1(b)

The Plaintiffs certify that the matter in controversy is not the subject of any other action pending in any court or arbitration proceeding and that they are not contemplating any other action or arbitration proceeding regarding the subject matter of this action. Plaintiffs are not aware of any other party that should be joined in this action.

Respectfully submitted,

_____
Richard Gutman

February 14, 2007

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MARTIN O'SHEA and JOHN PAFF, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART HUDSON COUNTY
vs.	:	DOCKET NO.
KEARNY BOARD OF EDUCATION, Defendant.	:	Civil Action

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE

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Statement of Facts

This complaint concerns a request, under the Open Public Meetings Act, the Open Public Records Act and the common law right of access to public records, for minutes of a public

meeting of the Kearny Board of Education. (Ex. B, C.[1])

Martin O'Shea and John Paff requested meeting minutes and other records on February 5, 2007. (Ex. B). The Board on February 8 and 12, 2007, denied access to the minutes of a January 16, 2007, public meeting on the grounds that the Board had not yet formally approved those minutes. (Ex. D-1, G-1.)

Argument

Open Public Meetings Act

The Open Public Meetings Act states,

> "[E]ach 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" (emphasis added).
> N.J.S.A. 10:4-14.

By requiring that all minutes be "promptly" available, the Legislature expressed its strong policy favoring adequate disclosure. South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478, 493 (1991).

New Jersey courts have repeatedly held that the term "promptly" in the Meetings Act requires that draft minutes be publicly disclosed prior to the meeting at which formal approval is to occur. Liebeskind v. Mayor and Municipal Council of

[1] Ex. refers to the exhibits attached to the Complaint.

Bayonne, 265 N.J.Super. 389, 394, 395 (App. Div. 1993) (minutes to be publicly available within two weeks after each meeting and at least three business days before the next meeting); Martin O'Shea v. West Milford Township Council, et al., PAS-L-2229-04, final order, (July 14, 2004) (minutes to be publicly available no later than 48 hours prior to the next meeting) (Pa1.)

The most extensive discussion of the issue in a New Jersey court decision known to Plaintiffs is Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J.Super. 328 (Law Div. 1986). 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 by, among other things, "[p]roviding all persons with the opportunity to take action prior to the next meeting of the public body." Id. at 331. The court concluded,

> Upon examination of the factors set forth, the court concludes that the board's minutes, in order to be promptly available as required by the Open Public Meetings Act, must be available within two weeks after any regular meeting. 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.

Although O'Shea and Paff specifically cited the aforementioned Matawan case, (Ex. E, F), the Kearny Board of Education

made no attempt to distinguish Matawan or suggest why its denial of access did not violate the Open Public Meetings Act. (Ex. G.)

Open Public Records Act

In addition to violating the Meetings Act, the Kearny Board of Education also violated the Open Public Records Act, which favors public access to government records. "Any limitations on the right of access accorded by [OPRA] are construed in favor of the public's right of access." N.J.S.A. 47:1A-1. And the "public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

Minutes of public meetings are classic public records since they describe the public actions of public bodies.

In response to O'Shea and Paff's February 8 and 9, 2007, letters, the Board on February 12, 2007, invoked the "advisory, consultative or deliberative" exemption of OPRA Section 1.1. (Ex. G-1.) But the Board has not satisfied its OPRA Section 6 burden of proving that the law authorizes its denial of access since it has not even attempted to justify the withholding of the factual portions of the unapproved minutes.

The deliberative process privilege ("ACD") is a privilege that permits the government to withhold opinions, recommendations and drafts that are part of a decision-making process. Liquidation of Integrity Insurance Company, 165 N.J. 75, 83, 88 (2000). The basis for the privilege is the concern that government officials would be deterred from freely expressing their opinions

if they feared that those opinions would be exposed publicly. For the privilege to apply, the record must be both pre-decisional and deliberative.

> First, [the document] must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. [citation omitted] Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Purely factual material that does not reflect deliberative processes is not protected. Id. at 84-85.

