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May 29, 2012

Walter M. Luers, Esq.*

*Also admitted in New York

VIA ELECTRONIC ATTACHMENT

Catherine Starghill, Esq.
Executive Director
Government Records Council
P.O. Box 819
Trenton, New Jersey 08625-0819

Re: *Paff v. Township of Wall (Monmouth County)*

Dear Director Starghill:

On behalf of John Paff and adverse to the Township of Wall (“Township”), we attach our Complaint, Authorization and Exhibits. This complaint is being brought because the Records Custodian has a) too broadly redacted records requested by Mr. Paff and b) refused to provide Mr. Paff with sufficient information to allow him to determine whether or not the redactions are justified.

Recitation of Facts

On May 2, 2012, Mr. Paff e-mailed an OPRA request (See Exhibit 1) to the Township in which he asked for the resolution and minutes of the Township Council’s December 8, 2010 executive session. In his request, he specifically asked the Township to redact the minutes “as narrowly as possible” and to provide him with “an explanation of each redaction that will allow [him] to judge for [himself] whether or not the redactions are justified.”

After an exchange of e-mails that clarified Mr. Paff’s request (Exhibit 2), the Township responded on May 7, 2012 with an e-mail (Exhibit 3), redacted minutes from the Township Council’s December 8, 2010 executive session (Exhibit 4) and the resolution, as required by *N.J.S.A. 10:4-13*, that authorized the December 8, 2010 executive session (Exhibit 5). Despite Mr. Paff’s specific request, the Township, based on its attorney’s advice, refused to provide him with an explanation of each redaction.

Legal Argument

As the GRC knows, the Open Public Records Act (“OPRA”) mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing *N.J.S.A. 47:1A-1*). “The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (quoting *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)). The burden of proof in any proceeding under OPRA is on the Records Custodian. *N.J.S.A. 47:1A-6; Paff v. Borough of Lawnside*, GRC Complaint No. 2009-155 (April 2010).

The Township’s Refusal to Explain and Justify Redactions

Notably, the Township’s May 7, 2012 informed Mr. Paff of the Township attorney’s advice that “[the Township is] is not required by statute to provide the requestor with an explanation for each redaction.” Instead the Township advised Mr. Paff, in very general terms, that the redactions were “required . . . because they involve on-going litigation, personnel matters, discussion about purchasing property, etc.” The Township advised Mr. Paff to review the resolution, since it allegedly “lists the items that were discussed.”

Yet, contrary to the Township attorney’s position, *N.J.S.A. 47:1A-5(g)* requires custodians to inform requestors of “the specific basis” for their decisions to deny access to a record. “Under OPRA, a public agency seeking to restrict the public’s right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” *Courier News v. Hunterdon County Prosecutor’s Office*, 358 N.J. Super. 373, 382-83 (App. Div. 2003). When explaining a redaction, “an agency need not reveal the contents and should be guided by the standard included in *R. 4:10-2(e)*, which permits a party claiming privilege to ‘describe the nature of the documents . . . not produced or disclosed in a manner that, *without revealing information itself privileged or protected*, will enable other parties to assess the applicability of the privilege or protection.’” *Paff v. New Jersey Department of Labor, Board of Review*, 379 N.J. Super. 346, 354 (2005) (emphasis in Appellate Division decision).

The only way to harmonize the Township attorney’s position with *Courier News* and *Paff* is to interpret those cases as requiring a custodian to provide a full, detailed justification for a denial of access **only after** a Denial of Access complaint is filed. Indeed, *Paff*, holds only that a custodian must provide detailed justifications to the

GRC in response to “[t]he form ‘Information Statement’ prepared by the GRC for use in contested cases.” *Paff* at 354. Accordingly, it could be argued, as the Township attorney apparently does, that neither *Paff* nor *Courier News* requires the Township to provide Mr. Paff with detailed justifications for the redactions unless and until he files a GRC Denial of Access complaint.

But, such an interpretation makes little sense under OPRA or in accordance with common sense. As a matter of law, and as stated above, *N.J.S.A. 47:1A-5(g)* requires a custodian to provide a requestor with “the specific basis” for each denial of access. Thus, if a custodian elects to redact something from a document (and if the nature of the redaction is not obvious¹ from observing the redacted document itself), the custodian is required by law to inform the requestor with the “specific basis” for the redaction.

As for common sense, it would make little sense to require a custodian to provide a full, detailed reason for a redaction only after, but not before, the requestor files a Denial of Access complaint with the GRC. This would allow ornery custodians to give requestors heavily redacted documents, without justification or explanation, thus forcing them to involve the GRC, through filing a Denial of Access complaint, if they wanted to know why the redactions were made. This of course, would be counterproductive since at least some requestors might understand and agree with the custodian’s explanation if they were informed of it at the time they first received the redacted records. And, some requestors might have difficulty filing a Denial of Access complaint because attorneys, realizing that OPRA’s fee shifting provisions won’t adhere unless the GRC ultimately rules in the client’s favor, might be reluctant to take a case without knowing the basis for the redaction and thus being able to assess the case’s chance of success.

In sum, the Township’s presumed position that it is under no obligation to provide the detailed explanation required by *Paff* and *Courier News* fails both under the law and in accordance with common sense. In order to aid future requestors and custodians alike, the GRC should take this opportunity to declare that OPRA requires custodians to provide requestors of detailed justifications for denials of access not only after the filing of a complaint, but at the time of the denial of the request.

¹ A redaction is sometimes obvious just by viewing the redacted record. For example, if an agency alters a form “to obscure only personal information such as a social security number,” the justification for the redaction is evident and there is no need for the GRC to conduct an in camera review because an in camera review is not necessary to resolution of the appeal. *Paff, supra*, at 355. But when, as here, substantial portions of an otherwise nonexempt record are redacted, the GRC must conduct an in camera review and “provide reasons for its rulings on each document” so the Appellate Division, if called upon, can properly perform its appellate function. *Id.*, citing *MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J.Super. 534, 551 (App. Div. 2005).

The Township's Overbroad Redactions

Absent the detailed explanation that the Township has thus far refused to provide, Mr. Paff is unable to tell whether or not the redactions are justified². But, he is able to discern some clues that suggest that at least some of the redactions are improper.

First, some of the descriptions in the resolution do not match up with any of the Open Public Meetings Act's *N.J.S.A. 10:4-12(b)* exceptions that allow for topics to be discussed outside of public view. For example, while "Personnel--Department of Public Works Director" likely corresponds to the "personnel" exception embodied within *N.J.S.A. 10:4-12(b)(8)*, other topics, such as "Excessive OPRA requests" do not appear to correspond with any of the exceptions thus bringing into question the propriety of discussing them in private session. If the Township Council discussed something in private session that it ought to have discussed in public, it cannot now legitimately suppress the minutes of that discussion.

Second, even if all of the discussions were permissibly held in private session, that does not necessarily mean that the minutes of those discussions are presently exempt from public disclosure. "[I]f a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in *N.J.S.A. 10:4-12b*, it nevertheless must make the minutes of that meeting "promptly available to the public" unless full disclosure would subvert the purpose of the particular exception." *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 556-57 (1997). Rather, "the subversion must be balanced against the [requestor's] interest in disclosure." *Ibid*. Given that nearly eighteen months have elapsed since the executive meeting was held, one would think that at least some of the redacted information could now be revealed without compromising any legitimate governmental objective or personal privacy interest justifying the suppression.