Thus, even if a record is a pre-decisional draft, factual portions must be disclosed, since facts are not deliberative. McClain v. College Hospital, 99 N.J. 346, 360-61 (1985). In such situations any exempt portions of the document, such as opinions and recommendations, are redacted and the factual portions are released. Id. at 361. Factual material includes inferences based on facts. Id. at 360.

For the ACD discovery privilege to come into play, the government must first demonstrate that the document meets the threshold requirements. Liquidation, 165 N.J. at 85, 88. "[S]aying that the document is an intra-agency memorandum does not make it so." McClain v. College Hospital, 99 N.J. 346, 360 (1985). "[M]erely characterizing a document as deliberative is not dispositive." Liquidation, 165 N.J. at 86-87. Thus, "[t]he initial burden falls on the government agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature." Id. at 88. Similarly, OPRA expressly states, "[t]he

public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

The burden of proof is on the government under both the privilege and OPRA for identical reasons. First, it is the government, not the requestor, which knows the content of the government record at issue. Therefore, the government is better able to establish whether the exemption/privilege applies. Second, both OPRA and civil discovery favor disclosure. N.J.S.A. 47:1A-1 ("any limitation on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access"); R. 4:10-2(a).

In meeting its burden of proof, the government may not rely upon "conclusory and generalized allegations of exemptions." Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973); Courier News v. Hunterdon County Prosecutor's Office, 358 N.J.Super. 373, 382-83 (App. Div. 2003) (OPRA burden of proof not satisfied where prosecutor asserted that disclosure would cause confusion among jurors but failed to submit "specific reliable evidence"). As the New Jersey Supreme Court has stated regarding access to executive session minutes,

> The need for secrecy must be demonstrated with specificity as to *each document*. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning are insufficient . . . [T]he trial court . . . must examine *each* document individually and make factual findings with regard to why [suppression is warranted] . . . The need for secrecy should extend no further than neces-sary to protect the [demonstrated need for]

> confidentiality (emphasis in original).
>
> Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 559 (1997); quoting Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 381-82 (1995).

Here, the Kearny Board of Education has yet to satisfy its burden of establishing either that (1) the OPRA advisory, consultative, or deliberative exemption includes factual material or (2) the unapproved minutes of the January 16, 2007 public meeting contain no facts. Since the law requires the minutes to include such facts as "the time and place, the members present, the subjects considered, the actions taken, the vote of each member," N.J.S.A. 10:4-14, the Board is unlikely to ever meet its burden of proving that no facts are present in the withheld minutes.

The Board's February 12, 2007, letter cited two Government Records Council rulings in support of the Board's decision to deny access to the unapproved minutes. (Ex. G-1.) But OPRA expressly states "[a] decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to [OPRA]." N.J.S.A. 47:1A-7e.

Moreover, the GRC decisions are clearly erroneous. First, the GRC decisions ignore the issue of factual material in drafts and other pre-decisional records. Second, none of the judicial decisions cited in the GRC rulings exempted factual material from disclosure and none concerned meeting minutes. Third, the GRC decisions are contrary to all other decisions known to Plaintiffs regarding access to unapproved meeting minutes. Attached is a

Mississippi decision, (Pa26), and a Hawaii decision, (Pa27-35), that cites similar decisions in Florida, Indiana, New York, Minnesota and Connecticut, (Pa31-32), all holding that unapproved minutes are public records.

Common Law Right of Access to Public Records

In addition, the Kearny Board of Education violated the common law right of access to public records. The common law right involves a balancing of the requestor's need for the record versus the government's need for confidentiality. South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478, 487-89 (1991).

Here, the requestors need the unapproved minutes as soon as possible because of the public interest in the Board's "corrective action" taken regarding teacher David Paszkiewicz, whose misconduct was the subject of considerable media coverage. (Ex. A.) In addition, the requestors need the unapproved minutes if they are to take action prior to the next meeting of the Board. Stamping the unapproved minutes as "unapproved," "draft" or "unofficial" can satisfy any government concern that the requestors will misinterpret the unapproved minutes.

Respectfully submitted,

Richard Gutman
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O'Shea and Paff

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MARTIN O'SHEA and JOHN PAFT, Plaintiffs,	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION CIVIL PART HUDSON COUNTY DOCKET No. L-856-07**
vs.	
KEARNY BOARD OF EDUCATION, Defendant.	**Civil Action**

BRIEF IN OPPOSITION TO ORDER TO SHOW CAUSE

Statement of Facts

Defendant, Kearny Board of Education (KBOE), with its offices located at 100 Davis Avenue, in the Town of Kearny, County of Hudson, and State of New Jersey is a political sub-division of the State of New Jersey. The Custodian of Records for the Kearny Board of Education is Karen Yeamans, the Board Secretary (Custodian).

On February 5, 2007, the Plaintiffs herein wrote a letter to the Custodian to request certain records from the Kearny Board of Education. In response to the Plaintiffs letter, the Custodian requested the Plaintiffs to complete the standard form for requests under the Open Public Records Act (OPRA). Plaintiffs promptly submitted the form and received a written reply on February 8, 2007. In that response the Custodian, through legal counsel and after referencing the State of New Jersey OPRA web site, identified the various records which were available and various records which were not available to

Plaintiffs under the OPRA. See Exhibit A.

Plaintiffs focused on one of the denials, namely the statement that unapproved minutes were not available under OPRA and requested . . . "If you are claiming an exemption under OPRA, please state it." See Exhibit B.

Counsel for the KBOE reviewed the request and consulted the State of New Jersey OPRA web site for guidance on the issue of unapproved minutes. Finding a very recent case involving one of the Plaintiffs herein wherein the Government Records Council (GRC) ruled that minutes which were unapproved as of the time of the OPRA request were exempt from disclosure, counsel called both Plaintiffs to discuss the matter in an attempt to understand why they would make such a request when they clearly knew that they had been denied these items by the GRC previously. Their response was in writing stating that they "disagreed" with the GRC's ruling and insisting on a written response as to whether unapproved minutes were available prior to their approval.

A formal written response was provided on February 12, 2007 which made available to Plaintiffs thirty-five (35) pages of records but stated once again that in accordance with the rulings of the GRC the unapproved minutes were not available. Plaintiffs were informed that the minutes were expected to be approved at the KBOE meeting scheduled for February 20, 2007 (8 days later) and that if they renewed their request after the 20th the minutes would be available to them. See Exhibit C.

Rather than wait 8 days and renew their request, or seek another decision from the GRC, Plaintiffs course of action was to avoid the GRC this time and seek an opinion from another forum, the New Jersey Superior Court. The minutes in question were approved at the February 20, 2007 meeting and are attached hereto as Exhibit D.

Legal Argument

In 2001 the State of New Jersey enacted the Open Public Records Act declaring that ". . .government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*. . ." (Emphasis added.) N.J.S.A. 47:1A-1.

Part of the legislation established in the Department of Community Affairs a Government Records Council. The Statute provides that ". . . the Government Records Council shall: receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian; issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public; prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records; prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records; operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied; Upon receipt of a written complaint signed by any person alleging that a custodian of a government record has improperly denied that

person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation. If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in section 12 of P.L.2001, c.404 (C.47:1A-6). A decision of the council may be appealed to the Appellate Division of the Superior Court. A decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L.2001, c.404 (C.47:1A-6). All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible.

It is clearly the intention of the legislation that the GRC be a reference point for Custodians seeking to comply with OPRA in good faith. While the decisions of the GRC are not binding precedent on this Court, a Custodian who relies on decisions of the GRC is acting in good faith and should not be criticized for so doing. Further, as the legislative "watch dog" for the OPRA, the opinions, guidance and expertise that the GRC has in these matters should be very persuasive to a court.