Attorney fees

N.J.S.A. 47:1A-6 allows Mr. Paff to recover his attorney fees if he "prevails" in this action. Whether or not a party "prevails" only if he or she ultimately achieves relief, which has a basis in law, which flows from (has a factual causal nexus with) the Denial of Access complaint. *Paff v. Neptune Township Housing Authority*, Complaint No. 2010-307. As argued above, requestors who are refused an adequate

² In her response, the custodian suggests that the topics listed in the resolution (Exhibit 5) correspond to the matters discussed during executive session as disclosed in the minutes. Yet, the resolution lists eight topics (i.e., 1) Sale of Property--Glendola Road; 2) Negotiations and Labor Counsel; 3) Sanitation changes; 4) Complaint--Prosecutor's Office OPRA request; 5) Excessive OPRA requests; 6) Personnel--Department of Public Works Director; 7) Police reorganization and 8) Purchase of Property) while the minutes (Exhibit 4) show that seven topics were discussed (the handwritten numerals in the minutes were on the minutes as they were received by the Township). Accordingly, even if the topic descriptions, as described in the resolution, were adequately descriptive, there is no way that Mr. Paff could know which description corresponded to which redacted paragraph in the minutes.

Catherine Starghill, Esq.
Government Records Council
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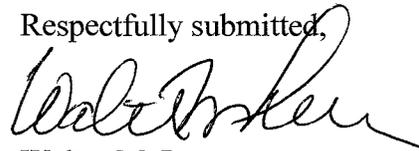
explanation for why a requested records was redacted are placed in a dilemma. They are forced to file a Denial of Access complaint, and incur attorney fees, only to find out the reasons for the redaction. Once they are informed of a proper reason for redaction, they may readily agree that the redaction is justified. But, at that point they've already incurred attorney fees that are now realized to not be recoverable. Or, if the attorney takes GRC cases on the expectation that he or she will be paid only if the cases succeed, those attorneys will be reluctant to take cases when they are not informed of the reasons for the redactions to help them gauge the chance of success.

Accordingly, Mr. Paff requests that the GRC, in its adjudication of this case, establish a new rule that requestors who are refused information sufficient for them and their counsel to determine whether or not a redaction or suppression is justified should be awarded their attorney fees regardless of whether the Denial of Access complaint results in disclosure of the redacted or suppressed material. To hold otherwise would give custodians an unfair advantage by allowing them to withhold, with impunity, information that the requestor is legally entitled to know.

Conclusion

For the foregoing reasons, we respectfully request that the GRC (1) require the Township to submit the December 8, 2010 minutes for an in camera review and provide a detailed privilege log to both the GRC and Mr. Paff; (2) rule that Mr. Paff is entitled to an unredacted or more narrowly redacted version of those minutes and (3) award Mr. Paff a reasonable attorneys' fee.

Respectfully submitted,



Walter M. Luers

cc: Records Custodian

EXHIBIT 1

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

From: John Paff [<mailto:paff@pobox.com>]

Sent: Wednesday, May 02, 2012 8:05 PM

To: Kubacz,Lorraine; paff@pobox.com

Subject: OPRA Request

Township of Wall

Please accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA) and the common law right of access. Please respond and send all responsive documents to me via e-mail at paff@pobox.com. If e-mail is not possible, please fax responses and responsive records to me at 908-325-0129. Also, I would appreciate it if you would acknowledge your receipt of this e-mail.

Records requested:

Minutes of Township Committee's 12/08/10 executive session. If you need to redact the minutes, please do so as narrowly as possible and give an explanation of each redaction that will allow me to judge for myself whether or not the redactions are justified.

The resolution that the Committee passed to authorize its 12/08/10 executive session.

Thank you.

John Paff
(voice - 732-873-1251)

EXHIBIT 2

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

From: John Paff [<mailto:paff@pobox.com>]

Sent: Thursday, May 03, 2012 5:45 PM

To: Kubacz,Lorraine

Subject: Re: OPRA Request

I want the minutes from the meeting(s) that the public is excluded from attending. These are usually called "executive" meetings but I think that Wall may refer to them as "private" meetings.

On 5/3/2012 12:04 PM, Kubacz,Lorraine wrote:

Mr. Paff,

The Township Committee has three types of meetings and minutes, regular, executive and private session. Please clarify if you are looking for the executive minutes or the private session minutes.