Under the OPRA, a government record is defined as

". . . any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political

subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material. Emphasis added.

The GRC considered this exact issue in John Paff v. Borough of South Bound Brook, Custodian of Record, Complaint No. 2006-158. On December 14, 2006 the Government Records Council ("Council") considered the December 7, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. "The Council, therefore, finds that:

> . . . 3. The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

A thorough analysis of the GRC's decision is found in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). :

"The Open Public Meetings Act provides that:

"[e]ach public body shall keep reasonable 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." N.J.S.A. 10:4-14.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The draft minutes in question are prepared as part of the process of producing minutes of a meeting of a public body that was held pursuant to the Open Public Meetings Act (OPMA).

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are

advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as information either "made, maintained or kept on file in the course of [an agency's] official business," or "received" by an agency in the course of its official business, N.J.S.A 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency's deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App Div. 2004), certif. den. 182 N.J. 149 (2004); see also In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA "shields from disclosure documents 'deliberative in nature, containing opinions, recommendations, or advice about agency policies,' and 'generated before the adoption of an agency's policy or decision.'" Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n. v. Dinkins, 807 F.Supp. 955 (S.D.N.Y. 1992); Archer v. Cirmcione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it "'reflect[s] that aspect of the agency's function that precedes formal and informed decision making.'" *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions. The court stated that these drafts were "all clearly pre-decisional and reflective of the deliberative process." *Id.* at 18. It further held:

The trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their

entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. Ibid. (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. *See also* Edwards v. City of Jersey City, GRC No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

Although draft minutes always fall under OPRA's exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. *See* In re Readoption, *supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Thus, in accordance with the foregoing case law, all draft documents, including the draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be

contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14. This conclusion is a departure from prior GRC decisions and is based on the legal advice received from the Office of the Attorney General.

As a result, the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1."

Plaintiffs rely on the case of Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J. Super 328 (Law Division 1986), for the proposition that the minutes of any Government Body must be made available to the public within 2 weeks after the meeting. This case is a Law Division case and is not binding on this Court. Further, it deals with a Board that was meeting every 2 weeks, thereby giving the Board an opportunity to approve the minutes at its next scheduled regular meeting. The decision even stated that if a meeting is held earlier than 2 weeks, the minutes should be approved at the earlier meeting and made available to the public. This implies, and it would be reasonable to expect, that the minutes of a Board meeting should be approved and made available to the public after the next meeting of the Board which would be the first opportunity at which the minutes of the prior meeting

could be approved. The KBOE regularly meets one per month. The February 20, 2007 Board meeting was the first opportunity the KBOE had to approve the minutes of the January 2007 meeting and they did. It would be reasonable, absent some showing of an urgent need, for Plaintiffs to wait until the minutes were approved on February 20, 2007 to have access to the minutes.

The GRC and the New Jersey Attorney General's Office were aware of the Matawan case when they issued their opinions. The Matawan case was decided 15 years before the OPRA was enacted. The more recent decisions, being made with the benefit of all the cases and the OPRA legislation should be given deference.

It is clear that Plaintiffs seek to change law with this request. They have shown no emergent or over riding public need for the release of the draft minutes In fact they still have not renewed their request for the minutes attached as Exhibit D. They could have had those minutes on February 21 if they were urgently needed. It is important for the Court to understand the purpose of the Plaintiffs herein. The minutes in question have been provided, they were informed they could have the minutes 8 days later after they were approved They had been denied their request for unapproved minutes by the GRC and disagreed with that decision. Instead of properly pursuing their disagreement to the Appellate Division as the OPRA provides, Plaintiffs have chosen to attempt to get an opinion more to their liking in this Court. At all times the Custodian and the KBOE acted reasonably, promptly and in good faith. For this Court to grant Plaintiff's request would be to establish new law which goes directly against the opinions of the applicable case law, the GRC and the Office of the New Jersey Attorney General.

For the above reasons, the complaint of Plaintiffs must be dismissed.