Thank you,

Lorraine Kubacz, RMC
Township Clerk
Township of Wall
732-449-8444 Ext. 215
FAX 732-449-8992

WALL RESIDENTS - SIGN UP FOR CODE RED TO RECEIVE EMERGENCY
NOTIFICATIONS CODE RED SIGN UP VISIT US AT WWW.WALLNJ.COM

EXHIBIT 3

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

Subject: RE: OPRA Request

Date: Mon, 7 May 2012 21:05:00 +0000

From: Kubacz,Lorraine <lkubacz@townshipofwall.com>

To: paff@pobox.com <paff@pobox.com>

Thank you. I was out of the office on Friday. I checked with my deputy clerk and she said you did not contact her on Friday.

In response to your OPRA request below, please see attached minutes and corresponding Resolution for 12/08/10.

Our Township Attorney's office has advised that the redactions were made because the need for confidentiality still exists. Our Attorney's office has advised that we are not required by statute to provide the requestor an explanation for each redaction. The items that were removed are required to remain confidential because they involve on-going litigation, personnel matters, discussion about purchasing property etc. The resolution provided to you, corresponding to the minutes, lists the items that were discussed.

Lorraine Kubacz, RMC
Township Clerk
Township of Wall
732-449-8444 Ext. 215
FAX 732-449-8992

WALL RESIDENTS - SIGN UP FOR CODE RED TO RECEIVE EMERGENCY
NOTIFICATIONS
CODE RED SIGN UP
VISIT US AT WWW.WALLNJ.COM

EXHIBIT 4

Private Session
December 8, 2010

1. Kate Kohri advised that there is an inquiry Glendola Road. The assessor Denise Siegel advised that the market value for this piece is \$75,000 but it will only add \$52,000 to his assessed value. This is a landlocked piece of property. The committee discussed setting a standard for the sale of property.
2. Administrator Verruni discussed Labor Counsel Matt Giocobe and ongoing negotiations of contracts.
3. Administrator Verruni discussed a trash study that was done with Ken Critchlow and Larry Leming and asked the committee to review it.

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The meeting adjourned at 9:10 p.m.

EXHIBIT 5

A RESOLUTION OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WALL AUTHORIZING THE DISCUSSION OF MATTERS IN A CLOSED SESSION PURSUANT TO THE STATUTORY EXCLUSIONS OF N.J.S.A. 10:4-12.

WHEREAS, the matters to be discussed relate to a statutorily excluded topic pursuant to N.J. S.A. 10:4-12(b)1-9, specifically:

- Attorney-client privilege;
- Employment and personnel;
- Imposition of civil penalty;
- Investigation;
- Leasing or acquisition of property;
- Pending or anticipated litigation;
- Privacy;
- Public Safety;
- Educational matter;

Description of matter: Sale of Property – Glendola Road, Negotiations and Labor Counsel, Sanitation changes, Complaint – Prosecutor’s office OPRA request, Excessive OPRA requests, Personnel – Department of Public Works Director, Police reorganization, Purchase of property

WHEREAS, this may be disclosed to the public at a time when the necessity for confidentiality no longer exists, or within six months or less from the date hereof.

NOW, THEREFORE, BE IT RESOLVED, by the township Committee of the Township of Wall as follows:

1. That the Township Counsel shall retire into executive session where the public shall be excluded and where said matters shall be discussed and formal action may be taken with regard thereto.
2. That the minutes of this executive session shall be closed from public inspection and shall so remain until the reason for confidentiality ceases to exist, or upon formal action by the Township Council at an official meeting within six months or less.
3. That at the termination of said executive session the meeting would be adjourned.

I, LORRAINE KUBACZ, Clerk of the Township of Wall, do certify that the foregoing is a true copy of the Resolution adopted by the Township Committee of the Township of Wall a Regular Meeting held on December 8, 2010.