The OPRA provides also that a public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

To have knowingly and willfully violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Here the actions of the Custodian were proper, lawful and in good faith. In the event the Court decides to make new law with this case, the KBOE should not be demeaned in any way for following the law in place at the time.

Dated: March 21, 2007

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MARTIN O'SHEA and JOHN PAFF, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART HUDSON COUNTY
vs.	:	DOCKET NO. UNN-L-0835-07
KEARNY BOARD OF EDUCATION, Defendant.	:	Civil Action

PLAINTIFFS' REPLY BRIEF

Citation of Meetings Act and Common Law Right

Although this lawsuit was filed under the Open Public Meetings Act, the Open Public Records Act and the common law right of access to public records), "it is Defendant's position that only the Open Public Record Act, NJSA 47:1A-6, applies as that was the statute under which Plaintiffs made the request that is the subject of this action." Answer, Para. 1.

The Board is mistaken. The Plaintiffs' request expressly stated, "[p]lease consider this a request for records under terms of the common law, the Open Public Meetings Act and the Open Public Records Act." (Complaint, Ex. B.)

Moreover, even if Plaintiffs had not expressly cited in their records request the Open Public Meetings Act and the common law right of access to public records, they still would have been able to sue on any of those grounds. When any entity illegally

denies any type of request, be it for a record, a refund or a rifle, the requestor can sue under any legal basis that applies. The requestor is generally not required to inform the entity as to the legal basis of the request when making the request.

GRC Decisions

The Board relies very heavily on Government Records Council decisions, (Db3-10), and states, "the opinions, guidance and expertise that the GRC has in these matters should be very persuasive to a court." (Db4.) This contradicts the express provision of OPRA, "[a] decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L.2001, c.404 (C.47:1A-6)." N.J.S.A. 47:1A-7e.

Matawan

On page 10, The Board notes that Matawan Regional Teachers Association v. Matawan-Aberdeen Regional Board of Education, 212 N.J.Super. 328 (Law Div. 1986) "is a Law Division case and is not binding on this Court." But like the Law Division in Matawan, the Appellate Division in Liebeskind v. Mayor and Municipal Council of Bayonne, 265 N.J.Super. 389 (App. Div. 1993), also held that the term "promptly" in the Meetings Act requires that draft minutes be publicly disclosed prior to the meeting at which formal approval is to occur.

Moreover, the Board has misread both Matawan and also Plaintiffs' interpretation of Matawan in this lawsuit. According

to the Board's brief at page 10, Plaintiffs rely on Matawan "for the proposition that the minutes of any Government body must be made available to the public within 2 weeks after the meeting." There is no such statement in Plaintiffs' legal filings in this lawsuit. Plaintiffs rely on Matawan for the proposition that "the term 'promptly' in the Meetings Act requires that draft minutes be publicly disclosed prior to the meeting at which formal approval is to occur." (Pb2-3.)

More important than the Board's misreading of Plaintiffs' legal position, the Board has misread Matawan. Matawan states, "If successful 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. The Board twists Matawan's statement into "if a meeting is held earlier than 2 weeks, the minutes should be approved at the earlier meeting and made available to the public." (Db10.) Note that while Matawan uses the term "earlier meeting" to refer to the meeting described in the minutes, the Board's brief uses the term "earlier meeting" to refer to the later meeting at which the minutes of the earlier meeting are official approved.

On page 11, the Board implies that the later 2002 Open Public Records Act overrode the 1986 Matawan decision. The Board is comparing oranges and apples. The Matawan case concerned the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The Open

Meetings Act and the Open Public Records Act are independent grounds for obtaining access to meeting minutes. The unavailable-ity of meeting minutes under the Open Public Records Act does not limit access to meeting minutes under the Open Public Meetings Act and vice versa.

Sanctions

The Board's extensive defense against sanctions on pages 16 and 17 is irrelevant since the Complaint does not seek sanctions.

Respectfully submitted,

Richard Gutman